

# From Supreme Court–Backed Scheme to Statutory Duty: Is BNSS Section 398 'Adequate' Witness Protection?

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## ABSTRACT

Witness protection is a fundamental element of a just and fair criminal justice system, ensuring that witnesses can testify without fear of intimidation, retaliation, or harm. Judicial declarations (as in the Mahender Chawla case (2018)) and executive initiatives (like the Witness Protection Scheme, 2018) recognized by the Supreme Court have typically handled witness protection in India. Inconsistencies in their execution and an absence of legal enforceability resulted from the fact that these plans were not based on statute law. A major change has occurred with the implementation of Section 398 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS). Removing witness protection from the realm of discretionary policy measures and making it a legislative requirement, this clause mandates that state governments design and announce a witness protection system. To guarantee that witnesses are protected throughout the whole criminal justice process, this legislative framework seeks to provide uniform protection across all states and Union Territories. In this article, we trace the history of witness protection in India from court actions to legislative measures, and we examine whether or not Section 398 sufficiently allays witnesses' fears for their safety. In addition, it draws comparisons between India's legal system and foreign norms, showcasing successful strategies while pointing out obstacles to the scheme's full implementation. This analysis seeks to determine whether Section 398 offers sufficient protection or whether further reforms are necessary to strengthen witness security in India.

**Keywords:** Witness Protection, Bharatiya Nagarik Suraksha Sanhita, Section 398, Criminal Justice System, Legal Reform

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## 1. Introduction

The criminal justice system relies heavily on witness testimony since it is the principal source of evidence in several instances. Their testimonies can substantially impact the outcome of trials, influencing whether a defendant is convicted or acquitted. However, the adversarial nature of criminal trials, combined with the often dangerous world that surrounds criminal activities, places witnesses in a vulnerable position. They are at risk of intimidation, threats, and even violence, especially in high-profile or organized crime cases. This environment of fear can lead to witnesses retracting their statements, altering their testimonies, or even refusing to testify altogether. Such actions undermine the entire judicial process, obstruct justice, and often allow perpetrators to go free.<sup>1</sup>

The Indian legal system has long understood that protecting witnesses is critical to ensuring that trials remain fair and that everyone gets the chance to present their case. A number of steps were taken to ensure the safety of witnesses, such as official announcements from the judiciary, government decrees, and guidelines. Notwithstanding these endeavors, witness safety in India was not ensured by a coherent and obligatory legislative framework. The Supreme Court, through the momentous judgment in *Mahender Chawla v. Union of India (2018)*<sup>2</sup>, performed an essential function by mandating the 2018 Witness Protection Scheme's implementation by the government. Nonetheless, despite the significance of these plans, they remained unenshrined in law, leaving their execution up to the discretion of each state

<sup>1</sup> Kailash K. Soni, "Witness Protection in India: A Constitutional Perspective," in *Contemporary*

*Criminal Law Issues* (New Delhi: Eastern Law House, 2022), 214-236.

<sup>2</sup> 2018 SC 829, 2019 (14) SCC 615

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administrations. This resulted in disparities nationwide.<sup>3</sup>

Recognizing the inadequacy of these measures, the Indian legislature introduced a more structured approach with the enactment of *Section 398* of the “*Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023*”. This provision represents a critical milestone by shifting witness protection from an executive directive to a statutory obligation. Section 398 mandates that state governments frame and implement their own witness protection schemes, thereby creating a uniform and enforceable framework that ensures the safety of witnesses across India. This statutory provision signifies the state's commitment to witness protection, not as an ad hoc measure but as a core element of the unlawful justice system.

The importance of statutory backing cannot be overstated. While the Supreme Court’s directives in earlier cases set a foundation for witness protection, they did not carry the force of law. As a result, their implementation was often sluggish, inconsistent, or incomplete. With the inclusion of Section 398 in the BNSS, witness protection has now become a legal obligation, ensuring that it is not left to the discretion of individual states or judicial interpretations. The statutory duty imposed on the states represents a shift toward a more institutionalized and comprehensive approach, providing witnesses with more concrete protection and making it easier for courts to hold states accountable for failure to implement the provisions effectively.<sup>4</sup>

Despite the promise of Section 398, its adequacy remains a matter of concern. The practical challenges in implementing witness protection schemes at the state level, such as insufficient resources, administrative inefficiencies, and potential resistance from local authorities, could undermine its intended impact. Furthermore, there may be inconsistencies in the extent and quality of witness protection offered by various states due to the absence of a national witness protection agency or centralized supervision system. The purpose of this article is to take a close look at Section 398 and see whether it adequately protects

witnesses throughout India or if further changes and funding are needed to make it work.<sup>5</sup>

A major improvement to India's witness protection laws has been the passage of Section 398. It indicates that the government understands the importance of witnesses and the necessity to keep them safe from threats or pressure. But we don't yet know how well this provision holds up in actual use. To determine if the statutory requirement outlined in Section 398 offers adequate protection or necessitates additional enhancements to guarantee that witnesses can testify without fear—and thus reinforce the credibility of India's criminal justice system—this paper will analyze its provisions, difficulties in implementation, and comparison with global norms. indicates.<sup>6</sup>

## 2. Legal and Historical Background

### 2.1 Pre-BNNS Framework

Prior to statutory codification, witness protection in India was promoted through:

- Supreme Court Judgment in ‘Mahender Chawla v. Union of India (2018)’<sup>7</sup>: In 2018, the Court gave its stamp of approval to the Witness Protection system, instructing states and union territories to put it into action. Until Parliament passes legislative measures, the Court regarded the system as a binding legislation under Articles 141 and 142 of the Constitution.
- Executive Schemes: The Home Affairs Ministry circulated guidelines for implementation, but these lacked express statutory backing and enforceability unless adopted by state governments.

### 2.2 The Bharatiya Nagarik Suraksha Sanhita Act (BNSS), 2023

Witness protection was one of many criminal process rules incorporated within the BNSS, which succeeded the Code of Criminal process and went into effect on July 1, 2024. Under Section 398, “*Every State Government shall prepare and notify a Witness Protection Scheme for the State with a view to ensure protection of the witnesses.*”

<sup>3</sup> Vikram Singh, "The Concept of Witness Protection and its Legal Framework in India," in *Protection of Human Rights and Legal Reforms in India*, ed. Ramesh Kumar (New Delhi: ILSA Publishers, 2021), 56-70.

<sup>4</sup> Arvind Kumar, "Witness Protection and the Criminal Justice System," *Indian Law Journal* 62, no. 4 (2020): 233-249.

<sup>5</sup> R. K. Agrawal, "Witness Protection: A Need for Stronger Legal Framework," *Indian Law Review* 17, no. 2 (2022): 120-133.

<sup>6</sup> Ashok Kumar, "Witness Protection: Constitutional and Legal Framework in India," in *Law and Justice in India* (New Delhi: LexisNexis, 2020), 102-123.

<sup>7</sup> 2018 SC 829, 2019 (14) SCC 615.

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This places witness protection onto a statutory footing, transforming it from a discretionary policy tool to a mandated duty of state governments.

### 3. Provisions and Mechanisms Under Section 398

Section 398 of the *BNSS 2023* represents a major step in formalizing witness protection in India. While it does not provide detailed operational procedures, it mandates that state governments formulate and implement comprehensive witness protection schemes. These state-level schemes must adhere to the principles outlined by Section 398 but are free to tailor specifics to local needs, while ensuring consistent protection across the country. The introduction of this statutory framework aims to standardize witness protection and ensure its reliability and enforceability. Below are the key provisions and mechanisms typically included in these schemes, based on draft and notified guidelines, that aim to safeguard witnesses from intimidation, threats, and retaliation.<sup>8</sup>

#### ❖ Threat Assessment

One of the foundational elements of the witness protection scheme under Section 398 is the *Threat Assessment* process. Law enforcement agencies are tasked with conducting comprehensive *Threat Analysis Reports* to assess the level of danger faced by witnesses. These reports categorize witnesses into different risk categories, based on factors such as the nature of the case, the defendant's profile (e.g., their criminal history and resources), and the likelihood of retaliation. This detailed assessment helps law enforcement determine which protective measures are appropriate for each witness, ensuring a targeted and effective response. Such an approach is vital because the degree of threat can vary significantly across cases, and the protection strategy must be commensurate with the level of risk involved.

#### ❖ Protective Measures

Section 398 also ensures the implementation of *Protective Measures* designed to safeguard witnesses and maintain the veracity of their witness. These measures include physical security, such as *police protection*, where armed personnel may be assigned to protect witnesses at various stages of the legal process, including pre-trial, during the trial, and post-trial. Another important protective measure is *relocation*, which allows witnesses to move to a safer location if they are at risk of being harmed in their current

environment. *Identity concealment* involves legally altering the witness's identity to prevent retaliation, a particularly useful tool in cases involving organized crime or powerful individuals. Further, witnesses may testify without physically being present in the courtroom via the use of live video connections and in-camera testimony, which are closed court procedures. This reduces the possibility of intimidation or injury. The goal of these safeguards is to make sure that those who testify in court don't have to worry about their safety.

#### ❖ Witness Protection Funds

A component of the legislative framework is the allocation of Witness Protection Funds to each state, which allows for the successful implementation of these protective measures. Housing, relocation, security staff, and legal fees are all part of witness protection, and these monies are set aside to pay those expenses. To avoid administrative inefficiencies and budgetary restrictions, it is crucial to set up such a financial provision for witness protection procedures. Access to these funds guarantees that witness protection is not just a theoretical right but a practical, executable policy. Furthermore, the availability of funds demonstrates the state's commitment to protecting witnesses and preserving the integrity of its criminal justice system.<sup>9</sup>

#### ❖ Competent Authorities

At the state and district levels, Competent Authorities are designated under Section 398 to ensure the effective and coordinated execution of witness protection measures. Within their respective domains, these agencies must coordinate the implementation of witness protection programs. At the district level, committees are formed to oversee the implementation and monitoring of protective measures. These committees are usually composed of police officers, legal experts, and other relevant stakeholders who are tasked with ensuring the timely and effective protection of witnesses. The role of these authorities extends beyond just the operational aspects; they are also responsible for conducting periodic reviews to assess the adequacy of existing protection measures and make adjustments where necessary. The establishment of these district-level committees helps create a more localized and responsive framework,

<sup>8</sup> National Human Rights Commission, "Study Report on the Protection of Witnesses," Government of India, 2019, accessed on 8 January 2026, <https://nhrc.nic.in>.

<sup>9</sup> Subhash Chandra, "An Evaluation of the Witness Protection Scheme in India," *Indian Journal of Public Policy* 16, no. 3 (2022): 22-40.

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ensuring that witness protection needs are addressed efficiently.

### ❖ Family Protection

An important feature of the witness protection schemes outlined under Section 398 is the extension of protective measures to the *family members of witnesses*. This provision recognizes that threats to witnesses often extend to their loved ones, who may become targets of retaliation in an effort to coerce the witness into withdrawing or altering their testimony. As such, the family members of witnesses, especially those who are directly dependent on them, may also receive police protection, relocation, and other forms of assistance. Witnesses will not have to choose between their own and their families' safety thanks to this all-encompassing method. It is simpler for witnesses to testify without worrying about damaging their loved ones since the legislation extends protection to family members, creating a more complete and strong system of security.<sup>10</sup>

### 4. From Judicial Scheme to Statutory Duty: The Shift

A major step forward in the development of India's criminal justice system has been the transition in witness protection from plans supported by judges to regulations established by statute. It is part of a larger movement to institutionalize and formalize important parts of the legal system so that they may be reliably and consistently applied nationwide. The Supreme Court played a pivotal role in the early stages of witness protection in India, the enactment of *Section 398* of the *BNSS, 2023*, marks the formalization of witness protection as a legal duty of the state, elevating it from an executive directive to a statutory obligation.<sup>11</sup>

#### 4.1 Judicial Backing: Supreme Court's Role

The Indian Supreme Court's decisions have been crucial in shaping the field of witness protection law. Recognizing the serious dangers witnesses confront, the Supreme Court determined in the seminal case of *Mahender Chawla v. Union of India (2018)* that

Article 21 of the Constitution guarantees witness the right to life and personal liberty, which includes protection against threats to their identity. To maintain justice and the rule of law, the Court said, it was essential to make sure witnesses were secure. If the criminal justice system could not provide a fair trial via adequate witness protection, the whole legal process would be undermined. In its ruling, the Court ordered the federal and state governments to establish a Witness Protection Scheme to safeguard witnesses from any kind of physical or legal violence.<sup>12</sup>

Despite the judicial order, the Supreme Court could not provide a comprehensive legal framework by itself. The Court's powers under *Articles 141* and *142* allowed it to treat its directions as binding law, which meant that the *Witness Protection Scheme, 2018* became enforceable under the Court's directives.<sup>13</sup> However, this arrangement had inherent limitations. Firstly, it relied on the executive for implementation, leading to inconsistent application across states. Secondly, the Supreme Court's directives lacked the permanence and institutional stability that could only be achieved through legislation. Thus, while the Mahender Chawla ruling was revolutionary in safeguarding witnesses, it was evident that a statute was required to guarantee the broad, consistent, and long-term implementation of witness protection provisions.<sup>14</sup>

#### 4.2 Statutory Embedding: Section 398 BNSS

With the introduction of *Section 398* in the *BNSS, 2023*, witness protection transitioned from a Court-driven scheme to a *statutory duty*. Section 398 specifically mandates that every state government prepare and notify a witness protection scheme, providing a legal foundation for the protection of witnesses. This shift from a judicially sanctioned executive scheme to a statutory duty carries several critical implications, both in terms of the legal landscape and the practical implementation of witness protection measures.

- **Legal Obligation:** The most significant change introduced by Section 398 is the

<sup>10</sup> 'Report of the Committee on Witness Protection, "Final Report on Witness Protection in India," Ministry of Home Affairs, Government of India, 2020, accessed on 8 January 2026, <https://mha.gov.in/sites/default/files/FinalReportWitnessProtection.pdf>.'

<sup>11</sup> Manoj Sethi, "The Role of Section 398 in Strengthening Witness Protection in India," *Indian Criminal Justice Journal* 19, no. 1 (2023): 35-52.

<sup>12</sup> P.K. Tripathi, "The Role of the Judiciary in Witness Protection: A Study of Judicial Initiatives in India,"

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<sup>13</sup> Vinayak Yadav, "Witness Protection as a Fundamental Right: An Examination," *Journal of Indian Legal Studies* 18, no. 4 (2020): 144-159.

<sup>14</sup> Supreme Court of India, "Mahender Chawla v. Union of India," *Judgments of the Supreme Court of India* (2018), accessed on 12 December 2025, <http://www.supremecourt.gov.in/judgments/2018>.

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establishment of legal obligation for state governments. Unlike the earlier executive schemes, which were voluntary and could be ignored or poorly implemented by individual states, the statutory requirement binds state governments to ensure that comprehensive witness protection schemes are in place. States are now legally mandated to design and enforce these schemes, providing a clear legal framework within which witness protection must occur. Failure to comply with the statutory duty could lead to judicial intervention, ensuring accountability in witness protection efforts.

- **Institutional Framework:** The statutory embedding of witness protection also creates an institutional framework for its implementation. Previously, witness protection was handled on an ad-hoc basis, often in the form of temporary arrangements or executive orders. The introduction of Section 398 ensures that witness protection schemes are institutionalized and standardized across the country. This consistency is crucial in ensuring that the protection offered to witnesses is both predictable and uniform, irrespective of which state or Union Territory a witness resides in. The establishment of state-level committees to oversee the schemes and allocate resources is an important step toward creating a more organized and sustainable system.
- **Judicial Enforceability:** Section 398, by transforming witness protection into a statutory duty, also enhances its judicial enforceability. Under the earlier system, witnesses and their advocates could approach the Court in cases where protection measures were insufficient or absent. However, judicial intervention was often piecemeal and reactive. With the statutory backing provided by Section 398, citizens can now directly seek judicial enforcement of witness protection measures. If a state fails to enact or implement its scheme, citizens can challenge the non-compliance in court, prompting judicial oversight and ensuring that states fulfill their constitutional and legal duties.

### ❖ Implications for Strengthening Legal Architecture

The evolution from a Supreme Court–backed scheme to a statutory duty under Section 398 represents a *strengthening of the legal architecture* for witness protection in India. Previously, witness protection was treated as an ancillary or secondary issue that was addressed through executive discretion. The increasing significance of protecting the fairness of trials and the basic rights of witnesses has led to its permanent incorporation into the criminal justice system.<sup>15</sup>

Furthermore, this change guarantees that witness protection is no longer a matter that may be influenced by administrative or political caprices. Section 398 makes witness protection a constitutionally mandated subject, elevating it to the status of a matter of law. The public's faith in the justice system is maintained and the likelihood of harassing or intimidating witnesses is decreased. The change shows that India's criminal justice system is serious about delivering justice without bias or favoritism, which boosts its legitimacy.

### 5. Assessment: Is Section 398 ‘Adequate’?

#### 5.1 Strengths

1. *Uniform Mandate across States:* Section 398 ensures every state must act, reducing the fragmentation of protection measures.
2. *Statutory Clarity:* A clear legal obligation may promote greater implementation and accountability.
3. *Broader Protective Tools:* Many schemes include progressive tools (identity shielding, relocation, dedicated funds).<sup>16</sup>

#### 5.2 Challenges and Gaps

Despite advancement, concerns remain:

- *Limited Prescriptive Detail:* Section 398 mandates *creation* of schemes but does not prescribe minimum standards or enforcement mechanisms, potentially leading to uneven protections across states.
- *Implementation Delays:* Several states have yet to frame detailed rules or notify schemes, leading to judicial intervention evidenced by Supreme Court notices to states like Madhya Pradesh for inaction.
- *Resource Constraints:* Effective witness protection requires trained personnel, funds,

<sup>15</sup> Rajesh Kumar & Alok Patel, "Challenges in the Implementation of Witness Protection Programs," *National Criminal Law Review* 7, no. 5 (2021): 55-68.

<sup>16</sup> R. K. Agrawal, "Witness Protection: A Need for Stronger Legal Framework," *Indian Law Review* 17, no. 2 (2022): 120-133.

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and infrastructure gaps that many states may struggle to address.

- *Operational Challenges:* Ensuring confidentiality in the digital age and balancing protection with the accused’s fair trial rights are complex challenges.<sup>17</sup>

### 5.3 Comparative Perspective

When comparing India’s witness protection framework to international models, the differences in scope and institutionalization become apparent. Witness protection systems in countries like Italy and the US are significantly more extensive and powerful than those in India at the moment, and they provide a wider variety of services. For American citizens, there is the 1970-established *Federal Witness Protection Program (WITSEC)*, provides a national, centralized system for protecting witnesses involved in high-risk cases, particularly those involving organized crime, terrorism, and drug trafficking. This program offers long-term protection, which can include the relocation of witnesses and their families to undisclosed locations, changing their identities, and providing new social security numbers, bank accounts, and employment opportunities. Witnesses and their families are often relocated far from their original lives, with continuous support and surveillance to ensure their safety. Additionally, the U.S. system offers social integration services, helping relocated individuals to establish new lives, including housing, employment, and psychological counseling. Similarly, *Italy’s witness protection program*, which has been in operation since the 1990s, includes comprehensive measures such as identity changes, physical relocation, and continuous monitoring for those at significant risk, especially in cases involving mafia organizations. The Italian system is centrally coordinated and provides long-term, holistic support to ensure that witnesses can reintegrate into society while maintaining their safety. In contrast, India’s statutory framework, while progressive, remains largely focused on state-level implementation, which can create significant disparities in the quality and scope of protection available across different regions. *Section 398 of the BNSS*, though a positive step toward standardizing witness protection, largely delegates the responsibility of implementing protection measures to individual

states. As a result, the protection schemes may vary from state to state, with some states potentially lacking the resources, infrastructure, or administrative efficiency required to offer robust protection. For instance, the lack of a *centralized national witness protection agency* in India means that each state must independently allocate resources and design its own procedures, which could lead to inefficiencies and uneven protection across the country. Additionally, while the framework under Section 398 includes provisions like threat assessments and protective measures, it does not yet provide for long-term, comprehensive support such as full identity changes or continuous social integration assistance, which are fundamental aspects of successful international models. India’s system also currently lacks the depth of social and psychological support that international programs offer to witnesses who may suffer from trauma or stress due to their involvement in high-stakes cases. Therefore, while India has taken a crucial step by enacting a statutory duty for witness protection, its framework remains less institutionalized and more procedural compared to the more comprehensive and integrated systems in countries like the U.S. and Italy. For India to achieve a truly robust witness protection program, it may need to consider establishing a centralized agency, allocating national resources, and providing long-term, holistic support similar to these international counterparts.<sup>18</sup>

### 6. Conclusion

Section 398 of the *Bharatiya Nagarik Suraksha Sanhita (BNSS)* represents a significant shift in India’s approach to witness protection, transforming it from a judicially backed, executive-driven scheme into a legally binding statutory duty. By embedding witness protection as a legal right, Section 398 ensures that the state is legally obligated to safeguard witnesses, reinforcing the foundational principle of justice that witnesses must be able to testify without fear of retaliation. This move marks a critical evolution in the Indian criminal justice system, making witness protection an essential part of legal proceedings, rather than a discretionary or ad-hoc measure.<sup>19</sup>

However, the effectiveness of Section 398 will depend heavily on its implementation across the states, uniformity of standards, allocation of sufficient

<sup>17</sup> S. Mahendra, "Witness Protection Schemes: Legal and Administrative Gaps," *Journal of Indian Criminal Law* 13, no. 2 (2021): 45-59.

<sup>18</sup> Sangeeta Mehta, "The Need for Comprehensive Witness Protection Laws in India," *Criminal Justice and Public Policy Review* 12, no. 1 (2021): 76-92.

<sup>19</sup> Arvind Kumar, "Witness Protection and the Criminal Justice System," *Indian Law Journal* 62, no. 4 (2020): 233-249.

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resources, and consistent judicial oversight. While the statutory framework is a step forward, challenges remain in translating it into effective protection for all witnesses, particularly given the disparities in administrative capabilities among different states. To ensure that witness protection is not merely a procedural formality, the framework must be supported by robust institutional mechanisms, including a national agency to coordinate efforts, and adequate social and psychological support for witnesses. Only by strengthening these foundations can India fully realize the constitutional promise of justice and ensure that witnesses are truly protected from threats and intimidation.<sup>20</sup>

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