EFFECT OF HOSTILE WITNESSES ON THE ADMINISTRATION OF CRIMINAL JUSTICE SYSTEM IN INDIA: A CRITICAL ANALYSIS

Dissertation submitted to Maharishi University of Information Technology, Noida, School of Law, in partial fulfilment of the requirement for the degree of Master of Laws.

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DECLARATION

This dissertation on "***Effect Of Hostile Witnesses On The Administration Of Criminal Justice System In India: A Critical Analysis"*** embodies and is imperative with the result of my own research work pursued under the supervision of **Dr. Vikas Sharma**. I declare that no part of this dissertation has been published or submitted to any other institution for any other purposes. My indebtedness to other works and publications have been duly acknowledged at relevant places.

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This is to certify that this Dissertation titled ***"Effect Of Hostile Witnesses On The Administration Of Criminal Justice System In India: A Critical Analysis"*** is written by **Ashesh Kumar** bearing enrolment no. **MUIT0224054059**. He is a candidate of Maters of Law Program here at the Maharishi University of Technology, Noida, School of Law. He has conducted all the research work under my supervision and submitted original and bona fide work to our utmost satisfaction, in the final semester for the partial fulfilment of the requirements for the award of the degree of Master of Laws.

SUPERVISOR

Dr. Vikas Sharma

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Ashesh Kumar

TABLE OF CONTENTS

ABBREVIATIONS

- AFP- Australian Federal Police
- AIR- All India Reporter
- ALL.E.R.- All England Law Reports
- BPRD- Bureau of Police Research and Development
- CBI- Central Bureau Of Investigation
- Cr.P.C.- Criminal Procedure Code
- Cri.L.J.- Criminal Law Journal
- Del- Delhi
- EUROPOL- European Union Agency For Law Enforcement Cooperation
- FBI- Federal Bureau of Investigation
- ICT- Information And Communications Technology
- IE- The Indian Express
- IPC- Indian Penal Code
- ISISC- International Institute Of Higher Studies In Criminal Sciences
- M.P.- Madhya Pradesh
- MOU- Memorandum of Understanding
- N.C.J. Int'l L. & Com. Reg.- North Carolina Journal of International Law and Commercial Regulation
- NALSA- National Legal Services Authority National Crime Agency
- NCT- National Capital Territory
- NOC- Notes on Cases
- NWPP- National Witness Protection Program
- OEO- Office of the Enforcement Operations
- OPCO- Osservatorio Permanente Sulla Criminalita' Organizzata (Monitoring Centre On Organized Crimes)
- POCSO- Protection of Children From Sexual Offences
- RCMP- Royal Canadian Mounted Police
- SC- Supreme Court
- SC 302- Sessions Case-Murder
- SCALE- Supreme Court Almanac

- SCC- Supreme Court Cases
- SCORS- Sessions Cases-Ors.
- SCW- Supreme Court Weekly
- SDPO- Sub-Divisional Police Officer
- SHO- Station House Officer
- TOI- The Times Of India
- UK- United Kingdom
- UKPPS- United Kindom Protected Persons Service
- USA- United States of America
- USMS- United States Marshals Service
- Vand. L. Rev- Vanderbilt Law Review

LIST OF CASES

31. State v. Siddharth Vashisht alias Manu Sharma & Ors. 2013 Supreme (Del) 607; 2013 3 JCC 1481
32. Sunil Kumar v. State Government of (NCT) Delhi AIR 2004 SC 552.
33. Swaran Singh v. State of Punjab (2000) 5 SCC 68.
34. Vadivelu Thevar v. State of Madras AIR 1957 SC 614 at p.619.
35. Yusuf v. State of Uttar Pradesh 1973 Cri.L.J. 1220.
36. Zahira Habibulla H. Sheikh v. State of Gujrat 2004 AIR SCW 2325
37. Zahira Habibullah v. State of Gujarat (2006) 3 SCC 374
38. Zamir Ahmed v. State 1996 Cri.L.J. 2354.

1 CHAPTER 1- INTRODUCTION

Bad will and resentment towards one another characterise the hostile condition. Unfavourable testimony comes from a hostile witness. It's possible that a first-time court appearance might be intimidating for a non-lawyer.

When a witness provides one version of his or her testimony to the police regarding his or her knowledge of the commission of a crime but a different version when summoned as a witness before the court during the trial, the former version is said to be the "hostile" version.

Neither the Indian Evidence Act of 1872 nor the Code of Criminal Procedure of 1973 use the word "hostile witness," and neither does any other Indian legislation. As far as can be determined, the word "hostile witness" first appeared in Common Law.

To protect against the "contrivance of an ingenious witness" who would deliberately use hostile evidence to "ruin the cause" of the party calling such a witness, the phrase "hostile witness" was first established in the common law. The pursuit of the purposes of justice by the judicial system is hampered as well as the interests of the parties to the litigation. The "safeguard" envisioned by the common law consisted of the party calling such witnesses contrasting their testimony with the witness's past remarks or impeaching their credibility (which was typically not allowed). That witness had to be labelled "hostile" before the "safeguard" could be activated. This is why common law established specific characteristics of a "hostile" witness, such as "not desirous of revealing the truth at the instance of the party calling him" or "the presence of a "hostile animus" to the person calling such a witness.

The definition of a hostile witness may be found in Section 154 of the Indian Evidence Act of 1872. It says , A party who calls a witness may ask him any questions that the other party may ask during cross-examination, subject to the Court's discretion. The analysis of this section reveals that this section does not say anything about declaring a witness as hostile and does not contain any such term as "hostile", "unwilling", "adverse" or "unfavourable witness". These terms are foreign to the Indian Evidence Act, 1872 and are, rather the terms of English law.

Under Indian Evidence Act, 1872, a witness may be declared hostile at two stages i.e. originally and subsequently. For the first category, the prosecution or the party producing the witness, make an application to the court, that the witness, which has been produced on his behalf, for testifying must be declared as "hostile". The Court, may, in its discretion, permit or disallow. In the second situation, a witness may be declared as hostile only when he passes through the process of examination-in-chief, and during course of cross examination, or lastly, at the stage of re-examination, he supports the cause of opposite party. The second process is largely adopted by the courts in India and is treated as a established judicial practice. Another aspect of hostile witness is the evidentiary value of testimony of hostile witness.

The fact that it is so difficult to find a credible "witness" or "relevant proof" nowadays is maybe a positive indicator of changes in modern Indian culture. In today's world, witnesses and tangible proof are more precious than ever. People in Indian society don't appear interested in testifying since doing so would put them in harm's way in many ways, including the following: physically; socially; legally; economically; morally; politically; personally; religiously; and so on. Many incidents of witnesses being harmed, killed, kidnapped, abducted, raped, molested, defamed, tormented, mistreated, outcasted, and similarly harassed may be seen in the news. The responsibility to testify as a witness for a fact which one saw, heard, and recognised is established by the Indian Evidence Act, 1872. Yet, due to these potential complications, many are now deterred or avoided from being witnesses.

Hence, now a days, the menace or turning of becoming a hostile witnesses, has seriously threatened the foundation as well as running the criminal judicial system of India. This epidemic is increasing at such a large scale, that it has annihilated the legislature, executive, judiciary, and the State and endangering the very existence of the Indian society and its social fabric.

The testimony of a witness is extremely important in an adversarial system where the prosecution has the burden of proof and the accused has the presumption of innocence. Both direct and indirect evidence can be used to prove the facts at hand. In addition, the Court can only accept direct testimony if the witness has first-hand knowledge of

the matter at issue, which indicates that he has experienced the occurrence in question directly through one of his five senses.[1]

This demonstrates the significance of witnesses in the administration of criminal justice, as direct oral testimony is prioritised over inferential evidence. Unfortunately, in the normal course of events, the witness is frequently overlooked or forgotten by those working in the criminal justice system.

One element influencing the conviction rate is the prevalence of the problem of witnesses turning hostile in the criminal court system, which persists despite the absence of particular legislation to protect them.

For the Criminal Justice System to function, it must be able to rely on evidence presented at trial that can be trusted to accurately reflect the truth of the matter and help the jury reach a verdict of guilt or innocence. The prosecution's case will be significantly weakened if the evidence presented is not believable. Witnesses play a crucial part in the administration of criminal justice in every country since a criminal case relies on the credibility of the evidence presented by them.

The prosecution's case will be strengthened if the witness testifies in court in line with the statement provided to the police, and the judge will be in a better position to evaluate the evidence and decide whether or not the accused is guilty based on that evidence. Yet if the witness recants and gives inconsistent testimony, the prosecution has very little chance of establishing its case. A "Hostile Witness" is a person who either testifies against the party who summoned them or refuses to tell the truth when asked to do so by that party.

In criminal cases, hostile witness testimony frequently discredits the prosecution. The prosecution may rely on the testimony of a hostile witness if that person provides reliable information; however, this is rarely the case. Most witness statements are completely disregarded.

[1] Section 60 of The Indian Evidence Act, 1872.

1.1 REVIEW OF LITERATURE

The Irish Research Council for the Humanities and Social Sciences supported the research that formed the basis of **Liz Cambell's**[2] paper. The article focuses on how the rise of so-called "gangland" crime in Ireland has led to an increase in witness intimidation inside the criminal justice system. This article takes a look at the measures used by the state to utilise the testimony of witnesses who are in danger of being discredited in court. In addition, the Witness Protection Program has been investigated thoroughly. The article also highlights the importance of witness evidence, saying that it is the only way culprits can be brought to justice in light of the rising numbers of killings involving weapons and organised crime. It is explained in the article that if it can be shown that the witness is unable to come to give evidence or may not give testimony owing to fear or intimidation, then the court may consider the witness's sworn deposition instead. This provision is included in the Criminal Justice Act, 1999. In addition, the Act guarantees a fair balance between the rights of the accused and the rights of the witness. It is also mentioned that a new procedure is provided by the Criminal Justice Act of 2006 to allow for the admission of a previously uncooperative witness's remarks as evidence against an accused. A witness with crucial information about crimes like drug trafficking and organised crime, which pose a significant threat to the witness's safety, may be eligible for the Witness Protection Programme, which is discussed in further detail in the article.

Emma Irving's[3] paper analyses the topic of witness protection in ICC (International Criminal Court) trials. She brings up an important point about witnesses who may not be able to safely return to their home state after testifying at the place where the alleged crime was committed because of the grave danger they face. Moreover, this paper investigates the Witness Protection Programme (ICCPP) established by the International Criminal Court to safeguard such individuals. This paper looks at the legal foundation of the ICCPP, which states that the Chambers of the Court have the authority

[2] The Evidence of Intimidated Witnesses in Criminal Trials,Available at http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=1031657 (Last visited on February 5, 2025).

[3] Protecting Witnesses at the International Criminal Court from Refoulement,Available at http://papers. ssrn.com/sol3/ papers.cfm? abstract_id=2570819 (Last visited on February 5, 2025).

to order protective measures such as the use of pseudonyms, closed sessions (when the public is not allowed to observe the testifying witness), and image and voice distortion. The ICC's Victim and Witness Unit must provide secure relocation for selected witnesses to a third country after they testify before the Court. To address the most pressing issues associated with witness protection, relocation is a non-judicial protective measure. Furthermore, she contends that international human rights principles, such as the Refugee Convention of 1951, might be used to overcome the shortcomings in the ICCPP that have made witnesses reluctant to rely on it for their protection.

The purpose of **Miiko Kumar's**[4] is to evaluate whether or not the principles governing the criminal justice system in Australia have been compromised during terrorist trials. These values include access to justice, equality before the law, and the right to confront one's accusers. The paper emphasises the need of concealing intelligence and the use of confidential witnesses. Further, the Article specifies that the Court may deviate from the open justice principle by issuing orders to close the Court, prohibiting the publication of evidence or access to information, requiring that a witness give testimony behind a screen or via encrypted video link or close circuit television from a remote point to prevent the public and possibly also the accused from identifying the witness, and/or issuing pseudonym orders in situations where a witness's identity is highly sensitive. Witness identities are concealed in this article because of public interest immunity. Disclosure of information related to an issue of State is shielded under the notion of public interest immunity. The State has used public interest immunity to prevent disclosure of certain material to the defence and to protect the name of witnesses from being made public and/or revealed to the accused. According to the article, anonymous witnesses were also employed in Australian terrorist cases.

[4] Secret Witnesses, Secret Information and Secret Evidence: Australia's Response to Terrorism , Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1949575 (Last visited on February 5, 2025).

The study of **G.S. Bajpai**,[5] aimed to zero in on challenges and concerns faced by witnesses to specific types of criminal acts. The research used both doctrinal and non-doctrinal methodologies to determine what causes and situations lead to hostile witnesses. Also, the Research analysed the necessity of witness protection and the ideas provided by various organisations with a critical eye. This empirical research focuses on eyewitness accounts of criminal acts such burglary, battery, robbery, attempted murder, and rape. The states of Madhya Pradesh, Rajasthan, Maharashtra, and Karnataka were each represented by a single district in the research. Following preliminary research, it was determined to focus on the state capitals. The study's primary suggestions were a National Policy for Witness Help and Protection, a network of agencies and coverage of scheme, such as the State Government establishing a Victim-Witness Assistant Department, and modifications to the Criminal Process Code's procedures.

In his work, Vijay Singh,[6] among other things, discusses the many causes of a witness's reluctance to testify or testify falsely or irrelevantly. He claims that inadequate witness protection is a key factor in witness resentment and the subsequent turn of events. In light of the fact that no accused can be convicted without witnesses, this article places a premium on witness protection in the administration of criminal justice.

Dipa Dube's article[7] explores the criminal justice system through the lens of the notorious Jessica Lal Trial, which ended with the Sessions Court acquitting all of the defendants. She examines the causes of criminal justice system failure include inadequate investigation, uncooperative witnesses, ineffective prosecution, and inactive judges. In the article's last section, she analyses problems in the penal system.

[5] Witness in the Criminal Justice Process: Problems & Perspectives, Available at http:// papers.ssrn.com/sol3/ papers.cfm?abstract_id=1802876 (Last visited on February 5, 2025).
[6] Witness Protection Laws: Immediate Need for an effective Criminal Justice Administration, Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1351136 (Last visited on February 5, 2025).
[7] Shaking the Foundations of Criminal Justice- The Jessica Disaster, Available at http://papers. ssrn.com/sol3/ papers.cfm?abstract_id=938949 (Last visited on February 5, 2025)

In his article, Rustom Singh Thakur[8] argues that witnesses are crucial to the functioning of the criminal justice system. He elaborates on how witnesses, especially those involved in instances involving sexual offences, are often subjected to trauma, harassment, and embarrassment over the course of the trial. In criminal cases, where the prosecution has the burden of proof and where witnesses' testimony forms the backbone of the prosecution's case, he elaborates more on the factors that might cause a witness to turn hostile. Finally, he states that the hostile nature of some witnesses is a significant factor in India's poor conviction rate.

Saini B.R.'s Thesis,[9] examines the development of legislation and judicial decisions to clarify the law surrounding Witness Protection. The study examines the international application of witness protection as well as the Indian statutes relevant to such protection. Nevertheless, a doctrinal approach using a Case Study approach was taken in order to accomplish the goals of the Study.

Pritam Ghosh[10] emphasises the value of witnesses in criminal trials and examines the effect on the trial when witnesses give conflicting accounts of the same events to the investigating agencies and the courts. The paper examines the issue of hostile witnesses and offers solutions, including the development of adequate witness protection measures that may be enforced through the passage of appropriate witness protection laws. In addition, the Paper examines many high-profile cases from India that were affected by this problem of hostile witnesses testifying against the prosecution. In addition to the Law Commission's suggestions and a cross-national analysis of Witness Protection programmes, the report suggests corrective methods to eliminate this scourge from the criminal justice system.

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[8] Evidentiary value of Hostile Witness: Chronological Case Law Study to Address Current Position in India, Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1985129 (Last visited on February 5, 2025).

[9] Protection of Witness under Law of Evidence: A Comparative Study submitted to Kurukshetra University Available at http://shodhganga.inflibnet.ac.in/handle/10603/8788 (Last visited on February 5, 2025).

[10] Hostile Witnesses in India- A Menace to Criminal Justice Administration , Available at http://papers.ssrn.com/ sol3/papers.cfm?abstract_id=2283861 (Last visited on February 5, 2025).

Perusing the existing literature, it is clear that the presence of hostile witnesses in criminal cases poses a threat to the proper functioning of the Criminal Justice system. Thesis and research papers written in India have addressed the issue of bias in the country's Criminal Justice System and provided solutions to effectively reduce and eradicate this threat in future trials.

Witness Protection Plans have been explored by writers of research articles and theses from other nations, who have brought attention to the topic in light of local conditions.

The purpose of this research is to draw attention to the many laws and regulations that already exist to deal with hostile witnesses, and to provide solutions to the problem. It's also an effort to figure out why witnesses become uncooperative and what can be done to fix this problem in the criminal justice system.

1.2 STATEMENT OF THE PROBLEM

Witnesses are discouraged from testifying in Court because the Criminal Justice System in India does not provide a welcoming atmosphere for them. Witnesses are often bought off by the accused through threats or financial incentives. Despite the prevalence of this issue, most states have not passed laws to protect witnesses, which has hampered the Prosecution's case and led to the acquittal of the guilty in numerous instances.

A witness cannot be declared hostile under Section 154 of the Indian Evidence Act; nevertheless, the Court may, at its discretion, allow the party who calls the witness to ask any question that may be asked during cross-examination. According to subsection (2), the applicant for approval under subsection (1) may rely on all or any portion of the witness's evidence.

Whenever the Court determines, based on the witness's demeanour, temper, approach, or tone of answers or from examination of his previous inconsistent statement, that granting such permission to the prosecution to cross-examine the witness is expedient to discover the truth and ensure justice is done, the Court shall exercise its discretion under Sec. 154 to the fullest extent possible.

1.3 RESEARCH OBJECTIVES

i. To analyse the current provisions of laws dealing with witnesses.

ii. To investigate how much of an effect hostile witness evidence has on the prosecution's case and to pinpoint the most likely causes of witness hostility.

iii. The testimony of the Hostile Witness will be analysed in order to determine its evidentiary value in evidence.

iv. To examine how other nations including Australia, Canada, South Africa, the United States, the United Kingdom, etc. handle witness identity protection and witness protection programmes.

1.4 RESEARCH QUESTIONS

I. Who is a Hostile Witness? At what stage a witness may be declared as hostile ? What factors forced him or her to turn hostile - the social, economical, political, religious, family, caste, place, and the likes ?

II. What are the immediate and far reaching consequences on Indian judicial system of such testimony ?

III. What is the evidentiary value of testimony of the Hostile Witness? Whether statement of hostile witness is wholly or partially admissible or describable? What shall be the evidentiary value of his testimony recorded prior to such declaration?

IV. What are the remedies against such person, and whether these measures are sufficient to deter a person for not changing his earlier testimony and so many other questions?

1.5 HYPOTHESES

One of the problems with our criminal justice system is that witnesses sometimes change their testimony and testify against the prosecution. It is possible to significantly reduce the number of hostile witnesses in criminal cases by passing special legislation to protect witnesses.

1.6 RESEARCH METHODOLOGY

This research will use a doctrinal approach and draw on a wide range of sources, including statutes like the Criminal Procedure Code (1973) and the Indian Evidence Act (1872), as well as scholarly works including books, journals, reports, and archival materials.

1.7 CHAPTERISATION

The structure of the present dissertation is divided into *Six* chapters, which are as follows:

Chapter 1 includes Introduction, Statement of the Problem, Research Objectives, Research Questions, Hypotheses, Research Methodology, and scheme of the dissertation in the form of a Chapterisation.

In **Chapter 2**, we will attempt to take a slightly elevated look at the history of the Criminal Justice System. The Adversarial and Inquisitorial Criminal Justice System is also described in this Chapter. It also covers the history of the law along with it currently stands with regards to witnesses, the causes of witnesses turning hostile, and the remedies available.

Chapter 3 is an international comparison of witness identity protection and witness protection programmes in places like Australia, Canada, the United States of America, the United Kingdom, and other nations.

Chapter 4 discusses the evidentiary value of testimony of the Hostile Witness. It also discusses the admissibility of the statement of hostile witness.

In **Chapter 5,** the role of the judiciary in shielding hostile witnesses is examined. The purpose of this Chapter is to examine how the legal system safeguards a Hostile witness. The effects of hostile witnesses on the judicial process are investigated. It aimed to learn the reasons and triggers for witness hostility, as well as the judicial system's perspective on how to best safeguard them.

Chapter 6 is the Final chapter of the study and it provides for guidelines for a proposed legislation suitable for Indian conditions for Witness Identity Protection and Witness Protection Program. In this Chapter, we lay out some suggestions for how to reduce the number of cases in which a witness becomes hostile during a criminal trial and, hopefully, reverse the negative impact this trend has on the country's conviction rate.

2 CHAPTER 2- HISTORY OF THE CRIMINAL JUSTICE SYSTEM RELATING TO WITNESSES

The lessons of the past are always present in any criminal procedural system. Laws are uniquely structured to protect against wrongdoings of the past, and the lessons of history are invaluable for our present moment. In order to understand how the many parts of the Criminal Justice System work together, it is important to examine the Adversarial and Inquisitorial models of criminal procedure, with a particular focus on the evidential process.

Both the accusatory and the inquisitorial systems make underlying assumptions about how best to ensure that criminal trials are conducted quickly and fairly, yet the two systems couldn't be more different from one another. In each, the judge has a different role in determining the facts of the case, but in the American system, this aspect of the trial has traditionally been given a higher prominence. The meaning, application, and extent of the right to a fair trial are profoundly influenced by the connection between truth and justice.

So, it is important to compare and contrast the adversarial and inquisitorial systems by conducting an evaluation of their efficacy in the administration of justice. To achieve justice in letter and spirit is the ultimate goal of criminal justice administration. Thus, understanding the role of the criminal justice system's many actors and stakeholders as well as its historical development is crucial..[11]

2.1 ADVERSARIAL SYSTEM

To fully grasp and appreciate the relevance and premise of the law of evidence, one must have a fundamental familiarity with the system of judicial inquiry or system of prosecution. The model of the system of prosecution has a significant impact on the type and character of practically all the principles covered by both procedural and evidentiary rules. Issues like the judge's function, the ultimate goal of presenting

[11] Christa Roodt, A Historical Perspective on the Accusatory and Inquisitorial Systems, 10 Fundamina 137 2004.

evidence, the requirement for ensuring fairness in the evidence adducing processes, the autonomy and accountability of witnesses who depose before the Court, etc. will all become clearer with this knowledge. The final demand is to determine the truth of matters that have been called into question.

Basic Tenets of Adversarial System

The "Accuser" or "Adversary" in an Adversarial System is one of the two competing parties in a trial. Trials are formally guided by the court and are intended to be public, oral, and contentious. The traditional, if outdated, depiction of the accusatory procedure has witnesses giving their testimonies under oath to the elders of the tribe. Respect for the accused's procedural rights is ensured by the elders. Providing the accused with an opportunity to engage in the proceedings is central to the concept of adversarial protection, which means that this practise remains relevant today.

The adversarial system is predicated on the idea that a neutral adjudicator may be put in a position to establish "truth" by means of political advocacy and manipulation of evidential sources, with both sides having an equal chance to present their case. There is hope that advocacy can help rein in the eccentricities of the judicial system. To understand the basis on which the adversarial system of trial functions, one must first get an understanding of its defining traits. The Adversarial system of trial is defined by the following salient features:-

1) The competition is controlled by an impartial third party who, for the most part, takes a backseat role. The rules of the "game" are strictly enforced by this person.

(2) The length and difficulty of the proceedings are under the discretion of the opposing party, who is responsible for creating and shaping the evidence.

Third, the trial is dominated by the attorneys representing the opposing parties (the prosecution and defence counsel interrogate the witnesses), and Fourth, the disagreement is resolved by the Judge ruling in favour of one side or the other.

As a result, a judge or jury must be a disinterested third party in the adversarial system in order to determine the facts. During a trial, attorneys for both sides present their claims to a neutral third party, called the "trier of fact," who makes no decisions and

takes no action. At trial, lawyers on both sides "manage the presentation of evidence and argument" and try to persuade the fact finder (a judge or jury) that their client's version of the facts is more plausible.[12]

Hence, the system pushes both parties to locate and present their strongest evidence. A "win at any cost" mentality on the side of the opposing attorneys is prevented by evidentiary, procedural, and ethical restrictions. A fact finder cannot participate in the collecting of evidence or render a decision before all the evidence has been presented.

Both the prosecution and the defence present their version of the events to an impartial judge, and the judge is then expected to make a ruling based on the more credible of the two. The judge acts as an arbiter by questioning whether the prosecution can establish the allegations against the accused beyond a reasonable doubt; if they can't, the judge sides with the defendant. The nature and extent of the disagreement, as well as the parties' ability to make independent, selected decisions about the evidence they present in court, are all determined by the parties themselves. The proceedings are oral, nonstop, and antagonistic. Cross-examination is used by both sides to discredit the other's witnesses and learn information that has been concealed. The judge, fearful of appearing biassed, makes no active steps to learn the facts. Not only does he not fix the problems with the investigation or the presentation of evidence in court, but he also doesn't seem to care. Due to the adversarial system's lack of an active role for the Judge to uncover the truth, the Judge is a bystander in the process of adjudication. The system is biassed in favour of the accused and disregards the needs and rights of the victims.[13]

The Adversarial system (also known as the "adversary system") or the "Accusatorial system" of law is the system of law used in common law nations, where each side has an attorney to argue their case and a third party (often a judge) tries to sort out the facts. In English courts, judges act as umpires who enforce the law before tossing the case to

[12] Kirsten DeBarba Maintaining the Adversarial System: The Practice of Allowing Jurors to Question Witnesses During Trial, 55 Vand. L. Rev. 1527-1528 2002.
[13] JUSTICE V.S. MALIMATH, COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM, available at
http:// www.mha.gov.in/criminal_justice_system.pdf (last visited on 04-02-2025).

the jury with a "Howzat?" But, the French judge d'instruction is more akin to a scientist in his or her search for the truth.[14]

In this excerpt, Peter Murphy provides an illuminating case study. After hearing opposing testimony in an English (adversarial) court, a judge questioned a lawyer, "Am I never gonna hear the truth?" "No, my lord, simply the evidence," counsel answered.[15] This means that the testimony of witnesses is given greater weight in an adversarial system since it is expected that it would be used in the court during the trial. The adversarial system, which was adopted from the United Kingdom and is widely employed in India today, is another vestige of British rule that has influenced the country's approach to criminal justice.

Neither England nor the United States utilises a purely adversarial or inquisitorial method, but rather a hybrid of the two. This is also true of the legal systems in Wales and Sweden and the legal systems in France and the Netherlands. Yet this doesn't mean that labels aren't useful; on the contrary, they shed light on the fundamentals of a system by highlighting its salient characteristics and guiding principles. Example: under an adversarial system, the two opposing parties and their lawyers are responsible for conducting the investigation, as well as making the evidence selection and presentation. The trial will consist of oral testimony submitted to a judge who will remain unbiased and uninvolved throughout the proceedings; the jury will be made up of ordinary citizens.

When it is said that the legal system in England and Wales is not strictly adversarial, this means that the accuser and the accused do not face each other head-to-head during the trial. Instead, the accuser is usually represented by an attorney and the prosecution

[14] NARIMAN FALI S., INDIA'S LEGAL SYSTEM: CAN IT BE SAVED? 96 (Penguin Books New Delhi, 1st ed, ,2006).

[15] http://www.lawgratis.com/2016/03/07/adversarial-system-of-justice/

is in charge of making the accusations. Cases are typically resolved by guilty pleas and other means rather than a fully fought trial when oral evidence is submitted and heard.[16]

Given the police monopoly in conducting the investigation that will form the prosecution's case; the rights of the accused to conduct their own investigation; the relatively partisan role of the prosecutor (rather than the more neutral'ministry of justice' function); the location of the trial, with live oral evidence as the ultimate forum for case disposal (and the fact that the accused has the burden of proof); and the fact that the accused has the burden of proof, the procedure followed in England and Wales might still be considered a broadly adversar (albeit that consent may be obtained with the aid of powerful incentives).

A conviction requires proof that proves the accused guilty beyond a shadow of a doubt. The Roman legal system was founded on the premise of formal accusation, and only by looking at the system from a more holistic historical perspective can one fully grasp the significance of this development.

2.2 INQUISITORIAL SYSTEM

Proponents of the Inquisitorial system, in contrast to those of the Adversarial system, argue that the State is in the best position to uncover the truth that the disputing parties are trying to hide, and to put its policies into effect. So, neither the prosecution nor the defence can be counted on to aid in fact discovery, and neither side can be permitted to have undue influence on the investigation.

In a pure Inquisitorial system, as opposed to an adversarial one, the same authority handles the investigation, prosecution, and trial of a case. Under this system, the burden of proof falls on the Prosecution to establish guilt beyond a reasonable doubt, while in the Adversarial system, the burden of proof falls on the Judge to reach a verdict. You can't compare the two systems of trial with any degree of accuracy without first learning how the Inquisitorial process works.

[16] Jacqueline S. Hodgson, The Future of the Adversarial Criminal Justice in 21st Century Britain, 35 N.C.J. Int'l L. & Com. Reg. 320 2009-2010.

Basic Tenets of the Inquisitorial System

The Inquisitorial method is predicated on the belief that the truth can and should be uncovered via an in-depth investigation. Once a mediaeval European procedural quirk, the idea that the judge is the sole accountable functionary who can uncover the truth has now been ingrained in all European countries. In a judge-centered procedure, the investigating judge operates as the state's agent, doing independent investigation, issuing instructions, supervising, and deciding on all aspects of the case, from the first stages of crime detection and police interrogation through the trial's ultimate outcome.

In order to mould the evidence, a thorough preliminary investigation is done in a non-contradictory manner during the pre-trial stage. The judge will determine who to call as witnesses and will conduct the initial interviews. When the attorneys have finished interrogating the witnesses, the judge can ask any remaining questions or compel either party to provide new evidence. At the outset of the trial, the accused testifies viva voce. Suspects are often given the opportunity to make a statement early on in inquisitorial procedures. The accused may speak last and is entitled to react to the testimony of other witnesses. Those who are under suspicion or who have been falsely accused are urged to cooperate and explain their side of the story as soon as possible without fear of self-incrimination.

The inquisitorial system's emphasis on finding the tangible truth is emphasised by the judge's dual role as police and enforcer. Those who support the Inquisitorial system believe the State should investigate the truth since it is the protector of the public interest and the parties may try to hide it otherwise. The parties (the Prosecution and the Defense) are not involved in or permitted to direct the fact-finding process. The dossier is used by both parties as a shared source of information since it provides each side's version of events. Defense attorneys primarily ensure that the state follows all procedural norms.

The inquisitorial procedure, in which a neutral official, typically a judge, is in charge of the inquiry, lays greater emphasis on the pre-trial period than on the trial itself. Cases under the pure inquisitorial model are handled in private and on the basis of written evidence; the same person conducts the investigation, prosecution, and trial of the accused. Even in the most cutting-edge of trials, pre-trial proceedings are still highly

centralised, with significant weight put on the dossier of written evidence compiled by the judge (or, increasingly, the prosecutor). Since the accused's role in the inquiry is that of a witness, it is not expected that she will do independent research and submit evidence contradicting the prosecution's. It is not necessary for the judge to passively await the presentation and examination of evidence selected by the defence and prosecution during a trial.

In order to limit the number of trials, Inquisitorial-style administrations have adapted streamlined trial procedures and various types of charge negotiation. The accused will be aware of the details of the case against her and may challenge it in court, but the prosecutor's dossier of evidence (seen as the product of a judicial inquiry) carries more weight and is more credible than the accused's own testimony; the dossier is pivotal evidence and can be used to convict the accused without the need for live witnesses and cross examination.

As a result, we may deduce that the judicial police officer in the inquisitorial system is vested with the authority to investigate crimes and is responsible for drafting the supporting documentation in light of his findings. A written report is submitted to the Judicial police officer for each offence of which he has knowledge. When an investigation is complete, the Officer will compile a file to provide to the appropriate prosecutor. The Prosecutor may decide to drop the charges if he finds no evidence to support further investigation. Yet, he has the authority to direct the judicial police to go deeper if he thinks it's necessary. As part of their obligation to assist the investigation and the prosecution in determining the truth, the judicial police must present evidence both in favour of and against the accused individual in a fair and balanced manner. There are no regulations that prevent some types of evidence from being presented in court. The norms of hearsay are unknown in this System. The prosecutor might ask the judge of instructions to take over supervision of the inquiry if he believes the case contains significant or complicated offences or topics of political sensitivity.

The Judge of Instructions has the authority to issue warrants, direct searches, make arrests, hold suspects in custody, and question witnesses in order to conduct a thorough investigation of the case. In proceedings before the judge of instructions, the accused has the right to be heard, to retain counsel, and to offer ideas about how the matter should be investigated. In order to produce a dossier for the trial court, the Judge of

Instructions must first gather evidence both in favour of and against the accused. The accused enjoys the benefit of the presumption of innocent, and it is the responsibility of the court to determine what actually happened. Witness testimony recorded by the judge of instructions during the investigation phase is admissible in court as evidence and will be used to build the prosecution's case.

Both the accused and the victim have the right to be present during the trial. The parties' participation is restricted to offering suggestions for questions that the Trial Judge may ask the witnesses. The parties are not afforded the right to conduct cross-examination. The accused's prior actions, history, and convictions may be used as evidence to prove or disprove their guilt. In the inquisitorial system, the standard of proof is not beyond reasonable doubt, but rather the satisfaction of the judge.

In addition, the Inquisitorial system is distinguished by its independent Judicial Officer, the Judge of Instructions, who collects evidence for and against the accused in order to determine guilt in cases of major and complicated crimes like murder, rape, etc.

2.3 ADVERSARIAL VIS-A-VIS INQUISTORIAL SYSTEM

It's common knowledge that there are two primary methods a country's legal system might utilise when trying a criminal suspect. In the first place, unless it has successfully shown his guilt via due process of law, he should be presumed innocent; in the second place, he should be presumed guilty until he successfully disproves that allegation by comparable procedure.[17]

Adversarial and inquisitorial systems for administering criminal justice are still in use in some regions of the world because they are more suited to local customs and norms. The burden of proof that an accused has violated a law rests with the prosecution under the adversarial system followed in common law countries, but in the inquisitorial system used in other European countries, the burden of proof rests with the accused person.

[17] Dogra Shiv Kumar, Criminal Justice Administration in India, (Deep & Deep Publications Pvt. Ltd, New Delhi, Ed. 2009) at 10.

In the Indian legal system, known as the adversarial or accusatorial system, the accused has a presumption of innocence unless the prosecution dispels that presumption via beyond-reasonable-doubt evidence. The Indian Evidence Act of 1872 legally codifies this rule.[18]

The prosecution always has the ultimate burden of proof in a criminal trial, as in an adversarial system. Yet, in some cases, the law may place the burden of proof on the accused rather than the prosecution, even though the prosecution usually has the burden of proof. In such circumstances, the prosecution has the heavier burden of proof, and they can get off of it by showing that the accused is guilty more often than not.[19]

There are typically significant discrepancies in procedure between the two systems when evaluating situations. It's debatable whether or not situations handled using the different methods would provide different outcomes, and there are no hard numbers to suggest that they would. Judiciary professionals, however, have varied views on the relative virtues and downsides of these various techniques, and this may be a source of national pride.

There is less room for the State to be biassed against the accused under the adversarial system, which is why its proponents frequently say that it is more fair and less prone to misuse than the inquisitorial method. Moreover, it enables the vast majority of private litigants to reach mutually agreeable resolutions to their disputes outside of court through discovery and pre-trial settlements in which non-contested facts are agreed upon and not litigated at trial.

Some who support the adversarial method also say that inquisitorial courts are too bureaucratic and out of touch with regular people. As a matter of common law, the courtroom serves as a veritable laboratory where the trial attorney can explore theories and hypotheses to determine the truth. In most situations, the assessment of evidence and testimony prior to presentation to the judge or jury is aided by the discovery process. In a process somewhat unlike to that of investigative judges, the attorneys

[18] The Indian Evidence Act, 1872, Section 101.
[19] State of Maharashtra v. Wasudev Ramchandra Kaidalwar AIR 1981 SC 1186 .

engaged have a solid understanding of the extent to which their clients agree or disagree with the topics to be presented at trial. A trial by a jury of one's peers has been claimed to be more fair than one conducted by a government-paid inquisitor and a panel of the accused's peers.

Consequently, it is clear that under an adversarial system of trial, the judge acts as a neutral and unbiased decision maker, deciding the case only on the facts presented by the parties. Each opponent must present evidence to counter the other's, and they can do so by independently analysing the other's evidence. In the Indian judicial system, the burden of proof rests squarely on the shoulders of the Prosecution, which presents and questions witnesses known as Prosecution witnesses in order to establish guilt beyond a reasonable doubt. The Prosecution's witness is subject to cross-examination by the Defense to determine the reliability of their statements.[20]

Being an unbiased arbiter requires that the judge stay out of the way of the proceedings throughout the presentation of evidence unless it is absolutely necessary. This aspect of the adversarial system, inherited from the British, has unintentionally reduced the role of the judge to that of a bystander. Section 165 of the Indian Evidence Act of 1872 gives the judge the authority to ask questions or order the production of evidence during the evidentiary phase of a trial.

As a result, it is clear that the Adversarial system lacks a foolproof method for either creating a welcoming atmosphere for witnesses or protecting them from any mistreatment.

Yet, the Inquisitorial system is predicated on the idea that the truth can and should be uncovered through an investigative process. For the most part, the procedure revolves on the judge, who serves as both police chief and law enforcer. It is standard practise to undertake a thorough, non-contradictory preliminary investigation before a trial begins in order to form the evidence. The Judge will identify possible witnesses, then call them in for questioning and screening. Witness testimony recorded by the Judge of Instruction during the investigation phase is admissible in evidence and will be used to

[20] The Indian Evidence Act, 1872, Section 138.

build the prosecution's case at trial. When the attorneys are done questioning, the judge can ask any follow-up questions they choose. Hence, because the Judge controls the fact-finding process, the Judicial Police must gather evidence both for and against the accused in an unbiased way, which fosters a safe space for the witnesses to speak.

Regarding criminal proceedings, the two systems are compared based on their respective structural frameworks, with particular attention paid to the efficiency of the processes and the treatment of witnesses. While the Adversarial system of criminal trial may have firm footing, its operation has been questioned, especially in cases when justice was not delivered.

2.3.1 CRITICAL APPRAISAL OF ADVERSARIAL SYSTEM

An opponent of the adversarial system would argue that a client's success depends less on the merits of their case and more on the calibre of their legal representation. A judge may not be persuaded by a lawyer who simply states the facts of the case, but a charismatic attorney may win over the judge with a story that has little to do with the actual evidence. To refute the charge that it loses criminal cases owing to inept prosecution, the government should hire prominent attorneys to serve as public prosecutors and bring the case to a conclusive conclusion.

Principles of justice include the requirement that justice not only be done, but also seem to be done. Unlike the Inquisitorial system, which is charged with the positive obligation of uncovering the truth, the Adversarial system is not. Not often do judges take the effort to fix problems when investigations fail. As the judge has no obligation to seek the truth and no efforts are made in that direction out of concern that his neutrality may be challenged, he plays a largely passive role in the trial.

The criminal law system in India was established by the British. It was a boast of the British that “better that guilty persons go unpunished than that one innocent person suffer”[21] acts as an incentive to the criminal for committing further crimes. In India, only about 45% of those accused of major IPC offences, such as mob violence, are

[21] William Blackstone, cited in Nariman.

found guilty. For example, the judge in the Best Bakery Case had acquitted all 21 defendants by applying Blackstone's maxim to the case. So, the Adversarial system has to be fortified by importing, with some essential tweaks, certain positive and helpful aspects of the Inquisitorial system.

Similarly, the administration and the Criminal Justice system both need to be strengthened to guarantee that they can do their jobs properly and protect the public interest. To achieve this goal, it is crucial that the various actors in the criminal justice system carry out their duties effectively.

2.4 HISTORY OF CRIMINAL JUSTICE SYSTEM W.R.T. WITNESSES IN INDIA

A witness's role in the criminal justice system cannot be overstated. A witness's testimony is crucial in establishing guilt or innocence. Truthfulness and objectivity in judgement are necessary components of a just system. Every bystander can now testify as a witness and verify or report the incident's specifics to law enforcement. Statements provided by the witness under oath are held to be true and factual by the court. As a result, a witness's contribution to the administration of justice has been crucial.[22]

The practice of summoning a witness to testify in a case is an ancient practice. Kautilya in his famous work 'Arthasastra' says "the parties shall themselves produce who witnesses who are not far removed wither by time or place. Witnesses who are far away or who will not stir out shall be made to present themselves by the order of the judge."[23]

Several types of evidence were separated into the human and divine categories in the ancient texts. It was determined that there were three distinct types of human witnesses, physical objects, and written records that might be used as proof. In his seminal work,

[22] G.S. Bajpai, Witness in the Criminal Justice Process: A Study of Hostility and Problems associated with witness, available at http://www.bprd.nic.in/WriteReadData/userfiles/file/20160824041904468252l Report pdf (Last visited on February 5, 2025).
[23] Ibid

Yajnvalkya lays forth three types of evidence. Even when comparing handwriting, it provides direction.

In order to understand the role of witnesses in Indian Criminal Justice System, it is necessary to trace the history of the law of evidence in the country, for which purpose, the history can be observed for three different periods namely (i) the Ancient Hindu Period, (ii) the Ancient Muslim Period, (iii) and the British Period.[24]

2.4.1 LAW OF EVIDENCE IN ANCIENT HINDU PERIOD

Legal evidence in ancient Hindu India originated in the Dharma Shastras. The Hindu Dharma Shastras state that the ultimate goal of each testing situation is to learn the truth. According to the Dharma Shastras, a judge's primary duty is to uncover the lie by employing his or her expertise. Yagnavalkya says, "The monarch should make judgements in conformity with accurate facts, discarding what is fake." All of the earliest codifiers of the law agreed that it was common practise for witnesses and evidence to be withheld or distorted during court proceedings.[25]

As a result, the Hindu law providers took all necessary measures to establish the facts. According to the Shastras, when people go to court, they should be convinced to tell the truth. The data may not always be on your side while making a decision, according to Mitakshara. Only after the parties were unable to come to an agreement did the trial begin. According to Manu, the King presiding over the Tribunal is responsible for determining the veracity of the testimony of the witnesses, the accuracy of the description, time, and location of the transaction or incident giving rise to the case, and the conformity of the evidence to the customs of the country, so that a just verdict can be rendered.

[24] KRISHNAMACHARI V., LAW OF EVIDENCE, 2 (S.Gogia & Company, Hyderabad, 7th ed. 2014).
[25] Ibid.

2.4.2 LAW OF EVIDENCE IN ANCIENT MUSLIM PERIOD

The concept of justice is central to the Holy Quran. Islam views the administration of justice as a divine inclination because it believes that the universe was built on the principle of justice and that one of God's finest qualities is that he is just.[26]

Evidence is split into two categories in Mohammedan legal texts: oral testimony and written evidence. We further subdivided oral testimony into direct and hearsay evidence. Despite the fact that properly completed records and books kept in the course of business were recognised as evidence, it appears that oral evidence was favoured. The Court has insisted on questioning the producing party whenever evidence is submitted. To be truthful when giving testimony orally is a commandment of the Holy Quran.

Another passage from the Holy Quran instructs witnesses to tell the truth, even if it means testifying against their own parents or close relatives, and to be steadfast in their pursuit of justice regardless of the wealth or poverty of the opposing party.[27] To some extent, it served as a moral admonition against damaging evidence.

The Courts were instructed to pay close attention to the demeanour of the parties and witnesses during cross-examination to ensure the latter's trustworthiness. A case that appeared before the Mughal emperor Shahjehan is a good example of this.

The Hindu scribe in question claimed that his wife had been abducted by a Mughal soldier. The king issued a warrant for the person's arrest and demanded that they be brought before him. When the lady who was believed to be the Hindu scribe's wife was brought forth, she denied being his wife. Seeing her demeanour, Emperor Shahjehan unexpectedly invited her to refill the inkpot in the Imperial Court. The woman's work

[26] Holy Quaran chapter 5, verse 8.
[27] Holy Quran Chapter 4, Verse 135.

was so precise and meticulous that the king was persuaded she was the Hindu scribe's wife.[28]

2.4.3 LAW OF EVIDENCE IN BRITISH INDIA

The British Indian Courts in Bombay, Madras, and Calcutta were using the English norms of the Law of Evidence as outlined in the British Charter. Outside of the Presidency Towns, where the Mofussil Courts were located, there were no hard and fast regulations regarding the Law of Evidence. When it came to deciding what evidence to accept, the Judges were given complete discretion. On September 1, 1872, the Indian Evidence Act was signed into law.[29]

There has been a paradigm shift in the way criminal courts handle the evidence process including witness testimony, which was once considered a sacred and moral responsibility in the pursuit of truth. Neither the ancients nor the Brits had to deal with the problem of witnesses recanting their statements or providing unfavourable or unfavourable testimony against the side calling the witness, or even turning hostile. This recently discovered phenomena has rapidly become a threat to the criminal justice system.

2.5 HOSTILE WITNESS: THE PRESENT LAW IN INDIA AND THE REMEDIES AVAILABLE

Common Law is the original source for the concept of a "hostile" witness. The word was acknowledged so that parties would be protected against witnesses whose testimony might "ruin the cause" of the other side. It was determined that the behaviour of such witnesses is not only harmful to the interests of the parties to the litigation, but also detrimental to the pursuit of truth and the administration of justice.[30]

[28] KRISHNAMACHARI, supra note 13.
[29] Ibid.
[30] Preeti Sharma, Perjury Laws, at http://www.academia.edu/9850177/Perjury_Laws (Last visited on February 5, 2025).

It is pertinent to note that the Common law envisioned a "safeguard" that would allow the party calling such witnesses to dispute the witness's statements to the police or undermine their credit (which was ordinarily not allowed). Declaring such a witness "hostile" was necessary for the "safeguard" to be activated. A "hostile" witness is one who "is not desirous of stating the truth at the instance of the party calling him" or "has a 'hostile animus' to the party calling such a witness," as defined by Common Law.[31]

While learning about the role of witnesses in criminal cases, it is important to distinguish between witnesses who are unfavourable and those who are hostile. There is always the risk that a witness would "fail to come up to proof," providing testimony that is either unfavourable to the party calling them or less favourable than might have been expected. This does not suggest that the witness is dishonest or has any ill will towards the party who has called him to testify. Sometimes the witness does not know or remember what they say they do. Yet, there are times when the witness is dishonest, uncooperative, or malevolent, and his goal is to discredit or derail the case of the party that called him as a witness. It is thus argued that the witness is unfriendly.[32]

As there was a difference of opinion in England, the drafters of the Indian Evidence Act avoided using the terms "adverse," "unwilling," and "hostile" and instead left the decision up to the Court. While Section 154 of the Indian Evidence Act says nothing about labelling a witness as hostile, it does provide that the Court may, at its discretion, allow the party calling the witness to ask any question that may be asked during cross-examination.[33] Sub-section (2) states that “the person so seeking permission under sub-sec.(1) is entitled to rely on any part of the evidence of such witness.”[34]

[31] Suprio Bose, Hostile Witness- A Critical Analysis of Key Aspects Hitherto Ignored in Indian Law, available at http://www.legalserviceindia.com/articles/host.htm (Last visited on February 5, 2025).
[32] PETER MURPHY, MURPHY ON EVIDENCE, 526-527 (Oxford University Press, 9th ed., 2005)
[33] Sat Paul v. Delhi Administration AIR 1976 SC 294, 305 ¶ 37.
[34] Inserted by Act 2 of 2006 (w.e.f. 16-04-2006)

The Supreme Court in ***Sat Paul v. Delhi Administration***,[35] defined 'Hostile Witness' "as one who is not desirous of telling the truth at the instance of the party calling him." It was also stated by the Apex Court that an 'Unfavourable witness' "is one called by a party to prove a particular fact in issue or relevant to issue who fails to prove such fact, or proves an opposite fact."

"A hostile witness is one who from his demeanour and mode in which he gives his evidence (indication of the fact that he is willing to resile from previous statements made by him) shows that he is not desirous of telling the truth."[36]

The purpose would be undermined if a witness's display of hostility were the only criterion for labelling them as unreliable. In order to avoid giving unfavourable testimony or making assertions that run counter to the facts and what the party calling him expected him to say, even a clever and poised witness may try to hide his true feelings or hostile attitude. A witness cannot be deemed hostile just because he or she gives testimony that is unfavourable to the party who called them. If a witness lies or gives conflicting testimony in an effort to discredit the party's case, such witness is hostile.

The fact that a witness has turned hostile must be proven by extracting facts that might offer a hint of hostility; yet, a witness is not inherently hostile if, in expressing the truth, his testimony happens to go against the party calling him. The Indian Evidence Act of 1872 states that a court "may in its discretion empower the person who calls a witness to submit any question to him which may be put in cross- examination by the opposite party" in order to deal with hostile witnesses.[37] Under this provision, the party who is calling the witness can cross-examine him just as thoroughly as the opposing party. Cross-examination is the most potent and effective weapon for bringing out and testing the truth, therefore this is done just to see if the witness is a truthful and reliable one.

[35] AIR 1976 SC 294, 304 ¶ 32.
[36] SARKAR ET AL., supra.
[37] Section 154(1) of The Indian Evidence Act, 1872.

2.5.1 SEC. 154 OF EVIDENCE ACT

The purpose of being granted the right to cross-examine a witness is to determine whether or not he is telling the truth when he makes statements that go against the grain of what was expected of him or when he shows a propensity to conceal the truth, and also to elicit admissions of fact that would aid the Prosecution.

The Prosecution has two options when it believes that a witness summoned on its behalf is not being entirely truthful or is withholding information. The prosecution may ask the court, per Section 154 of the Evidence Act, to ask any questions of the witness that the defence would ask during cross-examination. In accordance with the proviso to subsection (1) of Section162 of the Criminal Procedure Code, the prosecution may cross-examine the witness on the contents of his or her police statement if they are granted permission to do so. A party may conduct cross-examination of his or her own witness in accordance with Section 154, just as the other side may do. During such a cross-examination, he will be subjected to following questions:-

a) Leading questions;[38]

b) questions relating to his previous statements in writing;[39] and

c) Questions which tend to test his veracity, to discover who he is and what is his position in life or to shake his credit.[40]

The alternative is to not make a request under section 154 of the Evidence Act, but rather to ask the court, in accordance with the proviso to subsection (1) of section 162 of the Criminal Procedure Code, to allow the prosecution to cross-examine the witness in accordance with section 145 of the Evidence Act. When option one is pursued, it is

[38] Section 143 of the Indian Evidence Act.
[39] Sec. 145 of The Indian Evidence Act, 1872.
[40] Sec. 146 of The Indian Evidence Act, 1872.

claimed that the prosecution is seeking to label the witness as hostile. The second option can only be taken if the prosecution is unwilling to label the witness as hostile.

For a party to be able to cross-examine his own witness by calling him hostile, the court must first be convinced that the witness is not telling the truth, is being intentionally untruthful, or has shown signs of hostility in his comments.[41]

If a witness contradicts his original testimony to the police during cross-examination, the prosecution has grounds to regard him as a hostile witness and question him more aggressively.[42] A judge must first investigate a witness' remarks to the investigating officer to see whether the witness was genuinely backing down from their original testimony before declaring them hostile.

2.6 WITNESS PROTECTION INITIATIVE IN INDIA

In an affidavit presented to the Supreme Court in 2018, the Government of India emphasised the need of inspiring trust in witnesses so that they would cooperate with law enforcement and the courts. The 2018 Witness Protection Plan was drawn up to ensure the safety of the witnesses and their loved ones in this regard. The proposal was presented to the Supreme Court, which approved it.[43]

2.6.1 OBJECT OF THE SCHEME

The 2018 Witness Protection Program was established to reassure witnesses fearing intimidation or retaliation and, as a result, guarantee their cooperation in any investigation, prosecution, and conviction of offences. The scheme's primary goal is to reassure potential witnesses that they will be completely protected if they cooperate with law enforcement and the judicial system. The program's stated objective was to ensure that witnesses and their loved ones were shielded from any form of physical or

[41] Alok Deb Roy v. State of Assam 2004 Cri.L.J. 3048
[42] A.P. Rao v. State 1990 Cri.L.J. (NOC) 29 A.P
[43] Mahender Chawla, supra.

psychological abuse, as well as any risks to their physical safety, financial security, or good name.[44]

2.6.2 JUSTIFICATION FOR THE SCHEME

The approach was necessary because of the disproportionate number of cases in which witnesses experienced physical danger, turning them hostile. The Supreme Court has, via its rulings, emphasised the need of having a thorough witness protection scheme.[45] The Supreme Court asserted that "It is the salutary duty of every witness who has the knowledge of the commission of the crime to assist the State in giving evidence."[46] This view was affirmed by the Malimath Committee Report "by giving evidence relating to the commission of an offence, he performs a sacred duty of assisting the court to discover the truth." The need for protection of witnesses was also reiterated by the National Police Commission.[47] The Police commission report stated "prosecution witnesses are turning hostile because of pressure of accused and there is need of regulation to check manipulation of witnesses."

In the case of ***Zahira Habibullah Sheikh v. State of Gujarat***,[48] "If the witness himself is disabled from serving as the eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial," the Supreme Court said when defining a fair trial. The Supreme Court emphasised the importance of safeguarding witnesses to ensure that the whole truth is laid bare in court and that justice is served. The Court also reaffirmed that the State has an essential role in safeguarding witnesses, particularly in the most serious cases.

[44] Witness Protection Scheme 2018, available at https:/ /mha.gov.in /sites /default /files/Documents_ PolNGuide_ finalWPS_08072019.pdf (Last visited on February 5, 2025).
[45] State of Gujarat v. Anirudh Singh (1997) 6 SCC 514; Zahira Habibullah Sheikh v. State of Gujarat (2004) 4 SCC 158; NHRC v. State of Gujarat 2003 (9) SCALE 329; Sakshi v. Union of India (2004) 5 SCC 518.
[46] State of Gujarat v. Anirudh Singh (1997) 6 SCC 514.
[47] The 4th NATIONAL POLICE COMMISSION REPORT 1980.
[48] (2004) 4 SCC 158.

The Legislature has initiated measures such as making it an offence for criminal intimidation of witnesses in the Indian Penal Code.[49] The Protection of Children from Sexual Offenses Act of 2012, the Whistleblowers Protection Act of 2011, etc. all exist to protect witnesses against coercion and intimidation. Nevertheless, there was no systematic plan to deal with the issue of hostile witnesses.

The range of crimes committed has broadened in recent years. The rise of terrorist threats and organised crime highlights the need of fostering witnesses' faith in the criminal justice system. In order to aid law enforcement and prosecutorial authorities, a safe space had to be established. As a result, a standardised plan to handle witness protection measures and procedures across the country was required.

The programme was formulated by the Central Government in April 2018 after consultation with the National Legal Services Authority (NALSA) and the Bureau of Police Research and Development (BPRD), and by May 31st of same year, all States and Union Territories were asked for feedback. The Central Government finalised the plan in November, 2018, and presented it to the Supreme Court after receiving input from the States and Union Territories.

2.6.3 SCOPE OF THE WITNESS PROTECTION SCHEME 2018

In its most basic form, witness protection entails either the police physically guarding the witness and accompanying them to court, or the use of audiovisual recording equipment to preserve the witness's evidence. But, in extreme cases where the witness's safety must take precedence, exceptional steps may be necessary. Among these are the provision of temporary housing in a secure area, the hiding of identity, the issuance of a new identification, and the migration to an unknown location. Depending on the level of vulnerability and perceived threat, this Scheme will respond flexibly to the protective requirements of a witness. This means the plan can only be used when witnesses perceive danger. Before the scheme may be used on a witness, there is a certain protocol that must be followed.

[49] Section 195A of Indian Penal Code, 1860

Crimes covered under the plan include those listed in Sections 354, 354A, 354B, 354C, 354D, and 509 of the Indian Penal Code and are punished by death, life in prison, or a term of imprisonment of seven years or more.[50]

2.6.4 PROCEDURE FOR INDUCTION OF WITNESS INTO THE SCHEME

The Witness Protection Scheme provides constitution of Competent Authority,[51] and a Witness protection Cell.[52] The scheme prescribes that "the witness shall move an application before a Competent Authority in the form prescribed. The applicant in the application seeks a Witness protection Order. The application may be moved by the witness or his family member, or his advocate, or the Investigating officer/Station House officer(SHO)/Sub-Divisional Police officer (SDPO)/Prison Superintendent of Police, and the same should be forwarded through the Prosecutor concerned."[53]

"Once an application is received by the Competent Authority, the member secretary of the Competent Authority is obligated to pass an order for calling a Threat Analysis Report from the Assistant Commissioner of Police or Deputy Superintendent of Police."[54] The Competent Authority is authorised to pass such orders for provisional protection during the pendency of the application.[55]

The scheme envisages that "the threat analysis report is prepared expeditiously by upholding confidentiality of the applicant. The threat analysis report should be submitted to the Competent Authority within five working days of receipt of the

[50] Clause 2(i) of the Witness Protection Scheme 2018.
[51] Clause 2(c) of the Witness Protection Scheme 2018.
[52] Clause 2(o) of the Witness Protection Scheme 2018.
[53] Clause 2(l) of the Witness Protection Scheme 2018.
[54] Clause 2(j) of the Witness Protection Scheme 2018.
[55] Clause 6(b) of the Witness Protection Scheme 2018.

Witness Protection Order. The threat analysis report classifies the threat perception and embodies suggestive protection measures for the witness or his family."[56]

"Apart from the threat analysis report submitted by the concerned Police authority, the Competent Authority is obligated to interact either personally or through electronic means with the witness and his/her family so as to ascertain the protection needs of the witness and his family. The hearings on witness protection application shall be held in-camera by the Competent Authority. The application for witness protection shall be disposed of within five working days from the receipt of the threat analysis report."[57]

"The Witness Protection Order passed by the Competent authority is to be implemented by the Witness Protection Cell. "[58] The Head of the Police in the State/Union Territory shall be accountable for implementation of the witness protection orders. Whereas the Department of Home in the concerned State/Union Territory,[59] shall implement the Witness Protection Order if it relates to change of identity and/or relocation of the witness. The Witness Protection Cell is mandated to submit a monthly follow-up report before the Competent Authority.[60] The Competent Authority has the power to revise the Witness Protection Order.[61]

The Scheme also provides for a mechanism for review of the decision of the Competent Authority. A review application may be filed within 15 days of the Order by the aggrieved witness or the police authorities.[62]

[56] Clause 6(c) and (d)of the Witness Protection Scheme 2018.
[57] Clause 6(f) and (g)of the Witness Protection Scheme 2018.
[58] Clause 2(o) of the Witness Protection Scheme 2018.
[59] Clause 6(h) of the Witness Protection Scheme 2018.
[60] Clause 8 of the Witness Protection Scheme 2018.
[61] Clause 6(j) of the Witness Protection Scheme 2018
[62] Clause 15 of the Witness Protection Scheme 2018.

2.6.5 ELIGIBILITY CRITERIA FOR WITNESS PROTECTION

The scheme defines the term 'Witness' to mean 'any person who possesses information or document about any offence'.[63] The Scheme has categorised the witnesses on the basis of threat perception. The scheme outlines three categories which are as follows:-

i. Category 'A': Cases in which the threat extends to life of witness or his family members, during the stage of investigation or thereafter.

ii. Category 'B': Cases in which threat extends to safety, reputation or property of the witness, during investigation or thereafter

iii. Category 'C': Cases wherein the threat is moderate and extends to intimidation or harassment of the witness, during investigation or thereafter.

Based on the categorisation, the witness protection measures proposed are proportionate to the threat perception. The types of protection measures provided are enlisted below.

2.6.6 PROTECTION MEASURES

The protection measures are to be provided for a limited period not exceeding three months at a time. The protection measures ordered are proportionate to the threat perception.[64] The following protection measures are provided under the Scheme:-

a) Measures to prevent face to face contact between accused and the witness;

b) inspection of telephone calls and mails;

c) measures to change the telephone number or provide a special unlisted telephone number;

[63] Clause 2(k) of the Witness Protection Scheme 2018
[64] Clause 7 of the Witness Protection Scheme 2018.

d) Configure security device at the residence of the witness which includes security doors, CCTVs, alarms, etc.

e) Maintain confidentiality and concealment of identity of witness;

f) Emergency contact persons for the witness;

g) Close protection, and consistent patrolling around the house of the witness;

h) Provisional shifting of residence;

i) Escort to and from the court and providing a government vehicle, or funding for conveyance on the date of hearing;

j) Conduct of in-camera proceedings in Court;

k) Permitting a support person to remain present in the Court during the recording of testimony;

l) Use of specifically designed Vulnerable witness deposition rooms in the Court premises, with special arrangements like live video link, and other technological devices to safeguard the witness;

m) Expeditious recording of testimony during trial on day to day basis without adjournments;

n) Periodical financial support or grants to the witness from the Witness Protection Fund for the purpose of re-location, sustenance or starting a new avocation;[65]

o) Any other form of protection as may be required.

The Witness Protection Order is overseen by the Competent Authority. The Witness Protection Cell reports back to the Competent authority once a month with updates.

[65] Clause 2(n) of the Witness Protection Scheme 2018.

Every three months, the Competent Authority will look over the Witness Protection Order.

The witness's anonymity will be adequately protected, in addition to the safeguards mentioned in Article 7 of the Plan. Throughout the course of an inquiry or trial, you must apply to the Competent Authorities for protection of your identity. A threat analysis report must be requested once an application has been submitted, and this is done by the member secretary of the Competent Authority. The necessity of an identity protection order is decided by the Competent Authority. In the event that an Order is issued shielding the witness's identity, it is the duty of the Witness Protection Cell to ensure that the witness and/or his/her family remain anonymous.[66]

The Scheme also allows for the witness's identity to be changed if necessary once a threat assessment has been conducted. The witness is responsible for filing the application with the relevant authority. Name, occupation, hobbies, and parental status can all be changed with proper documentation. The change in name does not affect the witness's ability to work or own property.[67]

If the witness requests to move, and the circumstances are right, the Competent Authority will make a judgement based on the findings of a threat assessment. To protect the witness, the Competent Authority may issue an Order for the witness to be relocated to a different location within the State/Union Territory. The costs are covered by the Witness Safety Account.[68]

The Supreme Court has proposed the creation of Vulnerable Witness Deposition Complexes in addition to the other safeguards detailed in the Plan. These Complexes provide a safe and comfortable setting for witnesses to testify, increasing the likelihood that they will do so. A considerable number of witnesses, especially women and

[66] Clause 9 of the Witness Protection Scheme 2018
[67] Clause 10 of the Witness Protection Scheme 2018.
[68] Clause 11 of the Witness Protection Scheme 2018

children, were becoming hostile due to a lack of protection, which was the primary motivation for constructing these complexes.

According to the Plan, it is the responsibility of the Investigation Officers and the Courts to educate the witnesses. All witnesses should be briefed about the Witness Protection Program and its key components.[69]

All parties involved in the case (police, prosecutors, court personnel, defence attorneys) are required to maintain strict confidentiality and never disclose any information about the case to anybody outside of the legal process without first obtaining a formal order from the Court.

State Witness Protection Fund was established per the provisions of the programme to accomplish the goals and cover the costs of witness protection.[70]

2.6.7 WITNESS PROTECTION FUND

To cover the costs of carrying out the Witness Protection Order, a special fund has been established for that purpose. The Witness Protection Fund is funded by the State Government's Annual Budget. The sum the courts or tribunals receive in fees also goes into the pot. The Fund may also include money donated by charitable institutions or people or money obtained as part of a company's CSR efforts. State/Union Territory Ministry of Home administers the Fund.[71]

Perusing the Witness Protection Scheme, 2018, one can easily deduce its central features, such as the identification of threat perception categories, the Threat Analysis Report, the types of protection measures, the protection of identity, the change of identity, and the relocation of the witness in appropriate cases, etc. With this good plan, we hope to do more than merely strengthen the criminal justice system; we hope to

[69] Clause 12 of the Witness Protection Scheme 2018.
[70] Clause 13 of the Witness Protection Scheme 2018.
[71] Clause 4 of the Witness Protection Scheme 2018.

advance the cause of justice. The plan marks a major step forward in preventing once cooperative witnesses from changing their testimony during criminal proceedings.

For this reason, the Supreme Court upheld the validity of the Plan and ordered all States/Union Territories to implement it in full force and effect until the passage of a law. One year after the Court's ruling, however, most states have still not implemented the Witness Protection Act of 2018. By the end of 2019, the Court ordered all States and Union Territories to set up Vulnerable Witness Deposition Complexes.

In 2018, the Witness Safety Program is just getting off the ground. Though based on successful witness protection schemes in other nations, this one isn't perfect. An examination of witness protection schemes in other countries with comparable legal regimes is necessary. The study will help pinpoint the problems so they may be fixed and the plan enhanced. The enhancements will help make the programme robust until a comprehensive law is enacted.

3 CHAPTER 3- COMPARATIVE STUDY OF WITNESS PROTECTION PROGRAMS AND MEASURES: A GLOBAL PERSPECTIVE

A detailed examination of witness protection programs of various countries will provide an insight into the financial aspects, organisational structure of the agency providing protection, eligibility for protection, rights of protected witnesses and the nature of protection. This study includes a selected evaluation of witness protection programs from countries having common law system which include Australia, Canada, Kenya, Philippines, South Africa, the United Kingdom, and the United States of America.

3.1 WITNESS PROTECTION PROGRAM OF AUSTRALIA

The initiation of legislation on witness protection in Australia began in the year 1988, when the Parliament constituted a Joint Committee on the National Crime Authority. This Committee inquired into the objective and need to have a witness protection program. The Witness Protection Act, 1994, was drafted and came into force in the year 1995. The object of the legislation was to establish a program to give protection and assistance to certain witnesses and other persons.

Administration of the NWPP

The Act of 1994, created the National Witness Protection Program (NWPP).[72] The NWPP is administered by the Commissioner of the Australian Federal Police (AFP). The Commissioner and the staff members make necessary arrangements to provide protection and assistance to witnesses in pursuance of powers and functions vested in the Commissioner.[73] The Commissioner is also empowered to enter into arrangements with approved authority such as the Commissioners of Police of the State and territory, the Chief Executive Officer of the Australian Crime Commission and the Integrity

[72] https://www.afp.gov.au/sites/default/files/PDF/Reports/witness-protection-annual-report-2011-12.pdf (Last visited on February 5, 2025).
[73] Section 4 of Witness Protection Act, 1994.

Commissioner to enable protection and assistance to witnesses inducted in the witness protection program. The cost of witness protection is shared between the AFP and the approved authority which refers the witness for protection and support.[74]

The Commissioner administers the NWPP with the support of Witness Protection Committee and Coordinator Witness Protection. The Committee advises on induction and exit of witnesses in the NWPP. The Coordinator is responsible for day to day functioning of the NWPP.

Eligibility for Protection of Witness

The Witness Protection Act, 1994, sets out the eligibility criteria for a person to be considered as witness. It provides that any person is eligible for being inducted in the NWPP if:-

a) Such a person who has given or agreed to give evidence in criminal or prescribed proceedings for an offence.

b) A person has made a statement in relation to an offence,

c) A person requires protection or assistance for some reason,

d) Persons who are related to or closely associated with such persons.[75]

However, the Commissioner is empowered to not include a witness in the NWPP unless the witness makes necessary mandatory disclosures. Such disclosures inter alia include outstanding legal obligations of the witness, outstanding debts or tax liability to the State or territory, pending civil proceedings, bankruptcy proceedings, etc. The Commissioner while including the witness in the NWPP shall also have regard to psychological examination, criminal record, perceived danger to witness, nature and gravity of the offence.[76] When a witness is admitted into the NWPP, the person is

[74] Section 6(2) of Witness Protection Act, 1994.
[75] Section 3 of Witness Protection Act, 1994.
[76] Section 8 of Witness Protection Act, 1994.

termed as a 'participant.' The induction of a witness in the NWPP is not to be executed as a reward or means to persuade the witness to give evidence or to make a statement.[77]

Operation of the NWPP

The NWPP creates a conducive environment for witnesses involved in criminal trials that involve a significant degree of criminality without fear of reprisal. Largely witnesses are found to be included into the NWPP in prosecution of offences relating to illicit drug trafficking, organised crime, or corruption related cases. When a witness is included in the NWPP, the Commissioner has to take such action which he considers to be reasonable to protect the witness's safety and welfare. The following actions may be initiated by the Commissioner with respect to witnesses:-

i. Apply for necessary documents to establish new identity of the witness;

ii. Permit assumed names for staff members, to carry out duties in relation to the NWPP .

iii. Relocate witness;

iv. Accommodation for witnesses;

v. Provision of transport for the property of the witness;

vi. Provision for reasonable living expenses of the witness and other financial assistance as may be required;

vii. Payments to witnesses for meeting expenditure associated with relocation;

viii. Provide assistance in access to education and securing employment;

ix. Sanctioning other expenses to ensure that witness is self—reliant;

[77] Section 5 of Witness Protection Act, 1994.

x. No documentation in respect of new identity.[78]

There is a memorandum of understanding with the participant inducted in the witness protection program. The basis on which protection is included in the NWPP is set out. The Memorandum also contains provision for termination of the protection and the assistance in the event of breach of the terms of the memorandum.[79] The Act also provides for cessation of protection and assistance provided to the participant.[80]

The Witness Protection Act, 1994, further provides for mandatory reporting by the AFP to both houses of Parliament. The report shall be based on operations, the effectiveness and performance of the NWPP. The report also contains an explanation of the overall management of the program and the annual expenditures. The report also presents an insight into the active operations for the period of report.[81]

From the study of Australian Witness Protection Act, 1994, it can be concluded that the NWPP is operated by the AFP, and the Commissioner is responsible. The Witness Protection Committee decides on the inclusion and exit of a witness in the program. Apart from the Act, there is complementary State/territory witness protection schemes.[82] In the next section, the Canadian Witness Protection Act, 1996, is elaborately discussed.

3.2 REVIEW OF WITNESS PROTECTION IN CANADA

The Canadian government initiated the legislation on witness protection similar to that of Australia. The Witness Protection Program Act, 1996, was enacted with the object of establishment and operation of a witness protection program for the protection of certain persons for providing information or assistance in investigations and

[78] Section 13 of Witness Protection Act, 1994.
[79] Section 9 of Witness Protection Act, 1994.
[80] Section 18 of Witness Protection Act, 1994.
[81] Section 30(2) of Witness Protection Act, 1994
[82] Australian Capital Territory - Witness Protection Act 1996;New South Wales - Witness Protection Act 1995;Northern Territory - Witness Protection (Northern Territory) Act 2002.

prosecution, and inquiries. The Act provides for a federal program and also respects the protection granted under the Municipal or provincial protection programs.[83]

The Act has defined elaborately the terms protectee, designated program protectee, protected person, witness, and protection. The Act seeks to include in its ambit current or former protectee under the federal program as well as under the provincial program. The main purpose of the Act is to promote national security, enforcement of law, national defence, and public safety by protection of persons who are providing direct or indirect assistance in enforcement of the law in matters relating to activities conducted by the Royal Canadian Mounted Police (RCMP), or to the federal security, safety, defence organization, and the International Criminal Court.[84]

Operation of the Witness Protection Program

The Witness Protection Program Act, 1996, provides for protection measures which include accommodation, change of identity of the protectee, counselling and financial support for facilitating the security of the protectee, and for other purposes such as to ensure that witness is able to re-establish and become self-reliant.[85]

The Act also provides for deemed terms of protection agreement The agreement has deemed obligations on the Commissioner and the protectee. The agreement provides that the Commissioner shall take reasonable steps to protect the protectee. The protectee on the other hand is obligated to furnish evidence or information to the inquiry or prosecution or investigation in respect of which protection is granted under the agreement. The protectee has to also meet all financial and legal obligations which are not payable by the Commissioner under the agreement.[86]

The protectee can make a request for termination of protection. The Commissioner is required under the Act to meet the protectee in person to discuss the request and

[83] Preamble to the Witness Protection Program Act, 1996.
[84] Section 3 of Witness Protection Program Act, 1996.
[85] Section 2 of Witness Protection Program Act, 1996.
[86] Section 8 of Witness Protection Program Act, 1996.

thereafter confirm the request of the protectee.[87] The Commissioner has power to terminate the protection on grounds such as material misrepresentation default in disclosure of information connected to the inclusion into the program. The protection of the protectee can also be terminated for deliberate contravention of the obligations of the protectee.[88]

The highlight of the Witness Protection Program of Canada is that the Commissioner explores alternate methods to protect witnesses without admitting the witness in the Program. Similar to the Australian Witness Prtoection Act, the Canadian witness protection program also operates at the provincial level. The Witness Protection Program is managed by the Royal Canadian Mounted Police. In the next section we discuss the protection and assistance to witness in the African country of Kenya.

3.3 WITNESS PROTECTION IN KENYA

The Witness Protection Act, of Kenya, was enacted in 2006 and came into force in 2008. The main object of the Act is to facilitate protection to witnesses in criminal and other proceedings. The other purpose of the Act is constitution of a Witness Protection Agency and lays down its functions, powers, management and administration. Similar to Witness Protection legislations of other commonwealth nations, The Act of Kenya inter alia defines the terms 'participant', 'protected person', and 'witness'. For the purpose of the Witness Protection Act, the term witness is defined to mean a person who needs protection from threat or risk on ground of being a material witness and who has agreed to give evidence before proceedings for an offence or such other proceedings before an authority, or has given a statement to the police or a law enforcement agency, or is required to give testimony in an inquiry or proceedings before a Court outside Kenya, for the purpose of any treaty to which Kenya is a signatory.[89]

[87] Section 8(2) of Witness Protection Program Act, 1996.

[88] Section 9 of Witness Protection Program Act, 1996.

[89] Section 3 of Witness Protection Act, 2006.

The Act provides for establishment of Witness Protection Advisory Board and Witness protection Appeals Tribunal. The Board advises the Witness Protection Agency generally with respect to performance of its functions. The Tribunal is vested with the power of review and ventilate the grievances relating to admission into the programme or termination of protection.

Organization and Structure

Unlike other countries managing Witness Protection, the Witness Protection Act of Kenya is unique with a three tier structure. The Act provides for establishment of three authorities:-

i. Witness Protection Agency,

ii. Witness Protection Advisory Board, and

iii. Witness Protection Appeals Tribunal.

The Act provides for establishment of Witness Protection Agency with is independent in discharge of functions and powers under the Act, without interference from any authority.[90] The Agency appoints a Director on the advice of the Board. The director shall have powers necessary for performance of his functions conferred by the Act.[91] The purpose of establishing an agency is for providing a framework and procedures for protection of persons facing risk or intimidation for cooperating with the Prosecution and other law enforcement agencies.[92] The agency is vested with the power to establish and maintain the witness protection programme, to decide the criteria for eligibility of inclusion and exclusion of witness from the programme, determine the protection measures to be provided, and advise the Government on measures to protect witnesses.[93] The Agency can raise funds through gifts, and donations, provided the

[90] Sections 3A and 3G of the Witness Protection Act, 2006.

[91] Section 3E of the Witness Protection Act, 2006.

[92] Section 3B of the Witness Protection Act, 2006.

[93] Section 3C of the Witness Protection Act, 2006.

funds are used for discharge of functions under the Act.[94] The Agency is bound to submit to the Board within three months after the end of the financial year, a report of its operations during the financial year. The Board is required to submit the annual report to the Minister with fourteen days from receipt of report from the Agency.[95]

The Witness Protection Advisory Board is constituted with the primary function of advising the Witness Protection Agency on discharge of its functions. The Board also makes recommendations on witness protection policies and supervises the overall operations of the Agency.[96]

The Act provides for establishment of Witness Protection Appeals Tribunal, to furnish an opportunity to prefer an appeal by an aggrieved person for not being admitted or removal from the Programme by the Agency.[97]

Criteria for inclusion of Witness

It is observed that the Act, has a specific provision for temporary protection until a decision is taken by the director. This is provided in the event of urgent need for protection. The temporary protection is effected by an interim memorandum of understanding.[98]

The amendment to the Act in 2010, has limited the assessment to the above four factors.[99] In the opinion of the director, if there is no sufficient information relating to

[94] Section 3H of the Witness Protection Act, 2006.

[95] Section 3L of the Witness Protection Act, 2006.

[96] Section 3Q of the Witness Protection Act, 2006.

[97] Section 3U (4) of the Witness Protection Act, 2006.

[98] Section 9 of the Witness Protection Act, 2006.

[99] Section 6(1) of the Witness Protection Act, 2006.

assessment of the factors for inclusion of the witness in the programme, the director may decide to exclude such a witness from programme.[100]

The participant is required to enter into a memorandum of understanding with the Agency. The Memorandum sets forth the basis on which the participant is inducted into the programme and contains provisions relating to outstanding legal obligations of the participant, issue of any documents, surrender of passport, creation of new identity, welfare and other domestic or social obligations.[101]

An overall analysis of the Witness Protection Act in Kenya, indicates that there exists a system for physical protection, identity change, and relocation, however, the Act is silent on the financial support to the witnesses included in the programme. There also exists a multi-agency task force comprising of the Police, administration at the provincial level, Judiciary, intelligence services, Anti-corruption commission, Ministry of Justice, and the National Counter-terrorism centre.

Another country which requires attention with respect to legislation on protection and security of witnesses is Philippines. In 1991, Philippines enacted the Witness Protection, Security and Benefit Act.

3.4 WITNESS PROTECTION IN PHILIPPINES

In recognizing the role of witness in dispensation of justice and acknowledging that prosecution case fails or succeeds depending on the testimony of witnesses. It was with the object of protecting witnesses from threat and intimidation, influence, bribe etc., the Philippines government took appropriate measures to provide effective protection to the witnesses in criminal proceedings and confer them with rights and benefits. The government enacted the Witness Protection, Security and Benefit Act, 1991. The Act sought to protect a witness willing to testify before the Court, from allurements and any

[100] Section 6(2) of the Witness Protection Act, 2006.

[101] Section 7 of the Witness Protection Act, 2006

sort of reprisal. The implementation of the program is the responsibility of the Department of Justice which operates through its Secretary.[102]

It is pertinent to note that the Act has ensured speedy trial and disposal of the case within three months from the date of filing.[103] This provision ensures that threat or intimidation of witnesses is not for a prolonged period.

The protected witness admitted into the program is compelled to give his testimony and cannot refuse to give evidence. Failure or refusal to give evidence will entail action by the department resulting in arrest and detention of the witness pursuant to Court Order.[104] Perjury or Contempt proceedings are applicable to protected witnesses.[105]

The Witness Protection Act of Philippines appears to be more robust legislation. The Act authorises appropriation of Ten million pesos from the Government treasury to fulfil the object of the Act.[106] The welfare and security measures provided to witnesses and their family members, creates a secure environment for the witnesses. The provision for a speedy trial in the Witness Protection legislation, indicates a strong resolve to prevent intimidation and influence over witnesses.

The South African Witness Protection Act, 1998, has provided for nine regional witness protection units which are administered by the National Director of public Prosecutions. In the following section the analysis of the South African Witness Protection Act is discussed.

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[102] Section 3 of the Witness Protection, Security and Benefit Act, 1991.

[103] Section 9 of the Witness Protection, Security and Benefit Act, 1991.

[104] Section 14 of the Witness Protection, Security and Benefit Act, 1991.

[105] Section 15 of the Witness Protection, Security and Benefit Act, 1991.

[106] Section 20 of the Witness Protection, Security and Benefit Act, 1991.

3.5 WITNESS PROTECTION IN SOUTH AFRICA

South Africa enacted the Witness Protection Act, 1998, with the object of establishing an office for protecting witnesses, and provide for powers and functions of the director. The Act aims to provide temporary protection pending admission of a witness into the program and provide protection and necessary services to witnesses admitted into the program.[107]

Admission of Witness for protection

The Act provides for an application to be made by the witness who has a reasonable apprehension that his safety is likely to be threatened by any person or persons. The witness may report the threat perception to the investigating officer in the concerned trial, or any other officer incharge of Police Station, or the public prosecutor, and apply for protection.[108] The concerned authority to whom the report is made, must forthwith inform the Director and submit the application to the witness protection officer or the Director.[109]

Temporary protection may be provided to the witness pending the finalization of the application for protection.[110] The decision for temporary protection is taken by either by the Director or Witness Protection Officer. Where temporary protection is granted by the witness protection officer, he shall inform the Director within 48 hours of placing the witness under protection.

Unlike the legislation of Philippines, the Witness Protection Act, 1998, of South Africa, does not elaborately state the protection measures, however, the protection includes change of identity, relocation and other ancillary assistance and services provided to

[107] https://www.gov.za/sites/default/files/gcis_document/201409/a112-98.pdf- (Last visited on February 5, 2025).

[108] Section 7(1) of the Witness Protection Act, 1998.

[109] Section 7(3) of the Witness Protection Act, 1998.

[110] Section 8(1) of the Witness Protection Act, 1998.

the protected person.[111] There is no explicit provision relating to financial payment to the witnesses placed under protection.

Witness Protection legislations are not constituted in every country. There are countries which do not have a formal legislation on Witness Protection, however, the Police and law enforcement agencies, provide protection to witnesses. The United Kingdom has no formal legislation for witness protection. The National Crime Agency provides protection to the persons judged to be at risk of serious harm.[112]

3.6 WITNESS PROTECTION IN THE UNITED KINGDOM

The United Kingdom does not have an exclusive legislation or scheme for Witness protection. However, we find traces of witness protection in Serious Organised Crime and Police Act, 2005. The Act inter alia provides for protection of persons in investigation and proceedings, describes a protection provider, prescribes offence for disclosing information relating to change of identity of persons protected and for disclosing the contents of protection arrangements, class of persons eligible for protection.[113]

The National Crime Agency (NCA) is a national law enforcement agency in the United Kingdom. This agency is in the forefront of combating organised crime, drug trafficking, trafficking in human beings, trafficking in weapons, cyber crime, and economic offences. The National Crime Agency leads the network of regional units for protected persons. The service provided is called the UK Protected Persons Service (UKPPS).

Nature of Protection

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[111] Section 2 of the Witness Protection Act, 1998.

[112] https://www.nationalcrimeagency.gov.uk/what-we-do/how-we-work/providing-specialist-capabilities- for-law-enforcement/protected-persons (Last visited on February 5, 2025).

[113] Part 2, Chapter 4- Protection of Witnesses and other persons and Schedule 5 of Serious Organised Crime and Police Act, 2005.

This service is managed by the NCA. The Metropolitan police, Scotland Police, and the Police of Northern Ireland are aligned with the UKPPS. The UKPPS functions independently of the police force and focuses more on ensuring safety of witnesses in accordance with the protection arrangements. The Central Bureau is the National headquarters of the UKPPS.

The nature of protection is personalised and depends on the extent of threat to the individual. The protection involves relocation of the witness to a safe location. The regional protection units then ensure that the location of the individual is inconspicuous and assist the individual in rebuilding their lives. In order to attain this, the cooperation of the individual is essential. The Protection units maintain high level of secrecy to maintain the new area safe and secure. The wishes of the witness as to relocation, place of work, schooling and other issues are kept in mind and fulfilled to the extent possible.

Although the United Kingdom does not have an exclusive legislation for witness protection, the Serious organised crime and the Police Act, 2005, makes provision for protection of witnesses in serious offences. It appears that the protection arrangement is made only in organised crimes and grave offences. The National Crime Agency manages the United Kingdom Protected Persons service.

3.7 WITNESS SECURITY IN THE UNITED STATES OF AMERICA

The US Congress acknowledged that law enforcement efforts could be enhanced if the witnesses and persons related to the witnesses were protected from harm likely to be inflicted on them due to their testimony in criminal proceedings. In the year 1970, the US Congress enacted the Organized Crime Control Act. Through this Act, the Attorney General was authorized to protect the witnesses who are potentially at risk for testifying against accused involved in organised crime.[114] The U.S. Code also contains a chapter

[114] Section 501 Title V of Organised Crime Control Act, 1970; See Also: 18 U.S. Code §3521

on Protection of Witnesses.[115] As a consequence, the Attorney- General constituted the program to protect witnesses, called as the Witness Security Program.[116]

The Witness Security Reform Act, 1984, further extended the authority of the Attorney-General under the Organized Crime Control Act. This included providing protection, security by way of relocation of witnesses in legal proceedings involving offences of organized crime or other serious offences, or a local offence involving a crime directed towards a witness.[117]

Eligibility Criteria for Protection

For inclusion of the Federal witness in the Witness Security program, an application form in the nature of request for acceptance in the program is created by the Witness Security Special Operations Unit. The request for inclusion of the witness is made by the Government's attorney. The form comprises of a summary of the testimony of the witness, nature of threat to witness, and any risk which the witness in the event of relocation to a new locality. On matters pertaining to inclusion of the witness in the Program, the government's attorney seeks instructions from the Special Operations Witness Security Unit.[118]

Besides federal witness being inducted into the program, The Witness Security Reform Act, 1984, authorizes the Attorney-General to ensure protection to State and local witnesses. For this purpose the State is required to enter into agreement to cooperate with the Attorney-General to enforce the provisions of the said Act. The State is reimbursed the expenses incurred. The United States Marshal Service (USMS)

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[115] 18. U.S.Code Part II Criminal Procedure, Chapter 224.

[116] Witness Security Program: Prospective Results and Participant Arrest data, Report to the Chairman, Subcommittee on Courts, Civil Liberties, and the administration of Justice, Committee on the Judiciary, House of Representatives, submitted by the United States, General Accounting Office August 23, 1984. Available at https://www.gao.gov/assets/150/142083.pdf (Last visited on February 5, 2025).

[117] Justice Manual, Title 9:Criminal 9-21.020 available at https://www.justice.gov/jm/jm-9-21000-witness -security#9-21.100 (Last visited on February 5, 2025).

[118] Justice Manual, Title 9:Criminal 9-21.100 available at https://www.justice.gov/jm/jm-9-21000-witness-security#9-21.100 (Last visited on February 5, 2025).

determines the terms of the reimbursement agreements. The State authorities are required to transfer the supervision of the local witness to the Federal authorities prior to the witness's induction in the program. The Witness Security Program application should be routed to the appropriate United States attorneys. The United States Attorney reviews the application and offers suggestion to the Office of Enforcement Operations (OEO) for deliberation.[119]

The Attorney-General has powers under the U.S. Code, to take such protection measures including relocation and other measures ensuring the well-being of the witness.

Protection Measures

The Attorney-General shall take such action for protection of a witness, or a potential witness or family member of the witness, as may be necessary to protect the person from bodily injury, and to provide health, safety, and welfare, and psychological well-being of that person.[120]

The protection measures apply to witness admitted into the witness security program. The admission of the witness is the outcome of an elaborate process involving number of authorities.

Admission of the witness in the Program

The Organised Crime Control Act, 1970, provided for an elaborate process for admission of witness in the witness security program. The OEO, Criminal Division is vested with the task of monitoring the program.

The USMS is accountable for long term protection of the witness. The USMS renders protection by creating new identities for witnesses with necessary supporting documents, relocation of the witness to a safe location, providing temporary living

[119] Justice Manual, Title 9:Criminal 9-21.140 available at https://www.justice.gov/jm/jm-9-21000-witness- security#9-21.100 (Last visited on February 5, 2025).

[120] 18. U.S. Code § 3521 (b) (1).

subsistence till the time they are self- sufficient. The USMS also provides social service measures such as psychological counselling, medical treatment etc. The main purpose of the social service measures is to make the protected witness inclusive in the new community in which he/she has been relocated.[121] The Act has authorised the Attorney-General to decide on matters pertaining to inclusion of the witness in the program. However, the Attorney- General may delegate the authority of inclusion of the witness in the program to the Deputy Attorney-General, Associate Attorney-General, and Assistant Attorney- General of the Criminal and Civil Divisions.[122]

The Attorney-General is mandated by the Act to procure and assess the information regarding the suitability of the witness for inclusion in the Program. This information includes the threat perception, the criminal history of the witness, and psychological assessment of the witness and family members intended to be included in the program. In addition to these considerations, the Attorney-General is also required to evaluate the risk the witness and the relatives may present to the community where they are located. If the danger to the new community outweighs the need for protection, the Attorney-General is required to exclude the witness from the Program. The Attorney General in evaluating the risk must take into account the criminal record, alternative methods of protection if not admitted to the Program, attempt to obtain testimony from other sources.[123]

An additional condition for induction of the witness in the Program is that the Department may intimate the local enforcement agency about the presence of the witness in the community and furnish criminal history of the witness if any, conduct

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[121] Witness Security Program: Prospective Results and Participant Arrest data, Report to the Chairman, Subcommittee on Courts, Civil Liberties, and the administration of Justice, Committee on the Judiciary, House of Representatives, submitted by the United States, General Accounting Office August 23, 1984. Available at https://www.gao.gov/assets/150/142083.pdf (Last visited on February 5, 2025).

[122] Vide Attorney-General Order 1072-84, the Attorney-General has specifically designated the above authorities and OEO Director to authorise applications for witnesses or prospective witnesses to be admitted into the Program. See Justice Manual, Title 9: Criminal 9-21.200 available at https://www.justice.gov/jm/jm-9-21000-witness-security#9-21.100 (Last visited on February 5, 2025).

[123] Justice Manual, Title 9:Criminal 9-21.100 available at https://www.justice.gov/jm/jm-9-21000-witness-security#9-21.100 (Last visited on February 5, 2025).

drug or alcohol testing or substance abuse testing, and set other conditions in the best interests of the Program. There exists a provision for emergency authorisation if it is determined that a witness is in imminent danger of any injury or threat to life, and the concerned investigative agency is unable to provide necessary protection. The OEO can direct emergency Program protection to be provided by the USMS even before completion of the assessment of the risk factor and execution of the Memorandum of Understanding with the witness.[124] The expenses incurred by the witness and the family members of the witnesses before authorization into the Program is the responsibility of the agency or division.[125]

Procedures for Protection

On receiving the application for witness protection, the OEO makes necessary arrangements for the USMS to interview the witness. This forms part of the application review process in which a preliminary interview is held. The factors to be assessed by the OEO at the time of receipt of application are (1) the witness is a material and essential to the case, (2) witness is endangered, and (3) the need for protection and participation in the program. The purpose of the interview is to disseminate the program guidelines services which the witness is expected to receive and cannot receive. This interview also facilitates resolution of issue on any matter before the decision is taken on program authorization and relocation of the witness.[126]

Before a witness is included in the witness security program, the OEO makes necessary arrangements for psychological testing and evaluation for the witness and the relatives. The psychological test is conducted to determine if the protected witness is a threat to the new community in which he/she has been relocated. The witness is required to sign

[124] Justice Manual, Title 9:Criminal 9-21.220 available at https://www.justice.gov/jm/jm-9-21000-witness-security#9-21.100 (Last visited on February 5, 2025).

[125] Justice Manual, Title 9:Criminal 9-21.320 available at https://www.justice.gov/jm/jm-9-21000-witness-security#9-21.100 (Last visited on February 5, 2025).

[126] Justice Manual, Title 9:Criminal 9-21.300 available at https://www.justice.gov/jm/jm-9-21000-witness-security#9-21.100 (Last visited on February 5, 2025).

a release form before the psychological evaluation is conducted. This authorises the department to use the results of the test for any lawful use.[127]

It is incumbent on the Assistant United States Attorney, and the law enforcement agency, to furnish to the OEO the request for authorisation at the earliest possible time. This is to ensure that USMS gets sufficient time for preliminary interview, psychological testing, appropriate review and for making necessary arrangements for protection to the witness.[128]

When it is decided that a witness is suitable for inclusion in the Program, the witness and the family members if any, are required to sign a Memorandum of Understanding. The witness is obligated to satisfy the commitments laid in the Memorandum. Similarly, the USMS is obligated to fulfil each commitment mentioned in the memorandum so long as witness is compliant. The services not listed in the memorandum are not to be provided to the witness by the USMS.[129]

Besides, the Memorandum of Understanding, all other documents relating to the protected witness are to be handled specially. All documents are marked with security designation 'Sensitive Investigative matter'. The Court matters discussing a protected witness is filed under seal.[130]

In the event of witness being relocated, the witness is obligated not to keep the area of relocation confidential. The area of relocation is known only to USMS, and must not be made to known to case advocates or other staffs. The witnesses are contacted through

[127] Justice Manual, Title 9:Criminal 9-21.330 available at https://www.justice.gov/jm/jm-9-21000-witness-security#9-21.100 (Last visited on February 5, 2025).

[128] Justice Manual, Title 9:Criminal 9-21.400 available at https://www.justice.gov/jm/jm-9-21000-witness-security#9-21.100 (Last visited on February 5, 2025).

[129] Justice Manual, Title 9:Criminal 9-21.500 available at https://www.justice.gov/jm/jm-9-21000-witness-security#9-21.100 (Last visited on February 5, 2025).

[130] Justice Manual, Title 9:Criminal 9-21.940 available at https://www.justice.gov/jm/jm-9-21000-witness-security#9-21.100 (Last visited on February 5, 2025).

the OEO or the USMS.[131] A significant aspect of the witness security program is that the witness is provided continued protection even after the witness ceases to be part of the Program.

There is provision for continuing protection for witness admitted in the witness security program. This continued protection is available in the courtroom for testimony connected to case or cases for which witness was admitted into the program. In the event of witness being endangered due to previous cooperation under the program, the need for protection can be reviewed and appropriate steps to protect the witness can be taken.[132]

The United States Federal Witness Security Program, is comprehensive and includes physical protection, change of identity, relocation, financial support, financial payment and other services to support the protected witness.

In India, despite several recommendations of the Law Commission of India in their reports,[133] the Malimath Committee report,[134] and Judgements of the Supreme Court, a comprehensive Witness Protection Program did not see light of day.

3.8 COMPARATIVE STUDY OF THE INDIAN WITNESS PROTECTION SCHEME 2018 AND WITNESS PROTECTION PROGRAMS OF THE OTHER COUNTRIES

The Comparative analysis of other witness protection legislation and the Indian Witness Protection Scheme 2018, is essentially to identify the deficiencies to improve and

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[131] Justice Manual, Title 9:Criminal 9-21.950 available at https://www.justice.gov/jm/jm-9-21000-witness-security#9-21.100 (Last visited on February 5, 2025).

[132] Justice Manual, Title 9:Criminal 9-21.990 available at https://www.justice.gov/jm/jm-9-21000-witness-security#9-21.100 (Last visited on February 5, 2025).

[133] THE 14th , 178th and 198th REPORTS OF LAW COMMISSION OF INDIA, submitted to the Government of India, in the years 1958, 2001, and 2006 respectively.

[134] Malimath Committee on Reforms of Criminal Justice System, 2003.

fortify the scheme. The analysis is based on striking characteristics found in the witness protection programs of Canada, Australia, Kenya, South Africa, Philippines, the United Kingdom, and the United States of America. The comparative analysis is restricted to criteria based on legislative regime, Eligibility Criteria, Protective agreements, Protection measures, and Organisational Structure.

3.8.1 LEGISLATIVE REGIME

The study of the witness protection programs of the aforesaid countries except the United Kingdom, signifies that there is an enactment of legislation by the legislature than merely an executive act. In India, the Witness Protection Scheme 2018, does not have a legislative basis. The Supreme Court by giving its imprimatur to the Scheme and making it part of the Judgment, makes it a law under Article 141/142 of the Constitution of India, until a suitable legislation is enacted by the Parliament or State legislatures on the subject.[135] In the absence of legislative basis this scheme is treated solely as a political activity. An enabling legislation on the subject of witness protection is required at the federal or State level in India.

3.8.2 ELIGIBILITY CRITERIA

The analysis of the Witness Protection Programs of other countries indicates similarity with respect to the nature of protection offered. However, there are differences as to eligibility criteria and the manner in which protection is offered. One of the eligibility criteria included in Canadian Act, mentions alternative methods of protecting the witness without being inducted in the Program.[136] Similarly, in Kenya, in assessing the factors for including the witness in the Program, viable alternative methods of protecting the witness are assessed.[137] In South Africa as well, we observe that there is a provision for alternate means of protection without placing the witness under

[135] Mahender Chawla v. Union of India (2019) 14 SCC 615.

[136] Clause 7 of the Witness Protection Scheme 2018.

[137] Section 6 of the Witness Protection Act, 2006.

protection under the Act.[138] In the Witness Protection Scheme 2018, the Government has omitted to consider comprehensive eligibility criteria, except for categorisation of witnesses on the basis of threat perception. Moreover, if the witness/applicant under the scheme is not admitted into the scheme, there is no viable alternative in the Scheme to protect such a witness at risk. Another criteria for admission of the witness into the program is assessment of psychological examination, criminal record etc. of witness.

The admission into the Australian NWPP mandates psychological examination, criminal record etc. of witness to be taken into consideration.[139] Similarly, in the United States of America, besides information relating to the threat perception, the criminal history of the witness, and psychological assessment of the witness and family members intended to be included in the program are taken into consideration. However, the Indian scheme does not empower the Competent Authority to consider the psychological examination or criminal history of the witness applicant. The Competent Authority assesses the application solely on the basis of the Threat Analysis Report.

3.8.3 PROTECTION AGREEMENTS

Protection Agreement between the protected witness and the Protecting Agency regulates the relationship between the two. The nature and extent of protection is set forth in agreement. It also delineates the obligations of the parties. For successfully implementing protection measures, the protection agreements are essential.The study of witness protection legislations or arrangements in the various countries, reveals that all have a provision for Protection agreements or memorandum of understanding. The Memorandum of understanding or Protection agreements provide for the terms of protection and imposes obligations on the protectee/participant/witness and the authority responsible for protection. However, the Witness Protection Scheme 2018, fails to make a provision for an agreement between the Competent Authority and witness.

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[138] Section 10(1) of the Witness Protection Act, 1998.

[139] Section 8 of Witness Protection Act, 1994.

3.8.4 PROTECTION MEASURES

With respect to the protection measures, most of the witness protection programs provide for similar protection measures depending on the circumstances of the case and the risk assessment involved. physical protection, change of identity, relocation, financial support and other services such as counselling, medical treatment, burial benefit etc. The Witness Protection legislation of Kenya has a specific provision that the admission of the witness into the program shall not to be treated as a reward or as a means to influence or encourage the witness to give testimony. Similarly, the Australian legislation, we find an explicit provision stating that the induction of a witness in the NWPP is not to be executed as a reward or means to persuade the witness to give evidence or to make a statement.[140] The Witness Protection Scheme 2018, has no such provision so as not to treat the protection measures as a reward for testimony. Therefore, providing these measures could be perceived as partisan approach by the State towards the prosecution witnesses.

In the context of nature of protection measures, the rights and benefits of Philippines needs a special mention. The Philippines Witness Protection, Security and Benefit Act, 1991, provides for not only witness security but also benefits to the witness. It inter alia provides for financial support which includes provision of means of livelihood of children, continued protection in the program even if the witness was absent before judicial authority, employer duty bound to pay full salary in case of absence from work due to witness duty. Free medical treatment, hospitalisation, and burial benefit of 10,000 Pesos incase of death, education for dependent children from primary to College/University level.[141] The Act also further provides for a speedy trial and disposal of the case within three months.

The United States of America in its Witness Security Program, inter alia provides for basic living expenses, housing, transportation of furniture and property to the new residence. The Witness Protection Scheme 2018, provides for Periodical financial

[140] supra.

[141] supra.

support or grants to the witness from the Witness Protection Fund for the purpose of re-location, sustenance or starting a new avocation. However, the financial viability depends a lot on the budgetary provision made by the State Governments.

3.8.5 ORGANISATION AND STRUCTURE

The operation of any witness protection program depends on the organisation and authorities implementing the protection measures following the induction of the witness in the program. The witness protection program in Canada, is administered by the Commissioner and implemented by the Royal Canadian Mounted Police (RCMP). The Commissioner is obligated under the Act to submit a report on the operation of the Program for the preceding year to the Minister of Public safety and Emergency Preparedness, on or before June 30 each year. The Minister submits tables the report before each house of Parliament.[142] Similarly, in Australia, the National Witness Protection Program is maintained by the Commissioner of Australian Federal Police (AFP). The reporting requirement provided by the Act, states that the AFP shall report to both houses of Parliament as to the operational effectiveness, and performance of the NWPP.

The organisational structure in Kenya is unique as compared to the other countries studied. The Witness Protection Act, 2006, provides a three tier structure, comprising of Witness Protection Advisory Board, Witness Protection Agency, and Witness Protection Appeals Tribunal. The Witness Protection Agency has the power to establish and maintain the program. The Board is responsible for overall supervision of witness protection policies and overall operations of Agency. The Act has provided relief for a person aggrieved for not being admitted or removal from the Program. The person aggrieved can prefer an appeal to the Witness Protection Appeals Tribunal.

In Philippines, the task of formulation and implementation of the Witness Protection, Security and Benefit Program, is vested with the Secretary, Department of Justice. The department may also call upon any executive agency, or any other department or bureau

[142] Section 16 of the Witness Protection Act, 1996.

office to assist in implementation of the scheme.[143] The Program is administered by the National Prosecution Service (NPS) within the Department of Justice. There are regular interactions with the Armed forces and the Philippine National Police.

While the National Prosecution Service administers the implementation of the program in Philippines, in South Africa, the Office for Witness Protection within the Department of Justice is established with Director as the head. There is a Witness Protection Officer who monitors the implementation of the program in each branch office in a defined area. The Witness Protection officers are required to submit a report to the Director, Office for Witness Protection, every six months.[144] The Office for witness protection falls under the National Prosecuting Authority. The Protection is provided by the South African Police Service.

The United Kingdom, does not have an exclusive legislation on Witness Protection, however, witness protection is managed by the National Crime Agency with the assistance of United Kingdom Protected Persons Service. The National Crime Agency leads the network of regional units for protected persons. The service provided is called the UK Protected Persons Service (UKPPS).

In the United States of America, the Attorney General has constituted the Witness Security Program. The Witness Security Program application should be routed to the appropriate United States attorneys. The United States Attorney reviews the application and offers suggestion to the Office of Enforcement Operations (OEO) for deliberation. The United States Marshal Service implements the protection measures.

From the above discussion it is observed that the Police/law enforcement agencies are vested with the task of implementing the Witness Protection Programs. In few countries the Program is monitored by the Prosecution Agency while in other countries through an authority within the Department of Justice.

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[143] Section 2 of the Witness Protection, Security and Benefit Act, 1991.

[144] Section 2 and 5 of the Witness Protection Act, 1998.

The Witness Protection Scheme 2018, in India has adopted a two tier structure. The Competent Authority is vested with the power to consider the Witness Protection Application based on the Threat Analysis Report. The Witness Protection Cell, which is the Police agency, is responsible for implementation of the Witness Protection Order. The person aggrieved with the Order of the Competent Authority can prefer a review. There is no provision for appeal before an Appellate Tribunal as in the case of the Kenyan Witness Protection Act. In Indian Scheme, it is observed that the Police agencies are vested with task of implementing witness protection. The Police manpower is each State/Union Territory, may not be adequate to assume this task in addition to investigation of crime and law and order functions. Therefore, there will be a need to augment the Police force with specific designated task of protecting witnesses with no additional responsibility. With respect to reporting requirement, it is further observed that, ‘‘the Scheme has no mention of reporting requirement to the Department of Home. The Scheme provides for monitoring mechanism on the basis of monthly follow-up reports submitted by the Witness Protection Cell to the Competent Authority.”[145]

Due to the complexity of the issue, it is necessary in India to establish a separate Competent Authority under each state's or union territory's Department of Home. Similarly, the task of witness protection should be given to a police department that is not involved in any other ongoing investigations.

The weaknesses of the Witness Protection Program 2018 are highlighted by this comparative study so that they can be addressed and the system strengthened. The next chapter attempts, through empirical investigation, to examine the impact of hostile witness testimony on the Prosecution case and, by extension, the trial, using the insights gained from the comparative analysis and the international perspective on witness protection presented in the previous chapter. This section of the book aims to examine the factors that lead witnesses to become uncooperative, the degree to which the prosecution relies on the evidence of a hostile witness, and whether or not the Witness Protection system, which was implemented in 2018, will help reduce this problem.

[145] Clause 8 of the Witness Protection Scheme 2018.

4 CHAPTER 4- EVIDENTIARY VALUE OF TESTIMONY OF THE HOSTILE WITNESS

It is a violation of section 161 of the Criminal Process Code, 1973 for a prosecution witness to testify in a criminal trial in contradiction to the prosecution's case and the witness's own remarks recorded before the police. In that case, the prosecutor will ask the court for permission to declare the witness hostile and conduct cross-examination. If the judge allows it, the prosecutor will cross-examine the witness. Likewise, the defence attorney has a chance to question the witness in question. This suggests that the prosecution's examination in chief and the defense's cross-examination are constrained in some way. To the degree that it is helpful to the prosecution's case, the testimony obtained via examination in chief and cross questioning of such witness can be used.[146]

If a hostile witness testifies, we must consider all of their evidence. Either the prosecution or the defence may rely on any aspect of the testimony which is compatible with the case only after carefully weighing the testimony's inherent merit. So, the credibility and trustworthiness of a hostile witness's testimony would determine how persuasive it would be to the Court.[147]

There is no universally accepted standard for determining whether a witness can be considered hostile or unfavourable. However, in general, a witness may be subject to cross-examination if, first, his attitude, approach, demeanour, etc. in the witness-box demonstrates a deliberate hostile or antagonistic feeling towards the party calling him, or, second, if, while trying to hide his true feelings, he does not exhibit any hostile feeling but makes a statement contrary to what he was called or expected to prove what he had deliberately told before. A motion for leave to treat a witness as hostile can be made at any time during the examination process, including during direct examination, cross examination, and even reexamination. There is no basis for allowing one to cross-

[146] Bhajju v. State of M.P. (2012) 4 SCC 327.

[147] Zamir Ahmed v. State 1996 Cri.L.J. 2354.

examine one's own witness only because the witness has offered certain responses on small facts that seem to be favourable to the accused under cross-examination.[148]

In the case of ***Sat Paul v. Delhi Administration***,[149] the scope of Section 154 of the Evidence Act was carefully examined. Once a witness is cross-examined and refuted by the party calling him with the Court's permission, the evidence he provided cannot be disregarded or erased, as the Supreme Court ruled. The trial judge must decide if the witness's testimony has been completely discredited by cross-examination or if it may still be trusted. If the judge determines that the credibility of the witness has not been entirely destroyed, he may, after carefully weighing all of the evidence, place his trust in the parts of the testimony that are credible. It is prudent for the judge to disregard the witness's testimony if his credibility has been completely undermined by an attack on his whole testimony.

When the Supreme Court determines, based on the witness's demeanour, termper, approach, tone and manner of his responses, or review of his previous inconsistent statement given to Police, that the grant of such permission is necessary to extract the truth and do justice, it will exercise the discretion conferred on it by Sec. 154. However, it was reaffirmed that the Court's decision to give such authorization does not constitute an evaluation of the witness's credibility. Hence, the Court's notation at the end of the prosecution witness's deposition that he has been "declared hostile" has no legal bearing, and the defence is free to rely on the witness's testimony.[150]

A party must seek the court's approval before questioning their own witness as cross-examined. The question is whether a Commissioner appointed under section 284 of the Criminal Procedure Code has the authority to label a witness as uncooperative. The Supreme Court upheld the rule that in order for a party to cross-examine his or her own witness, the party must first acquire permission from the Court under Sec.154 of the Evidence Act. A witness's calling party must obtain authorization from the Court before

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[148] Yusuf v. State of Uttar Pradesh 1973 Cri.L.J. 1220.

[149] AIR 1976 SC 294, 308 ¶ 51.

[150] Sat Paul v. Delhi Administration AIR 1976 SC 294, 305 ¶ 51.

asking any questions that may be asked under cross-examination from the opposing party.[151]

A common misconception is that once a witness is labelled hostile, all of his or her testimony should be disregarded. The Supreme Court has reaffirmed that a witness is not rendered unreliable merely because he declares himself hostile during cross-examination and that no unfavourable determination is made regarding the witness' credibility when such authorization is granted. The testimony as a whole must be taken into account. Any verifiable claims can be accepted by the court. For things that are either introductory in nature, are not in dispute, or have, in the Court's judgement, been sufficiently shown, it may also allow for leading questions to be asked.[152]

In 2006, the courts were given the right to rely on any portion of the testimony of a witness who had been deemed "hostile" by the court, a right that had previously been established by judicial declarations. This right was codified by an amendment to section 154 of the Evidence Act. The Supreme Court, in a number of rulings, has ruled that the prosecution may use the testimony of hostile witnesses if doing so is necessary to prove the prosecution's case. It's generally established that you can't just ignore the words of hostile witnesses, whether they testify for or against the prosecution. Yet, it may be examined carefully, and the parts that are compatible with the prosecution's or defense's case can be valued.[153]

In ***State of Bihar v. Laloo Prasad Yadav***,[154] the Prosecution witness recanted his testimony during direct questioning, the public prosecutor did not ask the court for permission to label him hostile so that the defence may interrogate him. After being subjected to cross-examination by the defence team, the public prosecutor then requested an opportunity to question him. It was ruled that the prosecution could not cross-examine defence witnesses. The Supreme Court decided not to overturn the lower

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[151] Salem Advocate Bar Association, Tamil Nadu v. Union of India AIR 2005 SC 3353.

[152] Rabindra Kumar Dey v. State of Orissa AIR 1977 SC 170; 1977 Cri.L.J.173.

[153] State of U..P. v. Ramesh Prasad Misra 1996 Cri.L.J. 4002.

[154] 2002 Cri.L.J 3236, 3237 ¶ 5, 6.

court's ruling. The Supreme Court ruled that it was clear the Public Prosecutor did not want to take full responsibility for the witness's testimony since he immediately sought the Court's authorization once the cross-examination concluded. The Public Prosecutor might have informed the Court, upon final review, that he was not inclined to accept the testimony of any such witness.

K.Anbazhagan v. Supritendent of Police[155] was a case of Transfer Petition for transfer of case from Tamil Nadu to Karnataka which was allowed. Case against Tamil Nadu Chief Minister Ms. J. Jayalalitha and her family members. The Public Prosecutor did not object when 76 prosecution witnesses were asked back for cross-examination. No attempt was made by the Public Prosecutor to declare any of the 76 witnesses hostile or to cross-examine them using Sec. 154 of the Evidence Act, despite the fact that 64 of the 76 witnesses recanted their testimonies in chief. Previous comments, according to witnesses, were made under duress, and no effort was made to cross-examine them. The Supreme Court has already indicated that it would be difficult for a trial court to reject such testimony if it were presented later. Miscarriage of justice occurred as a result of serious harm done to the prosecution's case.

In ***State of Gujrat v. Rajubhai Dhamirbhai Bariya & Oths***.,[156] also called The Best Bakery case. Among the original pool of 73 witnesses, 37 gave conflicting or false testimony. Just seven people out of the total of thirty-seven witnesses were considered eyewitnesses. In India, it has been reported that the majority of Panch witnesses end up testifying against their own people. The witnesses had not deposed fearlessly, and the trial was significantly weighted in favour of the defendants. Once the decision was handed down (on June 27, 2003), Zahira Habiblla Shaikh claimed that she had been intimidated during her deposition. Four witnesses, including two injured people, turned hostile on September 5, 2003. The close relatives of the decedent all claimed they had not made a statement to the police under section 161 Cr.P.C. The erudite trial judge and the Public Prosecutor had a hard time accepting that they had changed their stories. The

[155] 2004 Cri.L.J 583, 584, 585 ¶ 2..

[156] 2004 Cri.L.J. 771, 780 ¶ 10.

Supreme Court relocated the case to Maharashtra and ordered a retrial, despite the fact that the High Court had not previously ordered one.

The Court ruled that a "fair trial" must be one in which any potential favouritism or animosity towards the defendant, the witnesses, or the cause being litigated is avoided. Neither would it be a fair trial if witnesses were threatened or coerced into giving false testimony. Not allowing crucial witnesses to testify is a clear violation of due process. The criminal court system in India has had a lot of trouble with witnesses becoming hostile. The acquittals in high-profile instances, such as the Jessica Lal murder case and the Best Bakery, have brought the issue to a wider audience.[157]

In the case of ***State v. Siddharth Vashisht alias Manu Sharma & Ors.***,[158] The prosecution called 101 witnesses to testify, including several who saw the murder of Jessica Lall happen. The prosecution had to get 32 witnesses labelled hostile throughout the trial, including three eyewitnesses to the murder and a ballistics expert. It's a sad state of affairs, according to the Divisiona Bench of the Delhi High Court. There appears to be a widespread trend of hostile witness behaviour. This hostile witness behaviour, which is intended to undermine the administration of justice, must be stopped, and the courts must do so.[159]

The public outcry that was sparked by the Best bakery case, the Jessica Lall murder case, and other examples raised increased awareness about the danger of hostile witnesses in the criminal court system. Public faith in the judicial system was eroded. Even in the second decade of the 21st century, the pattern of hostile testimony from once cooperative witnesses persisted. The Supreme Court's approach to the problem of uncooperative witnesses was aggressive. The Supreme Court did its utmost to raise awareness of the issue and bring it to the attention of the legislature and the executive branch through its judgements. Judicial rulings that served as both binding precedents

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[157] Zahira Habibulla H. Sheikh v. State of Gujrat 2004 AIR SCW 2325, 2341 ¶ 39.

[158] Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1: (2010) 2 SCC (cri) 1385.

[159] 2013 Supreme (Del) 607; 2013 201 DLT 657; 2013 3 JCC 1481.

and substantial contributors to efforts to solve the situation should be carefully examined.

5 CHAPTER 5- SHIELDING HOSTILE WITNESSES: A JUDICIAL RESPONSE

The Supreme Court has often voiced its distress and concern about the disturbing trend of once-cooperating witnesses turning hostile during criminal proceedings. The Court is aware that it is an all too common and deplorable occurrence for witnesses to turn against each other in criminal proceedings. It's not that police are coercing antagonistic witnesses into giving statements, so that they may use those remarks against them in court. A witness may be reluctant to testify against an accused person for a variety of reasons, including political or familial pressure, financial concerns, or other social issues.[160]

The Supreme Court has seen a disturbing trend: a general decrease in morality. Generally speaking, trial courts have decided that witnesses either aren't credible or aren't well prepared to testify. The Court found that one factor was the defendant's belief that they were in imminent danger from repeat criminals or those with access to or control over political, economic, or other forms of power, including physical force.[161] Similar view was adopted by the Apex Court in ***State v. Sanjeev Nanda***,[162] in which the Court asserted that "there is regularity in witnesses turning hostile particularly in high profile cases owing to monetary consideration or by other inducements which undermine the entire criminal justice system. This results in the belief that the people in position of power can escape the clutches of the law. This erodes the faith of the people in the administration of criminal justice."

Recognizing the significant role witness plays in the quality of criminal trials, the Supreme Court while highlighting the problem hostile witnesses in Zahira Habibullah v. State of Gujarat[163], observed that since witnesses are "eyes and ears of justice."

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[160] Ramesh v. State of Haryana (2017) 1 SCC 529.

[161] Krishna Mochi v. State of Bihar (2002) 6 SCC 81.

[162] (2012) 8 SCC 450.

[163] (2006) 3 SCC 374.

Therefore, "if the witness is incapacitated from being the eyes and ears of justice, the trial gets paralysed and it can no longer constitute a fair trial." The Court also explained that a witness's incapacity might result from a variety of corrupt tactics used to impede the finding of truth, including threats or force, enticing by monetary rewards at the instance of those in power whether politically or otherwise, and so on. The Court ruled that the State has a responsibility to safeguard witnesses in high-profile cases involving political favours, wealthy individuals, and powerful organisations. The State must take something to prevent the trial from rotting and the pursuit of justice from derailing. Sexual assault and other crimes against women sometimes involve traumatised victims who may be hostile to witnesses or law enforcement.

The Court has expressed concern that in situations involving crimes against women, victims may be unable to provide a full and accurate account of the events because of their acute anxiety. In order to protect the accused from potential intimidation, the court suggested using a screen, curtain, or other means to separate the two parties throughout the testimony. This was proposed so that victims wouldn't have to view the body or face of the accused, which might cause emotional distress. The court also noted that sexual assault victims may be embarrassed to testify truthfully or give a comprehensive account of the activities perpetrated by the accused when they are subjected to questions during cross-examination, which are sometimes designed to confuse the victims. The Court advised that the list of cross-examination questions be given to the Judge, who may then ask the questions of the victim or witnesses in appropriate language.[164]

"On the basis of this view, the Apex Court has directed States/Union Territories to set up Vulnerable witness Deposition Complexes. [165] These complexes have the potential to create a conducive situation to vulnerable witnesses in order to inspire them to provide their best evidence during the proceedings. The Court has given direction to set up the Vulnerable Witness Deposition Complexes by the end of the year 2019.[166] Another important aspect in which Courts have explored is the reasons for witnesses

[164] Sakshi v. Union of India (2004) 5 SCC 518.

[165] Mahender Chawla v. Union of India (2019) 14 SCC 615

[166] Ibid.

turning hostile. The Courts have called upon the trial Judges to play a proactive role in dealing with this phenomena of witness turning hostile."

The Supreme Court in Sidhartha Vashisht @ Manu Sharma v. State (NCTof Delhi),[167] and in Zahira Habibullah Sheikh v. State of Gujarat,[168] had identified that "there were blatant defects in the manner in which statements were recorded by the Police during the course of investigation and the consequent resiling by the prosecution witnesses due to inducement or intimidation. The Court pointed that the criminal justice system cannot be upturned by pliant witnesses who depose under pressure or inducement." The Court said that it "must not stand as a mute spectator and every effort should be taken to bring home the truth" if a witness turns hostile in an attempt to thwart the administration of justice.

A three-judge panel of the Supreme Court agreed with this assessment with regard to a rape survivor when the victim made an incriminating statement to the criminal's defence team. The Court ruled that a conviction may stand even when the rape victim had cleared the defendant. Besides the physical evidence, the court may also consider other evidence, such as medical records. Furthermore, the Court said in its Decision that neither the defendant nor the plaintiff may attempt to pervert justice by asserting the untruth, lest the process degenerate into a farce.[169]

In another instance, the Court emphasised the public responsibility of a trial Judge by remarking that a Judge's role is not just to make sure that no innocent man is punished, but also to make sure that no evil man gets away. In addition to being the case's lynchpin, a trial judge also serves as its eyes and ears. He is a provider of all evidence, both direct and indirect, and not just a notetaker. Many people believe that in order to

[167] (2010) 6 SCC 1.

[168] AIR 2006 SC 1367.

[169] Hemudan Nanbha Gadhvi v. State of Gujarat, AIR 2018 SC 4760;

be an effective trial judge, one must "hear with a third ear," or be able to understand things that are not being directly said."[170]

"This view of the Court is an indication to all the trial court Judges to be proactive during trial particularly when prosecution witnesses show signs of hostility and derogate from their statement. When one after another the material witnesses turn hostile, this must develop suspicion in the mind of the trial Judge to probe and question the witness.''[171] The Supreme Court from its analysis in various judgments has also made an attempt to identify the reasons for witnesses turning hostile in India.

The reasons for witnesses turning hostile were discerned from an analysis of previous precedents of the Court. The following reasons were cited for witnesses resiling from their statements:

i. Threat/intimidation.

ii. Inducement by various means.

iii. Use of muscle and money power by the accused.

iv. Use of Stock witnesses.

v. Protracted trials.

vi. Hassles faced by the witnesses during investigation and trial.

vii. Non-existence of any clear-cut legislation to check hostility of witness.[172]

The Court has further acknowledged that threat and intimidation has been one major cause for witnesses turning hostile. ''When witnesses are not able to testify the truth in

[170] Dinubhai Boghabhai Solanki v. State of Gujarat and Others AIR 2017 SC 5690.

[171] Ibid

[172] Mahender Chawla v. Union of India (2019) 14 SCC 615.

the Court of law, it contributes to a low conviction rate and in many cases dreaded offenders escape punishment. This erodes the public confidence in the system."[173]

Based on the CBI's list, the Supreme Court reexamined 26 witnesses (8 of whom were eyewitnesses) in a criminal appeal against the Gujarat High Court's judgement. In one particular case, a former lawmaker was suspected of killing a protester who had spoken out against unlawful mining. With such a high-profile case, it's no surprise that 105 of the 195 witnesses called testified against the defendant. The Court stated that achieving justice is the foundation of every effective judicial system. The major role of the Courts is to provide a fair trial, which is crucial in striking a balance between the interests of the accused and the victims. Witnesses play a crucial part in ensuring a fair trial, and this can only be accomplished if they are truthful in their testimony.[174]

A Special Court of Central Bureau of Investigation acquitted 22 accused people, including 21 subordinate police officials, in another high-profile case involving an alleged fake encounter in Gujarat involving Sohrabuddin Shaikh, his wife Kausar Bi, and assistant Tulsiram Prajapati. The court ruled that there was insufficient supporting evidence to rely on circumstantial evidence. The 210 Prosecution witnesses were cross-examined, and 92 of them became hostile.[175] The potential for witness tampering in high-profile trials involving powerful persons has been emphasised once again by this case.

The Supreme Court's study as a whole shows how crucial it is to ensure the safety of witnesses and improve their treatment within the criminal justice system.

JUSTIFICATION FOR PROTECTION OF WITNESSES

The Supreme Court has expressed its dismay with the pervasive problem of suddenly hostile witnesses in criminal prosecutions in a number of its recent judgements. The

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[173] Ramesh v. State of Haryana (2017) 1 SCC 529.

[174] Dinubhai Boghabhai Solanki v. State of Gujarat and Others AIR 2017 SC 5690.

[175] Rebecca Samervel, Four more witnesses declared hostile in Sohrabuddin Case, TOI, Mar.8, 2018, at 6.

State has failed to establish sufficient legislation for protection of witnesses despite a number of high-profile cases in the Nation resulted in acquittal owing to hostility of witnesses in criminal trials. It's a common occurrence for witnesses to turn hostile, but it's nevertheless a sobering reminder of the downsides of the judicial system that society can't ignore. When it comes to legal proceedings, the state has likewise failed to provide witnesses the respect they deserve. In the Indian judicial system, the position of witnesses is appalling.

Witnesses face unwarranted persecution in India. Witnesses go long distances to testify, only to have the case postponed and force them to head home without having their testimony recorded. This keeps happening until the witness gets sick of appearing to court and ceases showing up. Bribery, financial incentives, and intimidation are sometimes used to win over witnesses. The witness further complains that the court does not treat him or her with any degree of dignity. However, the witness travel allowance is quite modest and is often paid late. The court, however indirectly, is complicit in a miscarriage of justice if it does not act promptly to prevent it.

Because of these factors, potential witnesses often back out, which slows down the judicial process.[176] This ultimately results in secondary victimization of witnesses due to "hostile or semi-hostile environment" in the Court room.[177] In light of this, it is imperative that the process of compelling witnesses to give depositions be improved. The witness is a visitor to the courtroom and should be treated as such.

In addition to the widespread abuse of witnesses, One reason hostile witnesses are so common in criminal cases is because of the use of threats and intimidation.[178]

Lack of State protection measures is a contributing factor to hostile witness behaviour. The accused who are in authoritative positions or who are linked to political power often seek to intimidate the witnesses. Because of this, the witnesses are not testifying

[176] Swaran Singh v. State of Punjab (2000) 5 SCC 68.

[177] Mallikarjun Kodagadi v. State of Karnataka (2019) 2 SCC 752

[178] supra.

truthfully. In its 2003 report, the Justice Malimath Committee addressed the subject of protecting witnesses and their families from any potential harm they could come under throughout the course of the case.

While determining the severity of the threat against the witnesses, the Committee decided that the severity of the crime and the accused's criminal history were significant considerations. The Malimath Committee Report further claimed that witnesses are sometimes killed or seriously harmed before testifying in court. Witnesses are discouraged from testifying in court unless they are guaranteed their anonymity or given some other form of protection. The Committee stressed the importance of enacting a comprehensive law to safeguard witnesses and their close contacts.[179]

The problem of hostile witnesses and the need to ensure fair trial was addressed by the Law Commission of India in its 178th Report.[180] So also in the 198th Report of the Law Commission,[181] it was recommended that "Witness Identity Protection and Witness Protection Programmes be initiated. The Commission emphasized that in case of offences under special statutes such as Terrorism or sexual offences, the fear or danger of victims and witnesses may be more pronounced. If the trial is meant to be fair under special statutes, then the principle of fair trial in general offences of serious nature under the Indian Penal Code, 1860, should also be afforded as the fear or threat perception is common in both types of offences. The Commission also made a comparative analysis of Witness Protection Programs of other countries."

Neither the Union nor the State Governments took any action to begin an enabling law containing the Witness Protection provisions, notwithstanding the recommendations of the Malimath Committee and the several Law Commission Reports. Yet, in a recent Decision, the Supreme Court stressed the need of providing around-the-clock security

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[179] JUSTICE MALIMATH, COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM, 2003, supra.

[180] THE LAW COMMISSION OF INDIA 178TH REPORT ON RECOMMENDATIONS FOR AMENDING VARIOUS ENACTMENTS BOTH CIVIL AND CRIMINAL, 2001.

[181] THE LAW COMMISSION OF INDIA 198TH REPORT ON WITNESS IDENTITY PROTECTION AND WITNESS PROTECTION PROGRAMMES, 2006.

for witnesses who may be in danger.[182] The Court approved the Central Government's 2018 Witness Protection Plan and ordered all States to adopt it pending passage from Congress. To cover costs associated with the Scheme, each state is required to establish a special witness protection fund. It is understood that there must be some kind of Witness Protection measures taken in the current climate, and that there must be a comprehensive witness protection programme in place. The researcher has examined the Witness Protection Programs in selected countries and compared them to the Witness Protection Scheme 2018 of India to learn more about the structure of the witness programme, the authorities granting protection, the eligibility criteria for induction into the programme, and the protection measures in place.

[182] Amit Anand Choudhary, Witnesses facing threat must get 24x7 cover: SC, TOI, Dec.6, 2018, at 1.

6 Chapter 6- CONCLUSION AND SUGGESTIONS

6.1 CONCLUSIONS

The importance of a witness in a court of law cannot be overstated. The testimony of an eyewitness can be crucial in prosecuting a criminal. Reliable evidence presented at trial is essential to the fair administration of criminal justice. The judge places great weight on this evidence when deciding whether or not the defendant is guilty. Flawed evidence reduces the prosecution's ability to prove guilt beyond a reasonable doubt. The Supreme Court asserted "A criminal case is built on the edifice of evidence, evidence that is admissible in law. For that, witnesses are required whether it is direct evidence or circumstantial evidence."[183] When a witness testifies to what he or she has seen or heard, he or she is performing the sacred responsibility of aiding the Court in uncovering the truth. The oath the witness takes before testifying in court is meant to ensure that he or she will tell the truth and nothing but the truth. The witness's evidence may be the deciding factor in whether or not the defendant is found guilty. It follows that the witness plays a crucial role in the administration of justice.

Yet, the witness's path through the legal process is not an easy one. Threats against the witness's life, his family's safety, and his possessions are common, as are attempts to bribe or otherwise influence him. Civil society's willingness to come forward as witnesses and aid in investigations has been undermined as a result. Consequences, such as the hardships caused to the witness and the many postponements of the hearing, only make matters worse. The State denies any responsibility to protect the witness, and the somewhat hostile atmosphere of the courtroom further makes matters worse. The witness becomes lethargic and evasive as a result. Together, these problems render the witness unreliable, which weakens the prosecution's case. Because of this, both justice delivery and due process are compromised.

Consequently, the Public Prosecutor, the Police Officers, the Judges, the advocates, and the witnesses all have a collaborative role to play in the success of the justice delivery

[183] Swaran Singh v. State of Punjab (2000) 5 SCC 68.

system. The criminal justice system of a country determines the importance of witnesses.

Pretrial proceedings are given more weight in the inquisitorial form of trial than the actual trial itself. The inquisitorial system is based on a method of investigating and uncovering the truth. Pretrial investigations are conducted so that a guilty individual does not go to trial. A Judge, sometimes known as an investigative magistrate, conducts the pre-trial processes and looks into the matter from every angle. At this point, you provide your proof. Witness testimony is documented at this point. At trial, the prosecution can use the witness statements recorded by the investigating Judge as the basis of their case. Only if there is substantial proof of guilt would the investigating judge suggest a trial. Both the accused and the victim have the right to be present at the trial, albeit their participation will be restricted to offering suggestions for questions that can be asked of the witnesses. In contrast to the adversarial method, the Judge will ask the witness questions directly. Instead of proof beyond a reasonable doubt, the evidence is valued based on the Judge's subjective level of belief or satisfaction. If this is the case, we may conclude that the likelihood of a witness turning hostile under the Inquisitorial system is low.

To convict someone under an adversarial system, the prosecution must prove all of its allegations beyond a reasonable doubt, which is a far higher bar than the inquisitorial method. The Judge acts as an impartial arbiter in a hostile trial. The State, represented by the Prosecution, and the accused, represented by defence counsel, make up the parties. Each side will have a chance to present evidence and question the other's witnesses. Although while the adversarial system ensures a fair trial, it has been noted that it has its own flaws. The issue of suddenly hostile witnesses during trial evidence is one such negative. While looking at the two different legal systems, it becomes clear that in the inquisitorial system, judges are more cautious about witnesses. Cross-examination is limited before a trial judge. In an adversarial system, the judge must remain impartial and out of the way throughout the cross-examination of witnesses. The Judge's function is limited to hearing the evidence and does not include determining the truth, hence he is often reduced to a mute observer. Earlier, we addressed the institutional and historical context of the criminal justice system, with an emphasis on its roles today.

Lawmaking, law enforcement, adjudication, and correction are identified as the four pillars of the criminal justice system. One definition of "administration of justice" is when the goals of the criminal justice system contribute to a more stable and peaceful society. A deeper understanding of the role of adjudication in the criminal justice system was revealed. The adjudication process is divided into three distinct but interconnected phases: prosecution, guilt finding, and punishment imposition. Punishing criminals and shielding the innocent are two main functions of the criminal justice system. The topic then shifted to the development of India's criminal justice system, which the 'Puranas' and the 'Smritis' use to conceptualise the quest for 'nyaya', or justice. Also discussed is the evolution of India's criminal justice system, beginning with the Mauryan dynasty and continuing through the British era. Also, a historical perspective on witnesses' function in the criminal justice system has been examined. Present-day legal standards may be traced back to the ancient Hindu and Muslim legal systems as well as the British legal system. The research went even further, delving into the conceptual analysis of hostile witness testimony and the laws of the law of evidence relevant to the questioning of witnesses.

There has already been discussion about how crucial it is that evidence presented in criminal prosecutions be of high quality. According to the Indian Evidence Act, direct testimony given orally is given more weight. In a court case, witnesses are crucial because their testimony is considered to be the most credible kind of direct evidence. In a criminal trial, the Prosecution may call and question a wide variety of witnesses. The types of witnesses testifying in a trial are dissected in Chapter III, Section 3.1.1. Prior work has assessed the legal framework for cross-examination of witnesses and the present legal standing of the hostile witness. While it does not define "hostile witness," the Evidence Act does offer a legal remedy in the event that a witness testifies against the party that called them. Antagonism among witnesses happens when a witness recants a statement made to the police during trial evidence. The definition of "hostile witness" by the courts and the weight that should be given to a hostile witness's testimony have both been examined. The phrase "hostile witness" has been defined by the Supreme Court as "one who is not desirous of stating the truth at the instance of the party summoning him." The Evidence Act allows each side to examine its own witness under section 154.

With the court's permission, the party who called the witness can question him or her in cross-examination under Section 154 of the Evidence Act. Moreover, the clause allows the party to rely on the evidence of any portion of such witness. Because of this, the testimony of an adversarial witness is not automatically disregarded. But only if the testimony of the hostile witness is deemed to be credible and reliable can it be used as evidence. Nevertheless, in reality, the prosecution's case is substantially weakened since hostile witnesses cause the entire testimony to be thrown out. Research using real-world data supports this, as detailed in Chapter V. The Supreme Court has recognised that the criminal justice system has been dealing with the painful experience of witnesses turning hostile rather regularly during trials, and that this is a squalid phenomenon that must be addressed. It has been argued that Witness Protection Programs are necessary to ensure the safety of potential witness.

The researcher has looked at the witness protection measures and programmes of Common Law countries to have a global perspective on witness protection programmes. The Witness Protection Plan 2018, implemented by the Central Government in India, has been compared and contrasted with the Witness Protection Programs of a small number of nations.

Our goal with this research was to compare and contrast the various Witness Protection programmes in use across nations with Common law legal systems. Australia, Canada, Kenya, the Philippines, South Africa, the United Kingdom, and the United States of America are among the countries chosen at random by the researcher. Although there is no specific law protecting witnesses in the United Kingdom, the Serious Organised Crime and Police Act of 2005 does include protection provisions. Similarly, the Attorney General of the United States has established the Witness Security Program under the Organized Crime Control Act of 1970. The Attorney General's power under the Organized Crime Control Act was expanded by additional legislation, namely the Witness Security Reform Act of 1984. Of the countries examined, the Philippines stood out for having exceptional Witness Protection programmes. The uniqueness of the Philippines Witness Protection Program is in the rights and privileges it affords the witness. It's worth noting that Kenya, a developing country, has strong Witness Protection laws. Legally, there is a three-tiered hierarchy in Kenya. In terms of safeguards, the Australian and Canadian Witness Protection laws are quite comparable

to one another. The aforementioned nations all have laws in place to protect witnesses. The Central Government of India has taken an important step towards protecting witnesses by implementing the Witness Protection Program 2018.

2018's Witness Protection Program is still in its early stages, with no actual deployment yet. For the Scheme to be effective, enabling legislation must be enacted. The Supreme Court's ruling, to which it has been happy to offer its imprimatur, is binding on all States and Union Territories until such time as appropriate legislation is enacted. The study also compares the witness protection regimes of the aforementioned nations to India's new Scheme.

The results of the study not only back up the concept that hostile witnesses are a problem for criminal trials, but they also lend credence to the idea that the prosecution's case suffers as a result. It is also clearly demonstrated that the prosecution does not benefit from the evidence of a trustworthy hostile witness, notwithstanding the existence of Section 154 of the Indian Evidence Act. In addition, the concept that proper laws enabling witness protection measures can reduce the occurrence of witnesses turning hostile has been verified.

6.2 SUGGESTIONS

The researcher puts forth the following preventive, procedural, protection and legislative measures and suggestions.

6.2.1 SUGGESTIONS TO THE POLICE

i. Statements taken by police under Section 161 of the Criminal Procedure Code take longer to be deposed in court. i. By then, the witness could have forgotten all that was said. So, it is crucial for the investigating officers and public prosecutors to work together to jog the witnesses' memories. The cops conducting the investigation know all the specifics that need to be relayed to the witness. The Public Prosecutors are responsible for making sure the prosecution witness provides all relevant information during examination in chief. An adequate examination in chief and cross examination plan should also be provided to the witness. For the same reason, it's important to familiarise witnesses with courtroom protocol.

ii. In order to reduce the likelihood of witnesses retracting testimony and avoiding depositions of first-hand accounts of what they witnessed during Panchanama, it is becoming increasingly important to enlist impartial witnesses or government workers. Hence, the Public Prosecutors will be able to prove the panchanama. In other words, law enforcement shouldn't fabricate evidence by planting a fake witness. In panchanama, Stock witnesses are only used as a last option. It is noted, however, that the Prosecution's use of generic witnesses is not very helpful. It is recommended that no stock witnesses be used at this stage of the inquiry.

iii. Police officers are increasingly expected to have a customer-focused stance. Educating the population at large about the need of participatory justice is essential. The importance of a witness in a trial must be communicated to civil society. The police must gain the witness's trust. Having a good connection between the investigating officer and the witness is essential.

iv. It has been noted that by the time a trial begins, the investigating officer has often been transferred to a different police station and is juggling a number of duties. The attendance of the Investigating Officer during the trial has been proposed. Witnesses will be more forthcoming with information if they know the relevant Investigating Officer is also there.

vi. It is of the highest importance that the testimony of relevant witnesses be documented without undue delay during the Stage of the inquiry. Statements are less likely to be exaggerated if they are recorded immediately.

vii. It's also important that at this point in the inquiry, police stop using canned statements from stock witnesses. As independent witnesses are reluctant to testify in criminal trials, the police have little choice but to rely on stock witnesses. A common observation, however, is that the credibility of such witnesses is often called into question.

If you need to record a witness's testimony under Article 161 of the Criminal Procedure Code, you should use an audio-visual electronic recording method. This will make the procedure more open and lessen the possibility that cops may embellish the statement.

viii. It is hypothesised that successful outcomes can be seen when training and best practises have been implemented. Police officers need to be educated on how to take a deposition in a legal setting. This should be a required component of police academies. It is important to educate law enforcement on how to properly document and implement new methods of operation. It is crucial that the Police adhere to the best practises that are periodically disseminated to them by the Bureau of Police research and development in order to maintain a strong Police force.

ix. A Trial Strategy is necessary for major cases. A Parvy officer is required to monitor the case, track down key witnesses, and ensure that their testimony is properly recorded.

6.2.2 SUGGESTIONS TO THE JUDICIARY

No adjournment or postponement should be allowed, as a general rule, when witnesses are present. The Criminal Process Law must be followed to the letter. Unless absolutely necessary, witnesses shouldn't be asked to come back for depositions on the day of the hearing. The deposition should be recorded on the same day as the hearing if the witness can be found. This will lessen the accused person's ability to influence the witness.

Care should be taken to ensure that the accused and witness are not face to face in the courtroom if the witness has made a complaint with the police alleging threat or intimidation by the accused. The accused must be prosecuted under Indian Penal Code section 195A. It has been noted that this clause is not routinely used.

An efficient trial is essential, thus steps must be done to make it happen. If the trial is taking too long, the witness can forget to mention anything important during the deposition. In addition, the accused has less opportunity to establish influence over witnesses by enticement or other means if the statements of material witnesses are recorded promptly after the trial has begun.

It is also hypothesised that the Sessions Judge's administrative responsibilities contribute to the trial's length. To guarantee that judges can quickly resolve cases, administrative duties must be minimised.

Sessions matters and exceptional cases should be resolved by the Court of Sessions within a certain time limit. v. The standards of trial and inquiry should be the same. If

the inquiry has strict time constraints, so should the trial. The Criminal Process Law of 1973 should include a time restriction for the conclusion of trials. If it proves effective, the use of summary trial might be mandated for all sessions cases, not just those involving the most serious offences (such as those involving life or sexuality).

If a witness recants a statement made under oath, the prosecution must follow the steps outlined in section 164 of the Criminal Procedure Code in order to file charges of perjury under section 193 of the Indian Penal Code. It's crucial that judges don't hesitate to pursue perjury charges when they find evidence of it. The perjury procedures that are started in this way are also recommended to be tried quickly and in the style of a summary trial.

In high-stakes trials, it's becoming more and more important to keep key witnesses from being physically present. If a witness is recognised as being particularly susceptible, their testimony can be videotaped via video conferencing technology. Current information and communication technologies (ICT) may be put to a variety of uses.

6.2.3 SUGGESTIONS TO THE GOVERNMENT

To protect the anonymity of witnesses, it is important to take the following steps: i. Legislative action is suggested to change Section 173 of the Code of Criminal Procedure and the Model Form of Charge sheet included in the Code to protect the identities of prosecution witnesses. There is a similar proposal that investigators should not use the panchanama to divulge the whereabouts of the pancha witnesses.

As the Pancha witnesses are often hostile, it is recommended that scientific evidence, such as photographs and videos of a panchanama, be relied on instead. While conducting panchanama, it is helpful to rely on gazetted officers as pancha witnesses.

The amendment of Code of Criminal Procedure section 164 is highly suggested. It has been proposed to include all sessions cases in the practise of recording the statements of material witnesses before a Magistrate under section 164(5) of the Code of Criminal Procedure. As a result, there will be less of a likelihood of witnesses turning on each other out of fear of perjury proceedings that the judge may begin. Priority may be given to crimes that directly affect human life or physical property.

iv. It was found via observation in the course of the empirical investigation that there is no information regarding the frequency with which prosecution witnesses become uncooperative in sessions cases. As soon as possible, someone has to start keeping track of adversarial witnesses. Using this information, law enforcement and prosecutors may compile a database to learn more about the factors that lead witnesses to flip against their former allies and what crimes are most likely to turn them hostile. It is also suggested that the Court registry keep track of information on hostile witnesses and share it with the Director of Prosecution, the local police department where the crime was reported, the district's police chief, and the Director General of Police. More effective monitoring and action may result from the information contained in this database.

According to research conducted in 2018, the Witness Protection Program's scope is restricted to acts of threat or intimidation. It does not cover any efforts on the part of the accused to influence the witness by inducements or any other methods. There will be no official start date for the Witness Protection programme before March of 2020. The deadline set by the Supreme Court in December 2018 has now passed. The Witness Protection Fund, as stipulated under the plan, was not allocated any funds in the 2020-21 Annual Budget of the State of Goa. For this reason, it appears that the scheme's implementation will take longer than initially anticipated. Before the programme can be put into effect, it must be ensured that all other conditions have been met. Even a little state like Goa might serve as an example of how the programme should be carried out. Immediate action is required to execute the kind of witness protection procedures listed in clause 7 of the programme.

A complete law enacting a witness protection mechanism is necessary. We recommend that Parliament pass new legislation outlining a formalised, systematic plan for protecting witnesses. By having the plan codified in law, it would become more mandatory for states in India to adopt. For this reason, the Indian government should pass a comprehensive Witness Protection Act that covers not only the protection of material witnesses under the special laws, but also crimes punishable by ten years of imprisonment or more, life in prison, or the death penalty under the Indian Penal Code. The Federal Government should consider enacting a Witness Protection law similar to those in other Commonwealth nations.

When it comes to hostile witnesses, the Indian Evidence Act of 1872 is silent. Section 154 does not explicitly define "hostile witness," hence a definition should be included in the Act. The witness ought to be adequately protected by law. Actions should be taken by the Central Government to alter the Indian Evidence Act to include a definition of hostile witness.

The State Government should increase the compensation given to witnesses who appear in court on the day of the hearing (point viii). The stipend for out-of-town witnesses should be increased, and a fund should be established to pay for their food and lodging. It is equally crucial that witnesses be treated with respect and courtesy throughout their time in court. For the convenience of the court's witnesses, a waiting area can be set up in the building itself.

The report recommended that the State Government take measures to provide police escort for key witnesses, including eyewitnesses, victims of sexual offences, complainants, and other individuals with information relevant to the case. The Prosecution agency has advised the Government of Goa to immediately take safeguards till the 2018 Witness Protection Scheme is implemented.

Private sector businesses are obligated to grant employees paid time off in the event they are required to appear as witnesses in court. The State Government is urged to issue a notice, Ordinance, or similar steps requiring all private firms to provide paid leave to their employees.

Only with impartial trials can the judicial system be considered effective. This highlights the growing need of striking a balance between the rights of victims and prosecution witnesses, in addition to the rights of those accused. It's an undeniable fact that witnesses are crucial to the functioning of the criminal justice system. The trial will be compromised if witnesses are prevented or rendered unable to aid in the administration of justice by testifying truthfully. One such barrier in the criminal justice system is the presence of hostile witnesses at criminal trials. The Witness Protection Program, 2018 was implemented by the Federal Government to address this issue. This marked a turning point in the management of India's criminal justice system.

Unfortunately, State Governments have not yet begun implementing the plan. Once the plan is put into action, we can evaluate how much of a beneficial impact it has on reducing the phenomena of witnesses turning hostile. The State Governments are responsible for figuring out how to carry out the strategy and overcoming any financial or logistical obstacles that may arise. Only the will of the State Governments, within whose sphere the problem of public order rests, may mitigate the danger of witness hostility by the provision of protection and appropriate aid to prosecution witnesses.

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