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# Rights of Victims in the Indian Criminal Justice System

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## I. Introduction

The adoption by the General Assembly of the United Nations, at its 96<sup>th</sup> plenary on November 29, 1985 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereafter ‘U.N. Declaration’) constituted an important recognition of the need to set norms and minimum standards in international law for the protection of victims of crime. The U.N. Declaration recognised four major components of the rights of victims of crime – access to justice and fair treatment;<sup>1</sup> restitution;<sup>2</sup> compensation<sup>3</sup> and assistance.<sup>4</sup> In the first part of this piece it is proposed to examine how far the prevailing legal framework in India conforms to the norms and standards that were sought to be set by the U.N. Declaration nearly two decades ago.<sup>5</sup> It also notices relevant judicial dicta that have sought to address the needs of the victims of crime. In the second part the prevailing international trends and recent local developments are briefly noticed. The concluding part offers certain suggestions as regards the nature of the changes that are required in order to make the system respond effectively to the needs of victims of crime.

## II. Access to Justice and Fair Treatment

The victim of a crime sets the criminal justice mechanism in motion by giving information to the police which is expected to reduce it to writing.<sup>6</sup> The victim as an informant is entitled to a copy of the FIR “forthwith, free of cost”.<sup>7</sup> Where the officer in charge of a police station refuses to act upon such information, the victim can write to the Superintendent of the Police who is then expected to direct investigation into the complaint.<sup>8</sup> Failing these mechanisms, the victim can give a complaint to a Magistrate,<sup>9</sup> who will in turn examine the complainant on oath and enquire into the case herself or direct investigation by the police before taking cognizance.<sup>10</sup> The victim thereafter does not participate in the investigation except by being called to confirm the identity of the accused<sup>11</sup> or the material objects, if any, recovered during the course of investigation.

The position of victims who happen to be women or children has not merited the attention it deserves in the procedural statute. The protection under s.160 Cr. PC that “no male person under the age of 15 years or women shall be required to attend any place other than the place in which such male person or woman resides” does not apply to a woman or a child who is picked up as a suspect.<sup>12</sup> The plight of rape victims is compounded by their being held in ‘protective custody’ in jails or in the nari niketans (women’s shelters), on the pretext that they are required for giving evidence although such detention has no legal basis.<sup>13</sup>

The law’s response to the needs of victims of rape and other violent crimes against women has been both predictable and inadequate. In imposing severe and minimum punishments<sup>14</sup> for the offence and in shifting the burden of proof,<sup>15</sup> the law fails to address the needs of the victim to be treated with dignity, to sustained protection from intimidation, to readily access the justice mechanisms, to legal aid and to rehabilitation. There is yet no provision in the law mandating ‘in-camera’ trials particularly when the victim is a child.<sup>16</sup> There is also no statutory scheme recognising the rehabilitative needs of the victims of rape.<sup>17</sup> The legislative and executive apathy to the problem stands in contrast with the response of the Supreme Court in *Delhi Domestic Working Women’s Forum v. Union of India*.<sup>18</sup> The case arose out of an incident in which six women, working as domestic servants in Delhi, were raped by eight army personnel in a moving train between Ranchi and Delhi. The members of the petitioner forum, when prevented by the employers from meeting the victims, sought the court’s directions for expeditious and impartial investigation of the offences. The court indicated the following “broad parameters for assisting the victims of rape”:<sup>19</sup>

- The complainants in sexual assault cases had to be provided with legal representation. It was important to have someone well acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counselling or medical assistance. It was important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represented her till the end of the case.
- Legal assistance would have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station; the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.
- The police was under a duty to inform the victim of her right to representation before any questions were asked of her and the police report should state that the victim was so informed.
- A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable. An advocate would be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, advocates would be authorised to act at the police station before leave of the court was sought or obtained.<sup>20</sup>

The victim has a say in the grant of bail to an accused. S. 439 (2) Cr.PC, as interpreted by the courts, recognises the right of the complainant or any "aggrieved party" to move the High Court or the Court of Sessions for cancellation of a bail granted to the accused.<sup>21</sup> A closure report by the prosecution cannot be accepted by the court without hearing the informant.<sup>22</sup> Also, compounding of an offence cannot possibly happen without the participation of the complainant.<sup>23</sup> In *S.A. Karim v. State of Karnataka*<sup>24</sup> the Supreme Court acted on the plea of the father of a policeman killed by a dreaded forest brigand and set aside the order of the trial judge that had allowed the prayer of the State for withdrawal of prosecution.<sup>25</sup>

While the victim of a crime may move the government to appoint a special prosecutor for a given case,<sup>26</sup> there is no scope under the Cr.PC for the victim or informant or her lawyer to directly participate in the trial. S. 301 (2) Cr.PC mandates that such lawyer of the private party "shall act under the directions of the Public Prosecutor... and may, with the permission of the court, submit written arguments after the evidence is closed in the case." Further, though there is no provision in the Cr.PC for providing legal aid to the victim of a crime,<sup>27</sup> S.12 (1) of the Legal Services Authorities Act, 1987 (LSAA) entitles every person "who has to file or defend a case" to legal services. A victim of crime has a right to legal assistance at every stage of the case subject to the fulfillment of the means test and the 'prima facie case' criteria.<sup>28</sup>

The Cr. PC also does not effectively address the growing menace of intimidation of victims of witnesses during the pendency of trial at the instance of the accused and other vested interests.<sup>29</sup> Even the few provisions that exist are not creatively used for meeting the challenge.<sup>30</sup> Recently the Supreme Court took judicial notice of the fact that "the conviction rate has gone down to 39.6% and the trial in most of the sensational cases do not start till the witnesses are won over."<sup>31</sup> One response is to get the court trying the case to hold sittings in camera or shift the venue of the trial to a safer place in the interests of ensuring a fair trial.<sup>32</sup> The other, and a less frequently invoked option, is to seek a transfer of the trial to another state by petitioning the Supreme Court under s.406 Cr.PC. In *G.X. Francis v. Banke Bihari Singh*,<sup>33</sup> the Supreme Court transferred the trial of a criminal defamation case filed against Christians by a non-Christian from a court in Madhya Pradesh, where the atmosphere was palpably hostile, to one in the neighbouring state of Orissa. The judgment of Vivien Bose J's explained the grounds for transfer thus:<sup>34</sup> "In a case of defamation against Christians by a non-Christian, bitterness of local communal feeling and the tenseness of the atmosphere afford good grounds for transfer under this section. Public conference in the fairness of trial held in such an atmosphere would be seriously undermined, particularly among reasonable Christians all over India, not because the judge was unfair or biased but because the machinery of justice is not geared to work in the midst of such conditions".

The victim's right of participation in the post-trial stage of the proceedings stands on a better footing. An appeal against an order of acquittal can be preferred, with the prior leave of the High Court, by both the State Government<sup>35</sup> and the complainant.<sup>36</sup> The right of a victim's near relative, who was not a party to the proceedings, to file a Special Leave Petition under Article 136 of the Constitution in the Supreme Court challenging an order of acquittal by the High Court was expressly recognised by a Constitution Bench in *P.S.R. Sadhanantham v. Arunachalam*.<sup>37</sup> Telescoping the requirement of fair procedure implicit in Article 21 into Article 136, the court declared:<sup>38</sup> "When a motion is made for leave to appeal against an acquittal, this court appreciates the gravity of the peril to personal liberty involved in that proceeding. It is fair to assume that while considering the petition under Article 136 the court will pay attention to the question of liberty, the person who seeks such leave from the court, his motive and his locus standi and the weighty factors which persuade the court to grant special leave."<sup>39</sup>

### III. Restitution

The right of a victim of crime to restitution has not yet merited statutory recognition. In this area, the constitutional courts have been inclined to examine the plea of victims for redressal of the losses suffered during violent incidents including riots and caste clashes. The principle that is evoked is that of 'culpable inaction' under which the state and its agencies are expected to anticipate the losses or damage to public and private property in certain situations over which the potential victims have no control. The courts have gone as far as to find the state liable only where a definite failure on its part act has resulted in the loss.<sup>40</sup> The outbreak of riots in the wake of the assassination of the Prime Minister in October 1984, resulted in large-scale damage to the properties of members of the Sikh community in several places of the country. In *R. Gandhi v. Union of India*,<sup>41</sup> the Madras High Court, acting on the report of a commissioner appointed by it to assess the losses, directed payment of varying amounts of compensation for the losses to property of the Sikh community in Coimbatore. However, in *Sri Lakshmi Agencies v. Government of Andhra Pradesh*,<sup>42</sup> the Andhra Pradesh High Court declined to accept the prayer for compensation to the loss of life, injury, destruction and loss of property as a result of the violence that followed the murder of a sitting member of the legislative assembly. The court explained that:<sup>43</sup> "it is only when the officers of the state do any act positively or fail to act as contemplated under law leading to culpable inaction, that the state is liable to pay the damages. There should be a direct nexus for the damage suffered on account of state action and if that is absent, Article 21 of the Indian Constitution is totally inapplicable".<sup>44</sup> This is a still evolving area in which the courts are seen to be treading cautiously.<sup>45</sup>

### IV. Compensation and Assistance

The right of a victim of crime to receive compensation was recognised even under the Code of Criminal Procedure, 1898<sup>46</sup> but was available only where a substantive sentence of fine was imposed and was limited to the amount of fine actually realised. S.357 (3), Cr. PC 1973 permits the grant of compensation even where the accused is not sentenced to fine.<sup>47</sup> However, this provision is invoked sparingly and inconsistently by the courts.<sup>48</sup>

The 152<sup>nd</sup> Report of the Law Commission had recommended the introduction of s.357-A prescribing inter alia that compensation be awarded at the time of sentencing to the victims of the crime – Rs.25,000/- in the case of bodily injury, not resulting in death; Rs.1,00,000/- in the case of death.<sup>49</sup> The 154<sup>th</sup> Report of the Law Commission of India noticed that its earlier recommendation had still not been given effect to by the government. It went one step further and recommended that it was necessary to incorporate "a new s.357-A in the Code to provide for a comprehensive scheme of payment of compensation for all victims fairly and adequately by the courts. Heads of compensation are for (i) for injury, ii) for any loss or damage to the property of the claimant which occurred in the course of his/ her sustaining the injury and (iii) in case of death from injury

resulting in loss of support to dependants”.<sup>50</sup> This recommendation also has not been acted upon by the government.

Absent a viable, effective statutory regime for compensation, the courts in their constitutional law jurisdiction have had to forge new tools to give effect to the right of victims of crime to be compensated.<sup>51</sup> In the *Delhi Domestic Working Women Forum Case*, the court directed payment of Rs.10,000 as ex gratia to each of the victims.<sup>52</sup> In *Gudalure M.J. Cherian v. Union of India*<sup>53</sup> the State of U.P. was directed to pay a sum of Rs.2,50,000/- as compensation to two Sisters on whom rape had been committed by unidentified assailants. The question of payment of compensation to victims of crime from the wages of prison labour came up for consideration in *State of Gujarat v. Hon'ble High Court of Gujarat*.<sup>54</sup> The court recommended that the State should make a law “for setting apart a portion of the wages earned by the prisoners to be paid as compensation to deserving victims of the offence, the commission of which entailed the sentence of imprisonment to the prisoner, either directly or through a common fund to be created for this purpose or in another feasible mode”.<sup>55</sup>

## V. Victims of Custodial Crimes

The constitutional right of a victim of custodial crime to receive compensation was reiterated by the Supreme Court in *Nilabati Behera v. State of Orissa*.<sup>56</sup> The court pointed out that it was not enough to relegate the heirs of a victim of custodial violence to the ordinary remedy of a civil suit. The right to get relief of compensation in public law from courts exercising their writ jurisdiction was explicitly recognised. This was further developed in *D.K. Basu v. State of West Bengal*,<sup>57</sup> where it was explained that “the award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the state... the relief to redress the wrong for the *established* invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them.”<sup>58</sup>

In order to develop a comprehensive statutory scheme redressing the needs of victims of crime, it may be useful to examine some of the current practices elsewhere. The European Convention on Compensation of Victims of Violent Crime, 1983 provides for many of the rights recognised in the U.N. Declaration. The statutes on the topic in certain other countries include the Criminal Injuries Compensation Act, 1995 in the United Kingdom,<sup>59</sup> the Victims of Crime Assistance Act, 1996 of Victoria in Australia,<sup>60</sup> and the Victims and Witnesses Protection Act, 1982 of the USA<sup>61</sup>. Courts in some of these countries make use of a “victim impact statements” to take on board the victim’s feelings regarding the offence.<sup>62</sup> Outside of the formal legal system, there are associations formed in some of the countries, which are central to the provision of all forms of the assistance to victims of crime.<sup>63</sup>

South Africa has enacted a Witness Protection Act, 1998 (WPA) which provides, inter alia, for the establishment of a central office for witness protection, which will function under the control of the Minister of Justice and Constitutional Department. This office will be responsible for the protection of witnesses in terms of the WPA and regulations made in terms thereof, and will perform all duties relating to protection of witnesses.<sup>64</sup> It may be recalled that simultaneous with the making of the Constitution of South Africa, a Truth and Reconciliation Commission (TRC) was also established.<sup>65</sup> One of the key functions of the TRC was to examine the claims of victims of the apartheid regime to compensation.<sup>66</sup> An important aspect of the functioning of the TRC, as explained by one of its members, Justice Albie Sachs, was to give the victim a voice and encourage a dialogue between the victim and the perpetrator. He explains that “if you are dealing with large episodes, the main concern is not punishment or due compensation after due process of law, but to have an understanding and acknowledgment by society of what happened so that the healing process can really start. Dialogue is the foundation of repair.”<sup>67</sup>

The need for setting up separate victim and witness protection units in the trial of mass crimes has been acknowledged in the setting up of international tribunals to deal with them. The International Criminal Tribunal

for Rwanda has formulated rules for protection of victims and witnesses.<sup>68</sup> Similar provisions exist in the Statute for the creation of an International Criminal Court (ICC).<sup>69</sup>

Recent local developments require to be noticed. The notification of the Government of India constituting the Committee on Reforms of Criminal Justice System, chaired by Justice V.S. Malimath (hereafter 'Malimath Committee') was uncharacteristically candid in its lamentation that "People by and large have lost confidence in the Criminal Justice System... Victims feel ignored and are crying for attention and justice..."<sup>70</sup> In its turn the Malimath Committee, after making extensive recommendations to ensure that "the system must focus on justice to victims"<sup>71</sup>, has concluded that "criminal justice administration will assume a new direction towards better and quicker justice once the rights of victims are recognised by law and restitution for loss of life, limb and property are provided for in the system."<sup>72</sup> While largely concurring with the recommendations of the Law Commission of India in relation to witness protection the Malimath Committee concludes that "Time has come for a comprehensive law being enacted for protection of the witness and members of his family".<sup>73</sup>

The government of the day, on August 14 2003, tabled in the Parliament the Criminal Law (Amendment) Bill, 2003 proposing a series of changes including the insertion of new Ss.164-A and 344-A in the Cr. PC to deal with the problem of witnesses turning hostile.<sup>74</sup> Further, s.195-A is proposed to be introduced in the Indian Penal Code making the threatening or inducing of any person to give false evidence a cognizable and non-bailable offence punishable with imprisonment for seven years or fine or both. This response of the government is not only ad hoc but also inadequate as it fails to address the whole range of issues raised by victims of crime.

## VI. Conclusion

The brief review of the existing legal framework in relation to rights of victims of crime reveals that expect in the area of providing compensation, very little has been done either statutorily or through schemes to address the entire range of problems faced by victims of crime. There is need to take a fresh look at the position in which the victim of a crime is placed in our criminal justice system.

The role of the victim of a crime in our criminal justice system, which follows the common law colonial tradition, is restricted to that of a witness in the prosecution of an offence. This stems from a negative perception of the victim of a crime as a person who has "suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights."<sup>75</sup> Resultantly, the criminal justice system acquires a "vertical dimension" and becomes "a means of formal social control" by the state which takes over the prosecution of the offender to the exclusion of the victim.<sup>76</sup> From a criminological and victimological perspective, these are "value laden judgmental labels that serve no useful research function and thus can be easily replaced by more neutral designations, such as 'participants to the conflict', 'parties to the dispute', 'protagonists' and so forth."<sup>77</sup> This view advocates replacement of the vertical criminal justice system by a "horizontal line of justice" where the punishment system is sought to be substituted by a mediation system which gives a central role for the victim.<sup>78</sup> Our system however has persisted with the vertical dimension model.

The reorienting of the criminal justice system to address the needs of a victims of crime need not and perhaps should not be exclusive of the need to enforce and protect the rights of suspects as well as the rights of the accused. It should be possible to accommodate both requirements as has been done in countries like United Kingdom and the United States of America. To begin with it is essential to acknowledge that our legal system is not equipped at present to effectively deal with mass crimes, including the crimes of genocide and crimes against humanity.<sup>79</sup> The setting up of a witness and victim protection unit under the control of an independent and accountable agency by suitably modifying the available models, e.g., the one provided by the Statute for the creation of the ICC, becomes imperative. This ought to be built into the statutory legal framework itself.

Although the Malimath Committee has recommended that "the victim has a right to be represent by an advocate of his choice; provided that an advocate shall be provided at the cost of the state if the victim is not in a position to afford a lawyer",<sup>80</sup> this fails to acknowledge that the present state of implementation of the statutory

provisions concerning free legal aid in the criminal justice system leaves much to be desired.<sup>81</sup> The reform of the criminal justice system as a whole will have to be simultaneous with the reform of the legal aid system before a victim of crime can be guaranteed an effective right of representation in a criminal trial.

The limitation of the resources of the State in making adequate provision in the form of a victim assistance fund ought not to be countenanced any longer.<sup>82</sup> The attempt at devising a statutory scheme of witness protection will have to be preceded by a wide range of consultations by the law making body with not only victims of crime but other statutory bodies like the National Human Rights Commission which are plagued with a rising number of complaints.<sup>83</sup> The approach would also have to be multi-disciplinary involving, inter alia, sociologists, law persons and professionals from the field of medicine. Given the endemic delays faced by litigants in the present legal system, it would be appropriate to develop alternative forms of dispute resolution without diluting the need for providing fair and equal justice to victims of crime. The U.N. Declaration continues to serve as a useful benchmark in reordering the criminal justice system to address the needs of victims of crime.

## Endnotes

<sup>1</sup> Clauses 4 and 5 of the U.N. Declaration read thus:

“4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.”

<sup>2</sup> This contemplates deprivations both by State and non-State actors. Under Clause 8 of the U.N. Declaration, restitution includes “the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.” Clause 11 provides that “where the government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.”

<sup>3</sup> Under Clause 12 of the U.N. Declaration the onus is on the state to “endeavour to provide financial compensation to both victims who have suffered bodily injury or impairment of physical or mental health as a result of serious crimes as well as the family of those who have died as a result of victimization.”

<sup>4</sup> This includes “the necessary material, medical, psychological and social assistance through governmental, voluntary, community based and indigenous means” (Clause 14) Part B of the U.N. Declaration concerns victims of abuse of power “that do not yet constitute violations of national criminal laws but of internationally recognised norms relating to human rights.”

<sup>5</sup> Though the U.N. Declaration may not have the binding effect of a Covenant, its clauses serve as useful benchmarks.

<sup>6</sup> S.154 (1) of the Code of Criminal Procedure, 1973 (Cr. PC). This is registered as the (the first information report (FIR).

<sup>7</sup> s.154 (2) Cr. PC.

<sup>8</sup> S.154 (3) Cr. PC.

<sup>9</sup> S.190 Cr. PC.

<sup>10</sup> S.200, 202 Cr. PC. The failure by a public servant to willfully neglect to act upon the complaint of

- member of the Scheduled Caste (SC) or Scheduled Tribe (ST) is itself a punishable offence under s. 4 of the SC and ST (Prevention of Atrocities) Act, 1989 ('SC/ST Act').
- <sup>11</sup> The evidence gathered by means of a test identification parade is relevant and admissible: S.9 Evidence Act 1872.
  - <sup>12</sup> The Supreme Court emphasised the mandatory nature of this requirement in *Nandini Satpathy v. P.L.Dani* (1978) 2 SCC 424. The Rule that an arrest of woman should not be detained beyond sunset was evolved judicially: *Christian Community Welfare Council of India v. Government of Maharashtra* (1996) 1 Bom CR 70 but even this has been held not to be mandatory by the Supreme Court in *State of Maharashtra v. Christian Community Welfare Council of India* (2003) 8 SCC 546.
  - <sup>13</sup> The practice of keeping victim women in jails for giving evidence was strongly deprecated in *Hussainara Khatoon v. State of Bihar* (1980) 1 SCC 93 (at 96) as "nothing short of a blatant violation of personal liberty guaranteed under Article 21 of the Constitution."
  - <sup>14</sup> S.376 (2) prescribes a minimum sentence of ten years and a maximum sentence of life imprisonment for certain severe forms of rape.
  - <sup>15</sup> For e.g., S. 114 A, Evidence Act 1872 raises a presumption as to the absence of consent where the woman raped says in her evidence before the court that she did not consent. Recently some token amendments have been made recognising the need for preserving the dignity of the victim: S.155 (4) Evidence Act 1872 which permitted the impeachment of the credibility of a prosecutrix by reference to her general "immoral character" now stands repealed. S. 228 A prohibits the disclosure of the identity of the victim in any publication concerning the offence.
  - <sup>16</sup> An attempt is being made through a PIL in the Supreme Court (*Sakshi v. Union of India* (2001) 10 SCC 732) to get the legislature to remedy this lacuna.
  - <sup>17</sup> Societal support to victims of sexual crimes is seldom available. From a victimological perspective, studies show that in sexual crimes against females and children of both sexes, the greater damage is often done by the reactions of others. This is termed as secondary victimization: Gerd Ferdinand Kirchhoff, "Victimology – History and Basic Concepts" in Kirchhoff *et al* (eds.) **International Debates of Victimology**, WSV Publishing (1994), 1at 51
  - <sup>18</sup> (1995) 1 SCC 14.
  - <sup>19</sup> *Supra* note 47 at 19-20.
  - <sup>20</sup> The other parameters included the payment of compensation to victims of crime by the constitution of a Criminal Injuries Compensation Board. The National Commission for Women was asked to evolve a scheme for victims of rape. However, that is yet to come about. Meanwhile the incidents of crimes against women has shown a steady increase. From 1,21,265 in 1997 it had risen to 1,35,771 in 1999. Of these, torture constituted 32.4%, molestation 23.8%, kidnapping and abduction 11.7% and rape 11.4%: **Crime in India 1999**, National Crime Records Bureau (2001), 203.
  - <sup>21</sup> *Puran v. Rambilas* (2001) 6 SCC 338 and *R.Rathinam v. State* (2000) 2 SCC 391.
  - <sup>22</sup> *Union Public Service Commission v. S.Papiah* (1997) 7 SCC 614.
  - <sup>23</sup> S.320 Cr.PC.
  - <sup>24</sup> (2000) 8 SCC 710.
  - <sup>25</sup> In *P.Ramachandra Rao v. State of Karnataka* (2002) 4 SCC 578, the Supreme Court reversed its earlier orders in *Common Cause v. Union of India* (1996) 4 SCC 33 and (1996) 6 SCC 775 permitting closure of petty criminal cases the trial in which had not commenced even after the lapse of two to three years after institution. The Court noted the concern expressed for the plight of the victims of crime who, if left without a remedy might "resort to taking revenge by unlawful means resulting in further increase in the crimes and criminals." (*ibid.* at 596)

- <sup>26</sup> S.24 (8) Cr.PC. The trial of offences under the SC/ST Act is to take place in Special Courts (s.14) and for each such court a Special Prosecutor is required to be appointed (s.15). Nevertheless the effective conviction rate for offences under this Act has been around 5%: See, **Crime in India 2000**, National Crime Records Bureau (2002), 184.
- <sup>27</sup> S.304 Cr.PC provides for legal aid only to the accused.
- <sup>28</sup> S. 12 (1) (h) and s. 13 (1) of the LSAA respectively. Under s. 12 (1)(b) every victim of trafficking in human beings or *begar*; under s. 12 (1) (e) every person under circumstances of undeserved want such as a “victim of a mass disaster, ethnic violence, caste atrocity..” is entitled to free legal services irrespective of the means test but subject to the prima facie case test.
- <sup>29</sup> The provisions that exist offer protection against intimidation by the police. S.162 Cr. PC makes the statement made by a witness to the police during the course of investigation in admissible in evidence consistent with the statutory bar under s.25 Evidence Act, 1872. S.163 Cr. PC seeks to protect a witness against inducement threat or promise offered or made by “police officer or other person in authority”. S.171 Cr. PC mandates that “no complainant or witness on his way to any Court shall be required to accompany a police officer, or shall be subject to unnecessary restrained or inconvenience.”
- <sup>30</sup> S.284 Cr. PC provides that a witness can be directed by the court to be examined on commission thus dispensing with the need for such witness to attend the trial. In addition, where the court finds that the key prosecution witnesses have turned hostile it can under s.309 Cr. PC and for reasons to be recorded, postpone the trial. Also, under s.311 Cr. PC it can recall and re-examine a witness if “his evidence appears it to be essential to the just decision of the case”. However, these provisions are seldom used even when the court finds that the witness is under obvious threat and intimidation.
- <sup>31</sup> Order dated August 8, 2003 in W.P.(CrI.) No. 109/2003 (*National Human Rights Commission v. State of Gujarat*). The court also took note of the fact that “No law has yet been enacted, not even a scheme has been framed by the Union of India or by the State Government for giving protection to the witnesses.” In a 1984 case from Calcutta, the entire trial was held vitiated because all the key witnesses had been won over. A re-trial was ordered by the Supreme Court: *Sunil Kumar Pal v. Phota Sheikh* (1984) 4 SCC 533.
- <sup>32</sup> S. 9(6) Cr.PC states: “The Court of Sessions shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify; but, if, in any particular case, the Court of Sessions is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sittings at any other place in the Sessions Division, it may, with the consent of the prosecution and the accused, sit at that place for the disposal of the case or the examination of any witness or witnesses therein”.
- <sup>33</sup> AIR 1958 SC 309.
- <sup>34</sup> *Id.* at 310.
- <sup>35</sup> S.378(1) read with s. 378 (3) Cr.PC.
- <sup>36</sup> S.378(4) Cr.PC.
- <sup>37</sup> (1980) 3 SCC 141.
- <sup>38</sup> *Id.* at 146
- <sup>39</sup> The judgment of Krishna Iyer, J., for the court was concurred with by Pathak, J. (as he then was) in a separate opinion who sought to restrict the right of a private party other than a complainant to file a special leave petition “in those case only where it is convinced that the public interest justifies an appeal against the acquittal and that the State has refrained from petition for special leave for reasons which do not bear on the public interest but are prompted by private influence, want of bona fide and other extraneous considerations.”
- <sup>40</sup> For a detailed elucidation of this principle see Usha Ramanathan, *A Criminal Appraisal of the*

*Laws Relating to Compensation for Personal Injury*, Thesis submitted to the Delhi University for degree of Doctor of Philosophy, September 2001, 246.

- <sup>41</sup> AIR 1989 Mad 205.
- <sup>42</sup> (1994) 1 Andh LT 341.
- <sup>43</sup> *Id.* at 351.
- <sup>44</sup> See also *Inder Puri General Store v. Union of India* AIR 1992 J&K 11; *Smt. Bhajan Kaur v. Delhi Administration*, 1996 AIHC 5644 and *Noor Mohammad Usmanbhai Mansuri v. State of Gujarat* (1997) 1 Guj LJ 49.
- <sup>45</sup> For cases where compensation for loss of property in riot like situations has been declined see *State of J&K v. Jeet General Store* AIR 1996 J&K 51; *Smt. Charan Kaur v Chief Secretary, Orissa* (1998) 85 Cutt LT 581 and *Nathulal Jain v. State of Rajasthan*, (1997) 2 ACJ 1271
- <sup>46</sup> S.545 (1 & 2) and s.546 Cr. PC 1898.
- <sup>47</sup> S.357 (3) “When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment order the accused person to pay, by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.”
- <sup>48</sup> In *Hari Singh v. Sukhvir Singh* (1988) 4 SCC 551, the Supreme Court had to exhort the criminal courts to use this provision since “this power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system”. Recently, in *Pamula Saraswathi v. State of A.P.*, (2003) 3 SCC 317, the Supreme Court, while affirming the conviction of the four assailants of the appellant’s husband, directed them to pay a fine of Rs.10,000/- each which was then directed to be paid to the appellant.
- <sup>49</sup> Law Commission of India, *152<sup>nd</sup> Report on Custodial Crimes* (1994).
- <sup>50</sup> Law Commission of India, *154<sup>th</sup> Report on the Code of Criminal Procedure, 1973* 1996, 63. The Law Commission took note of the existence of a Victim Assistance Fund that had been created in the State of Tamil Nadu.
- <sup>51</sup> The earliest of these cases was *Rudul Sah v. State of Bihar* (1983) 4 SCC 141. The inadequacy of the provisions in criminal law to deal with custodial torture is reflected in the judgment in *State of M.P. v. Shyamsunder Trivedi* (1995) 4 SCC 262.
- <sup>52</sup> *Delhi Domestic Working Women’s Forum v. National Commission for Women* (1994) 3 SCALE 11.
- <sup>53</sup> (1995) Supp 3 SCC 387. This was notwithstanding the fact that the persons who had been arraigned as accused were found by the CBI not to be involved in the offence. The report pointed out grave lapses on the part of the investigating officers. See also *Chairman Railway Board v. Chandrima Das* (2000) 2 SCC 465.
- <sup>54</sup> (1998) 7 SCC 392.
- <sup>55</sup> The concurring judgment of Wadhwa J., however, opined that “any amount of compensation deducted from the wages of the prisoner and paid directly to the victim or his family may not be acceptable considering the psyche of the people in our country”.(at 435)
- <sup>56</sup> (1993) 2 SCC 746.
- <sup>57</sup> (1997) 1 SCC 416.
- <sup>58</sup> *Id.* at 443. (emphasis in original) For a later decision of the Supreme Court reiterating the same principles, see *State of A.P. v. Challa Ramakrishna Reddy* (2000) 5 SCC 712.
- <sup>59</sup> The working of the Criminal Injuries Compensation Board in the United Kingdom has not been found to be satisfactory. A recent report titled “Criminal Justice: the Way Ahead” makes a key recommendation that “we will put the needs of victims and witnesses at the heart of the criminal

justice system and ensure they see justice done more often and more quickly.”

- <sup>60</sup> Under s.3 of this Act, the family of the witness could also seek protection or other assistance.
- <sup>61</sup> Despite many states creating programmes responding the needs of victims of crime which include restitution by the offender, compensation by the state, assistance by government and private organisations and the promulgation of “bills of rights”, the actual implementation of these schemes appears to have not been adequate: See LeRoy L Lamborn “The Constitutionalisation of Victims’ Rights in the United States: The Rationale” in Kirchhoff *et al* (eds.) **International Debates of Victimology**, WSV Publishing (1994), 280
- <sup>62</sup> Matti Joutsen, “Changing Victim Policy: International Dimensions” in Kirchhoff *et al* (eds.) **International Debates of Victimology**, WSV Publishing (1994), 211 at 219
- <sup>63</sup> Among the prominent ones are the Weisser Ring established in Germany in 1977, the Scottish Association of Victim Support Schemes and the National Organisation for Victim Assistance in the USA.
- <sup>64</sup> Ss. 2 to 6.
- <sup>65</sup> The TRC was constituted under the Promotion of National Unity and Reconciliation Act, 1995.
- <sup>66</sup> S.23 of the 1995 Act constitutes a Committee on Reparation and Rehabilitation. The TRC has since submitted its final recommendations.
- <sup>67</sup> Albie Sachs. The Fourth D.T. Lakdawala Memorial lecture. “Post-Apartheid Africa: Truth, Reconciliation and Justice”. Institute of Social Sciences 37 – 38 (mimeo)
- <sup>68</sup> Article 21 of the Statute of ICTR provides for rules to be made for protection of victims and witnesses and further states that such rules shall not be limited to conducting an in-camera trial.
- <sup>69</sup> Article 68 of the Statute provides for ‘protection of the victims and witnesses and their participation in the proceedings’. Article 43(6) of the same Statute requires the Registrar of the ICC to set up a ‘victims and witnesses unit’ within the Registry which shall provide “protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.”
- <sup>70</sup> Report of the Committee on Reforms of Criminal Justice System, Government of India Ministry of Home Affairs – Vol.I, March 2003 (hereinafter referred to as ‘the Malimath Committee Report’), 75.
- <sup>71</sup> *Ibid* at 270.
- <sup>72</sup> *Ibid* at 271.
- <sup>73</sup> Para 11.3, *ibid* at 152. The principal criticism of the Malimath Committee is that in its single-minded focus on shifting the system from being accused-centric, an assumption not borne out by any systematic empirical analysis, and in its over eagerness to make it address the needs of victims, it adopts the ‘either/or’ approach. It jettisons the principle of presumption of innocence which it views as a barrier to discovering the truth. Prof. Upendra Baxi criticism is that “Instead of doing any sustained empirical work bearing on so crucial a matter, the Report relies merely on ‘commonsense’ expressed *ad nauseum* in judicial reiteration of the maxim: ‘it is better that ten guilty persons may escape rather than one innocent person may suffer’”: Prof. Upendra Baxi, Introductory Critique to ***The (Malimath) Committee on Reforms of Criminal Justice System: Premises, Politics and Implications for Human Rights***, Amnesty International India (September 2003), 19
- <sup>74</sup> The new s.164-A, as suggested by the Law Commission of India, provides for production by a police officer of “all persons whose statement appears to him to be material and essential for proper investigation of the case, to the nearest Metropolitan Magistrate or Judicial Magistrate, as the case may be, for recording their statements”. This will apply to cases involving an offence

“punishable with death or imprisonment for seven years or more”. S.344-A provides for a summary procedure for trial of witnesses deposing contrary to the statements recorded under s.164-A.

- <sup>75</sup> Clause 1 of the U.N. Declaration.
- <sup>76</sup> Gerd Ferdinand Kirchhoff, “Victimology – History and Basic Concepts” in Kirchhoff *et al* (eds.) **International Debates of Victimology**, WSV Publishing (1994), 1 at 63
- <sup>77</sup> Ezzat A. Fattah, “Some Problematic Concepts, Unjustified Criticism and Popular Misconception”, in Kirchhoff *et al* (eds.) **International Debates of Victimology**, WSV Publishing (1994), 82 at 84. Fattah argues that this neutral terminology represents a much needed return to the notion of crime as a conflict and the notion of conflict as an interaction. He points out that “normative designations of “criminal” and “victim” imply such a judgment and therefore preempt a thorough and objective investigation into the real and actual roles each party played in the genesis of the crime.”
- <sup>78</sup> Gunther Kaiser, “Comparative Prospective Concerning Victim Orientation in Criminology, And Criminal Justice” in Kirchhoff *et al* (eds.) **International Debates of Victimology**, WSV Publishing (1994), 104 at 137. The author while emphasising the advantages of the victim – offender mediation points out that this “requires as its foundation a form of organisation which is not directly integrated into the judiciary.” Clause 7 of the U.N. Declaration encourages the utilization of informal mechanisms for resolution of disputes “where appropriate to facilitate conciliation and redress for victims.”
- <sup>79</sup> For a detailed analysis of the failure of the legal system to deal with the mass killings of 2733 Sikhs in Delhi in November 1984 in the wake of the riots following the assassination of the Prime Minister. Vrinda Grover, “*Quest for Justice 1984 Massacre of Sikh Citizens in Delhi*” (2002) (mimeo).
- <sup>80</sup> Report of the Malimath Committee, 270.
- <sup>81</sup> See generally S. Muralidhar, “*Legal Aid and the Criminal Justice System in India*”, thesis submitted to the degree of Doctor of Philosophy (April 2002).
- <sup>82</sup> The Supreme Court has time and again negated such a plea: See *State of Maharashtra v. M. P. Vashi* (1995) 5 SCC 730
- <sup>83</sup> The Annual Report of the NHRC for the year 1998-99 reveals that the number of deaths in police custody and judicial custody were 183 and 1,114 respectively. There were 436 cases of illegal detentions and 2,252 cases of other police excesses. The official statistics of the National Crime Records Bureau also acknowledges that there were as many as 78 deaths in police custody and over a 100 deaths during “production/ process imports/ journey connected with investigation”: **Crime in India, 2000**, 355-356.

