

Witness Protection In India: Legislative Deficit, Empirical Dimensions, Comparative Models, And The Imperative Of Parliamentary Legislation

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ABSTRACT

The administration of criminal justice in India is imperilled by a persistent and structurally entrenched problem: the large-scale turning hostile of witnesses in serious criminal proceedings. The National Crime Records Bureau (NCRB) Crime in India 2023 Report documents an overall conviction rate of only 54 per cent for Indian Penal Code (IPC) offences, with the murder conviction rate standing at a mere 37.7 per cent and the rape conviction rate at 22.7 per cent — stark indicators of a justice system in which oral testimony, the primary vehicle of proof in India's adversarial trial architecture, is systematically compromised. Forensic and judicial scholarship consistently attributes a significant proportion of these acquittals to the phenomenon of witnesses retracting sworn depositions under threat, inducement, or fear. Despite this empirically documented crisis, India does not possess a dedicated Parliamentary legislation on witness protection. The Witness Protection Scheme, 2018, adopted pursuant to the Supreme Court's direction in *Mahender Chawla v Union of India* (2018) 14 SCC 716, remains a non-statutory administrative instrument, unenforceable as a matter of legal right, inadequately funded, and variably implemented across states. This paper undertakes a systematic doctrinal and comparative analysis of witness protection law, examining the constitutional foundations, the existing Indian statutory and administrative framework under the newly enacted *Bharatiya Nagarik Suraksha Sanhita 2023* (BNSS) and *Bharatiya Sakshya Adhinyam 2023* (BSA), and the legislative regimes in the United States, the United Kingdom, and Australia. Drawing on the functional comparative method and verified empirical data, the paper argues that India's current framework is constitutionally deficient and institutionally inadequate, and concludes with a concrete legislative roadmap for a comprehensive Parliamentary statute on witness protection.

Keywords: Witness Protection, Hostile Witness, BNSS 2023, BSA 2023, Witness Protection Scheme 2018, Article 21, WITSEC, Coroners and Justice Act 2009, Fair Trial, Organised Crime, India Criminal Justice Reform

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I. INTRODUCTION

The administration of criminal justice in any constitutional democracy ultimately rests upon the quality and reliability of evidence adduced before courts of law. In India, as in all common law jurisdictions that inherited the adversarial tradition from England, oral testimony occupies a position of singular primacy in the evidentiary hierarchy. The philosopher Jeremy Bentham memorably described witnesses as the 'eyes and ears of justice' — a metaphor that has lost none of its analytical force in the intervening two centuries.¹

The NCRB Crime in India 2023 Report — the most current authoritative data set on Indian criminal justice administration — paints a sobering picture. India recorded 6.24 million cognizable crimes in 2023, a 7.2

per cent increase over the preceding year. The overall IPC conviction rate was 54 per cent.² The murder conviction rate was 37.7 per cent, meaning that in approximately six out of every ten murder trials that reach a final verdict, the accused walks free. The rape conviction rate stood at 22.7 per cent, implying that over three-quarters of rape prosecutions that complete trial result in acquittal.³ The charge-sheeting rate — a proxy for the quality of pre-trial investigation — was 72 per cent. Against these figures, the number of cases pending trial in courts at the end of 2023 stood at enormous levels: 2,72,198 murder cases and 2,03,067 rape cases were under trial, with convictions secured in only 7,181 and 4,464 cases respectively in the calendar year.

¹Jeremy Bentham, *Rationale of Judicial Evidence* (Hunt and Clarke, 1827) vol 1, 3.

²National Crime Records Bureau (NCRB), *Crime in India 2023* (Ministry of Home Affairs, Government of

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India, 2024) — Overall IPC Conviction Rate: 54%; Charge-sheeting Rate: 72%.

³NCRB, *Crime in India 2023* (n 2) — Murder Conviction Rate: 37.7%; Rape Conviction Rate: 22.7%.

While multiple systemic factors contribute to this crisis — police under-manning, forensic capacity deficits, prosecutorial quality, and chronic court delays — the phenomenon of witnesses turning hostile stands out as a structurally distinctive and normatively troubling cause. A witness is said to have 'turned hostile' when they refile from a statement previously made to the police under Section 179 of the BNSS 2023 (corresponding to Section 161 of the repealed CrPC 1973) and either deny the earlier statement or give testimony favourable to the accused in open court. Section 141 of the Bharatiya Sakshya Adhiniyam 2023 (BSA) — corresponding to Section 154 of the Indian Evidence Act 1872 — permits cross-examination of such a witness by the party that called them, but this remedy is at best ameliorative: it does not address the causes of retraction, nor does it reconstitute the credibility of an undermined deponent.⁴ The scale of the hostile witness phenomenon in high-profile criminal cases in India is alarming. In the Sohrabuddin Sheikh fake encounter case, 33 of 49 prosecution witnesses turned hostile.⁵ In the Best Bakery case arising from the Gujarat riots of 2002, the Supreme Court found in *Zahira Habibullah H Sheikh v State of Gujarat* (2004) 4 SCC 158 that witnesses had been systematically intimidated into retracting depositions, holding that the entire first trial had been 'a mockery of the judicial process.'⁶ In the years that have followed, the phenomenon has not abated. Recent data from Assam — one of the few states to have actively tracked the impact of the new criminal laws — indicates that the introduction of mandatory technology-based investigation under the BNSS has contributed to a reduction in hostile witness rates and a near-trebling of the conviction rate to 66 per cent; but this is an exception that proves the rule in most other states.⁷ Against this empirical backdrop, the present paper argues that India's current legal architecture for witness protection is constitutionally inadequate, institutionally fragmented, and operationally ineffective. It proceeds through four analytical movements: (i) an examination of the constitutional and statutory framework under the new criminal codes; (ii) an empirical mapping of the hostile witness crisis; (iii) a comparative analysis of the legislative regimes of the United States, the United Kingdom, and Australia; and (iv) a normative proposal for Parliamentary legislation. The paper concludes that the enactment of a dedicated, rights-compatible Witness Protection Act is not merely a desideratum of criminal

procedure reform but a constitutional obligation of the Indian State under Article 21.

II. THE CONSTITUTIONAL AND STATUTORY FRAMEWORK IN INDIA

2.1 Constitutional Foundations

India does not possess a constitutional provision expressly guaranteeing witness protection. However, the Supreme Court has, through an expansive interpretation of Article 21 of the Constitution — which guarantees to 'every person' the right to life and personal liberty — progressively constructed a constitutional basis for State-provided witness protection. The right to life under Article 21 has been interpreted to include the right to live with dignity and the right to freedom from fear.⁸ A witness who faces credible threats to their life or safety as a consequence of testifying in a criminal trial has an arguable and judicially recognised claim under Article 21 that the State is constitutionally obliged to take effective measures to ensure their protection.

The Supreme Court gave definitive constitutional expression to this obligation in *Mahender Chawla v Union of India* (2018) 14 SCC 716, observing that 'one of the main reasons for witnesses turning hostile is the lack of appropriate protection by the State' and that 'being unable to testify in courts due to threats or other pressures is a clear violation of Article 21 of the Constitution.'⁹ The Court thereupon directed all States and Union Territories to enforce the Witness Protection Scheme, 2018 'in letter and spirit', and — critically — held that by virtue of Articles 141 and 142 of the Constitution, the Scheme as approved in that judgment was binding on all courts throughout the territory of India.

Article 39A of the Constitution, which mandates the State to ensure that the legal system promotes justice on a basis of equal opportunity and provides free legal aid to those who cannot afford it, provides a further constitutional grounding for witness protection. A criminal justice system in which witnesses in serious cases cannot testify freely by reason of fear is one that manifestly fails to deliver equal justice. The Directive Principle in Article 39A, while not directly enforceable, has been recognised by the Supreme Court as an interpretive guide to statutory construction and administrative action.¹⁰

2.2 The New Criminal Codes and Witness Protection

⁴Bharatiya Sakshya Adhiniyam 2023, s 141 (corresponding to Indian Evidence Act 1872, s 154).

⁵Shankar IAS Parliament, 'Securing Witnesses is Crucial' (19 February 2018) <<https://www.shankariasparliament.com/current-affairs/securing-witnesses-is-crucial>> accessed May 2025.

⁶*Zahira Habibullah H Sheikh v State of Gujarat* (2004) 4 SCC 158 (SC).

⁷Deccan Herald, 'In Assam, conviction rate under new criminal laws up by over 2.5 times to 66%' (19 March 2025).

⁸*Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) 1 SCC 608; *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545.

⁹*Mahender Chawla v Union of India* (2018) 14 SCC 716, para 21.

¹⁰*Hussainara Khatoon v Home Secretary, State of Bihar* (1979) 3 SCC 544.

The three landmark statutes enacted by Parliament in 2023 — the Bharatiya Nyaya Sanhita 2023 (BNS), the Bharatiya Nagarik Suraksha Sanhita 2023 (BNSS), and the Bharatiya Sakshya Adhinyam 2023 (BSA) — replaced, respectively, the Indian Penal Code 1860; the Code of Criminal Procedure 1973; and the Indian Evidence Act 1872. These statutes came into force on 1 July 2024. They represent the most sweeping overhaul

of India's criminal justice architecture since independence. Yet, as the following analysis demonstrates, even this comprehensive reform has not produced a dedicated legislative framework for witness protection.

The following Table 1 maps the principal witness-protection-relevant provisions of the new codes against their predecessors.

Table 1: Key Witness Protection Provisions — Old and New Criminal Law Framework

Subject Matter	Old Law (CrPC 1973 / IEA 1872 / IPC 1860)	New Law (BNSS 2023 / BSA 2023 / BNS 2023)
Evidence via Video-link	S 273 CrPC — evidence in presence of accused; court discretion to permit audio-visual means.	S 536 BNSS — retains the principle; expanded provisions for electronic recording and video-conferencing testimony; S 183 BNSS enables electronic communication for statements.
In-camera Proceedings	S 327 CrPC — in-camera trials in cases of rape and certain offences.	S 530 BNSS — corresponding provision; retained and applicable to sensitive cases.
Hostile Witness / Cross-examination	S 154 IEA — party calling witness may cross-examine them if declared hostile.	S 141 BSA — corresponding provision; same operative rule retained.
Indecent / Scandalous Questions	Ss 151–152 IEA — court's discretion to disallow.	Ss 137–138 BSA — protects witnesses; retained.
Perjury / False Evidence	S 193 IPC — criminalises giving false evidence in judicial proceedings.	S 229 BNS — corresponding offence; retained with enhanced penalties.
Intimidation / Witness Tampering	S 195A IPC (inserted 2006) — criminalises threatening or inducing a witness to give false evidence.	S 223 BNS — corresponding provision; offences affecting administration of justice retained in Chapter XIV.
Dedicated Witness Protection Statute	NIL — no standalone legislation.	NIL — no standalone legislation enacted even under the new codes.

Source: Compiled from BNS 2023, BNSS 2023, BSA 2023, IPC 1860, CrPC 1973, IEA 1872.

The picture that emerges from Table 1 is illuminating. While the new codes have modernised several procedural provisions — most notably by entrenching video-link testimony and electronic statement recording as statutory rights — they have made no structural advance on the fundamental problem: the absence of a dedicated legislative framework for witness protection. The legislative vacuum persists in precisely the same form under the BNSS and BSA as it did under the CrPC and IEA. The Witness Protection Scheme, 2018 — the sole comprehensive framework — remains non-statutory.

2.3 The Witness Protection Scheme, 2018: Provisions and Structural Deficiencies

The Witness Protection Scheme, 2018, approved by the Supreme Court in *Mahender Chawla*, was formulated by the Ministry of Home Affairs in consultation with the National Legal Services Authority (NALSA) and the Bureau of Police Research and Development (BPRD) on the basis of inputs from eighteen States and Union Territories, three High Courts, civil society organisations, and police personnel.¹¹ It represents the most detailed administrative articulation of witness protection in India's history. Its principal features include: a three-tier threat categorisation (Category A — threat to life; Category B — threat to safety, reputation, or property; Category C — threat during trial); a Witness Protection Fund in each State; a Threat Analysis Report prepared by the District Superintendent of Police or equivalent; and a range of protection measures from

¹¹Ministry of Home Affairs, Government of India, Witness Protection Scheme 2018, Preamble (5

December 2018) <<https://www.mha.gov.in>> accessed May 2025.

increased police patrolling to relocation and identity change.

However, the Scheme suffers from four fundamental structural deficiencies that distinguish it from the legislative regimes of comparable common law jurisdictions. First, it is non-statutory: it derives its binding force solely from the Supreme Court's direction under Articles 141 and 142 of the Constitution, not from Parliamentary legislation. A witness whose protection is inadequate has no enforceable statutory right of action. Second, the funding mechanism is structurally deficient: no central government contribution is mandated; the Witness Protection Fund depends entirely on State budgetary allocations, court-ordered fines, and voluntary contributions. The National Human Rights Commission's 2019 Report found that most States had not constituted the required Witness Protection Funds at all.¹² Third, there is no independent oversight body: the Competent Authority is either the Court or the District and Sessions Judge, and there is no dedicated witness protection authority with investigative or enforcement powers. Fourth, protection orders under the Scheme are limited to a maximum of three months, extendable — a constraint that is operationally inadequate for Category A witnesses in long-running organised crime or terrorism trials.¹³

More broadly, implementation of the Scheme has been conspicuously uneven. National Law School of India University's ongoing Witness Protection in Karnataka Project, supported by Hanns Seidel Stiftung and in collaboration with NALSA and the Karnataka State Legal Services Authority, has documented through RTI-based data collection that protection requests, approvals, and enforcement mechanisms function at levels far below what the Scheme contemplates.¹⁴ Public awareness of the Scheme among potential witnesses, police personnel, and legal practitioners has been characterised by multiple assessments as 'negligible.'

III. THE EMPIRICAL DIMENSIONS OF INDIA'S WITNESS CRISIS

3.1 NCRB Data: Conviction Rates, Pending Trials, and Systemic Failure

The NCRB Crime in India series, published annually by the Ministry of Home Affairs, provides the most authoritative and systematically compiled statistical picture of criminal justice administration in India. Table 2 below presents key conviction-rate data drawn from the NCRB Reports for 2021–2023, illustrating the magnitude of the evidentiary failure in India's criminal justice system and the structural context in which the hostile witness phenomenon operates.

Table 2: Key NCRB Criminal Justice Performance Data, 2021–2023

Indicator	2021	2022	2023
Overall IPC Crime Rate (per 100,000)	445.9	422.2	448.3
Total Cognizable Crimes (million)	~5.8	5.82	6.24
IPC Charge-Sheeting Rate (%)	~71%	72%	72.7%
IPC Conviction Rate (%)	57.0%	54.2%	54.0%
Murder Conviction Rate (%)	~40%	~39%	37.7%
Rape Conviction Rate (%)	~27%	~26%	22.7%
Murder Cases Under Trial (courts)	—	~2.5 lakh	2,72,198
Rape Cases Under Trial (courts)	—	~1.9 lakh	2,03,067
IPC Cases Pending Investigation (%)	—	~28%	29.2%

Source: NCRB, Crime in India 2021, 2022, 2023 (Ministry of Home Affairs, Government of India); Government of India, Rajya Sabha Reply, 20 December 2024.

¹²National Human Rights Commission of India, Report on Witness Protection (2019) <<https://nhrc.nic.in>> accessed May 2025.

¹³IPleaders, 'Witness Protection Scheme in India' (2019); Witness Protection Scheme 2018, cl 6(g).

¹⁴National Law School of India University, 'Project on Witness Protection Scheme in Karnataka' (2024) <<https://www.nls.ac.in/projects/witness-protection-scheme-in-karnataka-project/>> accessed May 2025.

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Several features of these data deserve particular analytical attention. First, the conviction rate has declined consistently — from 57.0 per cent in 2021 to 54.0 per cent in 2023. Second, the murder and rape conviction rates — the two categories where witness intimidation is most acutely documented — are substantially below the overall average and on a declining trajectory. Third, the enormous backlog of trials in courts — over 2.72 lakh murder cases and 2.03 lakh rape cases pending in 2023 — represents both a cause and an effect of the hostile witness crisis: delay in trial creates extended windows of vulnerability for witnesses, while the failure of convictions through hostile witnesses further congests the courts through retrials and appeals. Fourth, the charge-sheeting rate of approximately 72 per cent indicates that of every ten cases investigated, nearly three do not result in the filing of a charge-sheet — a significant attrition rate that, in high-profile organised crime cases, is also partially attributable to the intimidation of key witnesses at the pre-trial stage.

3.2 Case Studies: The Hostile Witness Phenomenon in Practice

The empirical picture presented by the NCRB data is corroborated by the jurisprudential record of the Supreme Court. Three leading decisions illustrate the scale and gravity of the hostile witness problem in India's most significant criminal prosecutions:

Zahira Habibullah H Sheikh v State of Gujarat (2004) 4 SCC 158: The prosecution in the Best Bakery case — arising from communal violence during the 2002 Gujarat riots — collapsed entirely when key eyewitnesses retracted their depositions before the Sessions Court. The Supreme Court found that 'a fair trial entails the interest of the accused, the victim and of society' and ordered a retrial before a different court in a different state. It observed that witness intimidation had made the original trial a travesty.¹⁵

Swaran Singh v State of Punjab (2000) 5 SCC 668: The Supreme Court observed with evident concern that 'the practice of witnesses turning hostile has assumed alarming proportions and is seriously imperilling the administration of justice', calling for urgent legislative action.¹⁶

Krishna Mochi v State of Bihar (2002) 6 SCC 81: The Court reiterated the State's constitutional obligation to protect witnesses who depose against accused persons in serious criminal cases, noting that the failure to do so was a dereliction of the State's duty under Article 21 and was causally connected to the pattern of acquittals in organised crime cases.¹⁷

¹⁵*Zahira Habibullah H Sheikh v State of Gujarat* (2004) 4 SCC 158, para 39.

¹⁶*Swaran Singh v State of Punjab* (2000) 5 SCC 668, para 14.

¹⁷*Krishna Mochi v State of Bihar* (2002) 6 SCC 81, para 22.

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3.3 Inter-State Disparities in Conviction Rates

The problem is further compounded by extreme inter-State disparities in conviction rates, which reflect uneven implementation of the Witness Protection Scheme and more broadly the highly variable quality of criminal justice administration across India's federal structure. Available data for 2023–2025 reveals the following approximate State-level patterns: Sikkim leads with a 95 per cent conviction rate in certain categories, benefiting from a small caseload and high institutional trust; Delhi achieves an 89 per cent overall conviction rate supported by over 600 fast-track courts and advanced forensic facilities;¹⁸ Chandigarh records an 88 per cent charge-sheeting rate. By contrast, Odisha had 98.6 per cent of cases involving crimes against women pending trial in 2021 with a conviction rate of only 8.3 per cent for such offences; several States recorded conviction rates for crimes against women below 30 per cent. This inter-State variation is directly relevant to the case for Parliamentary legislation: a statutory framework would impose minimum uniform national standards rather than leaving protection entirely to the fiscal capacity and administrative priority of individual State governments.

IV. COMPARATIVE MODELS OF WITNESS PROTECTION

4.1 The United States: WITSEC and the Sixth Amendment

The United States Witness Security Program (WITSEC), administered by the United States Marshals Service (USMS), is the world's oldest and operationally most sophisticated witness protection programme. Its legislative foundation is Title V (Sections 501–504) of the Organized Crime Control Act 1970, supplemented by the Victim and Witness Protection Act 1982 and the Justice for All Act 2004. WITSEC was designed as a direct legislative response to the operational failure of federal organised crime prosecutions in the 1960s, when key witnesses were routinely intimidated or killed before or during trial — a problem that directly parallels India's experience today.¹⁹

Under WITSEC, protected witnesses receive a comprehensive package of measures including: full relocation to a new geographic location with a new identity and supporting documentation (new Social Security Number, driving licence, and employment history); housing assistance; subsistence payments during the period of transition; employment assistance; medical care; and ongoing security for as long as the threat persists. The programme has protected over

¹⁸India Data Map, 'State-wise Conviction Rates in India 2025' (14 February 2026).

¹⁹Organized Crime Control Act 1970 (USA), Title V, s 501; Gerald Shur and Paul Eisner, *WITSEC: Inside the Federal Witness Protection Program* (Bantam Books, 2002).

19,000 witnesses and more than 38,000 family members since its inception. The USMS reports that no witness who has followed the programme's security guidelines has been harmed.²⁰

The constitutional dimension of US witness protection law is governed primarily by the Sixth Amendment's Confrontation Clause, which guarantees to the accused the right to 'be confronted with the witnesses against him.' The Supreme Court of the United States has, in a series of landmark decisions, defined the outer constitutional limits of witness anonymity and protective measures. In *Coy v Iowa*, 487 US 1012 (1988), the Court held that a screen placed between testifying witnesses and the accused violated the Confrontation Clause. However, in *Maryland v Craig*, 497 US 836 (1990), a majority held that one-way closed-circuit television testimony — which preserved cross-examination but removed face-to-face confrontation — was constitutionally permissible when the State made an adequate, case-specific showing of the necessity of protecting the witness. The constitutional framework thus permits a proportionate calibration of protection against the needs of the individual case.²¹ In *Crawford v Washington*, 541 US 36 (2004), the Court established the 'testimonial hearsay' doctrine, which has implications for the admissibility of prior out-of-court statements of witnesses who subsequently become unavailable, including as a consequence of intimidation.²²

4.2 The United Kingdom: Statutory Anonymity and Judicial Oversight

The United Kingdom has developed a mature statutory framework for witness protection through two principal instruments: the Serious Organised Crime and Police Act 2005 (SOCPA) and the Coroners and Justice Act 2009 (CJA). Part 2 of SOCPA provides for the relocation and identity change of witnesses who have participated or are likely to participate in criminal proceedings and whose safety is at risk. It creates a formal procedure for providing protected persons with new identity documentation and imposes criminal liability for the disclosure of their new identities.²³

Chapter 2 of the Coroners and Justice Act 2009 (Sections 86–97) establishes a detailed statutory regime for witness anonymity orders in criminal proceedings. A court may make a witness anonymity order — directing that the witness's name, address, and other identifying details be withheld from the defendant and the public — only if three conditions are satisfied: (a) the measures are necessary to protect the safety of the witness or another

person, or to prevent serious damage to property, or to prevent real harm to the public interest; (b) taking into account the accused's interests, it would be consistent with the interests of justice; and (c) the importance of the witness's testimony is such that it would be in the interests of justice to allow the witness to testify.²⁴ The CJA framework thus encodes within the statute itself the Strasbourg proportionality test derived from *Van Mechelen and Others v Netherlands* [1997] 25 EHRR 647 and later refined by the Grand Chamber in *Al-Khawaja and Tahery v United Kingdom* [2011] ECHR 2127.

The UK model offers three features of particular significance for India. First, it is fully statutory, creating enforceable rights and obligations. Second, the anonymity order framework is court-administered, ensuring that each order is subject to proportionality review by an independent judicial authority. Third, the Act contains explicit minimum counterbalancing measures designed to protect the accused's fair trial rights — including the requirement that the defendant be informed of as much identifying information about the witness as is consistent with the protection order, and that defence counsel be permitted full cross-examination on all matters going to credibility except identity.²⁵

4.3 Australia: Federal Cooperation and Statutory Comprehensiveness

Australia's witness protection framework reflects the challenges of a federal constitutional structure — eight jurisdictions (the Commonwealth and seven states and territories), each with its own criminal justice system — that bears a structural resemblance to India's own constitutional division of criminal law powers between the Centre and the States under Entries 1 and 2 of the Concurrent List. The primary federal instrument is the Witness Protection Act 1994 (Cth), which establishes the National Witness Protection Program (NWPP) administered by the Australian Federal Police (AFP). Each State and Territory has enacted its own witness protection legislation: the Witness Protection Act 1995 (NSW); the Witness Protection Act 1996 (Vic); and equivalent statutes in Queensland, Western Australia, South Australia, Tasmania, and the Australian Capital Territory.²⁶

The Australian model's most distinctive feature is its inter-jurisdictional cooperation mechanism: a protected witness may be transferred between Commonwealth and State programmes under a formal transfer protocol, ensuring that protection is continuous even when an individual moves across State lines or when criminal

²⁰United States Marshals Service, 'Witness Security Program' <<https://www.usmarshals.gov/what-we-do/witness-security>> accessed May 2025.

²¹*Coy v Iowa* 487 US 1012 (1988); *Maryland v Craig* 497 US 836 (1990).

²²*Crawford v Washington* 541 US 36 (2004).

²³Serious Organised Crime and Police Act 2005 (UK), Part 2, ss 82–87.

²⁴Coroners and Justice Act 2009 (UK), s 88.

²⁵Coroners and Justice Act 2009 (UK), ss 90–92; *Al-Khawaja and Tahery v United Kingdom* [2011] ECHR 2127, Grand Chamber, para 147.

²⁶Witness Protection Act 1994 (Cth), s 3 (definitions); Australian Federal Police, 'Witness Protection' <<https://www.afp.gov.au/what-we-do/services/witness-protection>> accessed May 2025.

proceedings span multiple jurisdictions. The federal statute also contains detailed provisions governing the effect of a witness's new identity — for example, providing that legal obligations (including prior convictions and financial obligations) attach to the protected person's true identity rather than their new identity, and that courts have power to disregard certain procedural rules where necessary to protect a witness's identity.²⁷

For India, the Australian model is particularly instructive in two respects. First, it demonstrates that a

federal system can achieve both uniformity and flexibility — uniform minimum standards set by central legislation, with State-level implementation. This model maps closely onto India's constitutional structure, where the Centre legislates under the Concurrent List (Entries 1 and 2) and States implement. Second, the AFP-administered NWPP provides an institutional model for an independent, centralised witness protection authority in India — a body analogous to what the 198th Law Commission Report recommended as a National Witness Protection Authority.

4.4 Comparative Summary Table

Table 3: Comparative Overview of Witness Protection Regimes — India, USA, UK, Australia

Feature	India	USA	UK	Australia
Dedicated Legislation	No (Scheme only)	Yes (18 USC 3521+)	Yes (SOCPA 2005; CJA 2009)	Yes (WPA 1994 Cth + State Acts)
Statutory Right to Protection	No	Yes	Yes	Yes
Identity Change / Relocation	Limited (Scheme, unenforced)	Yes (full WITSEC programme)	Yes (SOCPA 2005, Part 2)	Yes (federal + state)
Witness Anonymity Orders	No statutory basis	Limited judicial discretion	Yes (CJA 2009, ss 86–97)	State-by-state variation
Independent Oversight Body	No	Yes (USMS)	Yes (NCA + courts)	Yes (AFP + state police)
Enforceable Funding Obligation	No	Yes (federal appropriations)	Yes	Yes
Fair Trial Safeguards Codified	Partial (judicial discretion)	Yes (Sixth Amendment + case law)	Yes (CJA 2009, ss 90–92)	Yes
Federal-State Coordination	No formal mechanism	Federal-state cooperation schemes	Unitary state (N/A)	Yes (transfer protocols)

Source: Author's compilation from comparative statutory and secondary sources.

V. JURISPRUDENTIAL ANALYSIS: ANONYMITY, FAIR TRIAL, AND CONSTITUTIONAL BALANCE

5.1 The Tension Between Witness Protection and the Right to Confrontation

The central jurisprudential problem in witness protection law is the reconciliation of two sets of rights that pull in opposite directions: the witness's right to safety (grounded in Article 21 of the Constitution of India and, comparatively, in Article 8 of the European Convention on Human Rights) and the accused's right to a fair trial (grounded in Article 21's due process dimension and, comparatively, in Article 6(3)(d) ECHR

and the Sixth Amendment Confrontation Clause). This tension is not merely academic; it represents a genuine constitutional dilemma that any legislative framework must address with doctrinal care.

The international criminal tribunal jurisprudence is the most systematically developed body of law on this question. In *Prosecutor v Tadic* (Decision on the Prosecutor's Motion Requesting Protective Measures for Witnesses and Victims, IT-94-I-T, 10 August 1995), Trial Chamber II of the ICTY authorised a range of protective measures including pseudonyms, image and voice distortion, and closed sessions, while acknowledging that full anonymity — the complete non-

²⁷Witness Protection Act 1994 (Cth), ss 20, 27; New South Wales Law Reform Commission, Report 93: Witness Anonymity (2001).

disclosure of identity even to the defence — would be permissible only in cases of extreme necessity and subject to careful judicial calibration.²⁸ The ECtHR has similarly recognised, in its settled jurisprudence from Van Mechelen to Al-Khawaja, that witness anonymity may be compatible with Article 6 ECHR provided that: (i) there is a sufficient reason for the anonymity; (ii) the evidence of the anonymous witness is not the sole or decisive basis of conviction; and (iii) there are adequate counterbalancing measures to protect the defence's rights.

5.2 The Indian Position and Judicial Innovation

Indian courts have addressed the fair trial dimension of witness protection primarily through the exercise of inherent and constitutional jurisdiction rather than through statutory provisions. In *Sakshi v Union of India* (2004) 5 SCC 518, the Supreme Court — dealing with the protection of victims of child sexual abuse who were also witnesses — directed the use of screens between the accused and the witness, and the use of a commissioner for recording evidence, as measures to protect witnesses while preserving the right to cross-examination. In *State of Maharashtra v Dr Praful B Desai* (2003) 4 SCC 601, the Court upheld video-conferencing for witness examination, holding that it does not infringe the accused's right to a fair trial as long as cross-examination is preserved.²⁹

The BNSS 2023 has now placed video-link testimony on an express statutory footing through Section 536, and Section 183 enables the recording of statements through electronic communication. These provisions represent a significant legislative advance. However, they remain general procedural tools rather than witness protection measures: they do not identify when such measures should be used for protective purposes, do not create any procedure for adjudicating a protection application, and do not establish the threshold of risk that must be demonstrated before protective measures are ordered. The judicial practice developed since Mahender Chawla — of issuing ad hoc directions in individual cases — cannot substitute for a structured statutory framework.

5.3 Proposed Constitutional Framework for Witness Anonymity in India

Drawing on the comparative and international jurisprudence examined above, the present analysis proposes that any Indian statutory framework for witness anonymity must satisfy the following constitutional requirements to be consistent with Article 21:

(i) **Necessity:** The anonymity measure must be necessary to prevent a real and serious risk to the safety

of the witness; mere inconvenience or embarrassment is not sufficient.

(ii) **Proportionality:** The measure must be the least restrictive means of achieving the protective purpose; full anonymity should be reserved for Category A cases.

(iii) **Judicial Authorisation:** All anonymity orders must be made by a competent court, not by executive or police authority alone.

(iv) **Counterbalancing Measures:** The defence must be afforded meaningful opportunity to test the credibility of the protected witness — through cross-examination on all matters other than identity, full access to the witness's prior statements, and the right to make submissions on the reliability and weight of the protected testimony.

(v) **Non-Exclusivity Principle:** A conviction should not rest solely or decisively on the testimony of an anonymous witness without independent corroboration. These five requirements — derived from the convergent jurisprudence of the US Supreme Court, the ECtHR, the ICTY, and the Indian Supreme Court — constitute the constitutional minimum for any Indian witness anonymity provision, and should be expressly codified in the proposed Parliamentary legislation.

VI. TOWARDS A PARLIAMENTARY WITNESS PROTECTION STATUTE FOR INDIA: A LEGISLATIVE ROADMAP

The foregoing analysis establishes that India's current framework for witness protection is constitutionally deficient, empirically documented as inadequate, and significantly behind the legislative standards of comparable common law jurisdictions. This section advances a normative proposal for the principal architectural features of a comprehensive Indian Witness Protection Act, to be enacted by Parliament under the Concurrent List (Entries 1 and 2) of the Seventh Schedule to the Constitution of India.

6.1 Key Features of the Proposed Witness Protection Act of India

(i) Statutory Right to Protection

The Act must create an express, enforceable statutory right of witnesses in criminal proceedings to apply for State-provided protection. This right must be enforceable in a court of law and must carry with it a corresponding statutory duty on the State to assess the application and provide adequate protection where the prescribed threshold of risk is met. The non-justiciable

²⁸*Prosecutor v Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Witnesses and Victims, IT-94-1-T (10 August 1995) (ICTY, Trial Chamber II); Tim Welch and others, 'Witness Anonymity at the International Criminal Court: Due

Process for Defendants, Witnesses or Both?' (2011) 23 Denning Law Journal 29.

²⁹*Sakshi v Union of India* (2004) 5 SCC 518; *State of Maharashtra v Dr Praful B Desai* (2003) 4 SCC 601.

character of the current Scheme is its most fundamental deficiency; the Act must cure it.³⁰

(ii) National Witness Protection Authority

The Act should establish a National Witness Protection Authority (NWP), modelled on the Australian Federal Police's NWPP administrative structure and the US Marshals Service's WITSEC division, as an independent statutory body under the Ministry of Home Affairs. The NWP should have power to: receive and process protection applications; order and review protection measures; operate the National Witness Protection Fund; maintain secure identity records; and exercise oversight of State Witness Protection Units. It should be headed by a Director-General of the rank of Director, IPS (equivalent to a Director General of Police), with a dedicated cadre of trained officers.

(iii) Three-Tier Protection Framework

The Act should codify and strengthen the three-tier threat categorisation of the Witness Protection Scheme, 2018, with the following minimum protection entitlements assigned to each category. Under Category A (life threat), the protection package should include: full relocation to a new place of residence with new identity documentation; round-the-clock police protection for the duration of the threat; maintenance allowance; and post-trial rehabilitation support. Under Category B (safety/reputation/property threat), protection should include: change of residence within the same city or to another area; regular police patrolling; installation of CCTV and alarm systems; court testimony by video-link; and anonymity in court proceedings. Under Category C (threat during trial/investigation only), protection should include: an escort to and from court; concealment of identity in court documents; in-camera proceedings if appropriate; and a dedicated police helpline.

(iv) Witness Anonymity Orders

The Act should create a judicial procedure — closely modelled on Chapter 2 of the UK Coroners and Justice Act 2009 — for the making of Witness Anonymity Orders. Such orders should be grantable by the Sessions Court upon an application by the prosecution (or the witness directly) and should satisfy the three statutory conditions: (a) necessity; (b) consistency with the interests of justice; and (c) importance of the witness's testimony. The Act should also codify the five constitutional requirements identified in Section 5.3 of this paper as mandatory conditions for the making of any anonymity order.

(v) Federal-State Coordination Mechanism

Drawing on the Australian inter-jurisdictional cooperation model, the Act should provide for a Witness

Transfer Protocol under which a protected witness may be transferred between the National Programme and any State Programme, or between two State Programmes, with automatic continuity of all protection measures. The Act should require each State to enact implementing legislation consistent with the national minimum standards within two years of the central Act's commencement.

(vi) Adequately Funded Witness Protection Fund

The Act should establish a National Witness Protection Fund with mandatory central government appropriation as a line item in the Union Budget, supplemented by a percentage of fines imposed in organised crime, terrorism, and corruption cases. State Protection Funds should have mandatory minimum funding obligations prescribed by the Act. The ad hoc, voluntary-donation-dependent funding model of the 2018 Scheme is operationally unsustainable and should be replaced by a structured fiscal architecture.

(vii) Technology Integration

Building upon the BNSS 2023's provisions for video-link testimony (Section 536) and electronic statements (Section 183), the Act should create a dedicated Digital Witness Testimony Protocol, establishing minimum technical standards for encrypted video-link infrastructure, digital identity management for protected witnesses, and eSakshya-compatible evidence recording that preserves the integrity of protected testimony while ensuring verifiability of identity for the court and the defence counsel.

VIII. CONCLUSION

The administration of criminal justice in a constitutional democracy cannot be built on the silence or the fear of its witnesses. The empirical record of India's criminal justice system — documented by the NCRB, evidenced in the Supreme Court's jurisprudence, and catalogued in the reports of the Law Commission, the NHRC, and civil society — demonstrates that the hostile witness crisis is not a peripheral dysfunction but a structural failure at the heart of India's adversarial trial architecture. An overall IPC conviction rate of 54 per cent, a murder conviction rate of 37.7 per cent, and a rape conviction rate of 22.7 per cent (NCRB 2023) represent the institutional cost of leaving witnesses without effective legal protection.

The Witness Protection Scheme, 2018 was a welcome and important step. But it is not enough. It lacks statutory force, it is underfunded, it is unequally implemented, and — most fundamentally — it does not create a legal right that any witness can enforce in any court. Meanwhile, the new criminal codes — the BNS, BNSS, and BSA 2023 — though modernising procedural and evidentiary law in several significant respects, have

³⁰Law Commission of India, 198th Report on Witness Identity Protection and Witness Protection Programmes (2006) 84–95 (Draft Witness Protection Bill).

introduced no structural remedy to the witness protection deficit.

The comparative analysis of the USA (WITSEC and Sixth Amendment jurisprudence), the UK (SOCPA 2005 and CJA 2009), and Australia (the federal Witness Protection Act 1994 and State statutes) establishes that comprehensive Parliamentary legislation — conferring enforceable rights, mandating adequate funding, creating an independent authority, providing for relocation and identity change, and codifying a proportionate judicial procedure for anonymity orders — is both legally feasible and constitutionally consistent with India's adversarial trial framework and Article 21 jurisprudence.

The enactment of a Witness Protection Act by the Parliament of India would not merely be a legislative reform. It would be a statement of constitutional value: that the State of India takes seriously its obligation under Article 21 to protect those who have the courage to speak truth to power in courts of law; that it recognises that a witness is not merely an instrument of criminal justice but a rights-bearing person to whom the State owes a duty of care; and that the legitimacy of criminal justice depends, in the final analysis, on whether those who give evidence in criminal trials can do so freely, fairly, and without fear.

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