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## The Quest for Victims' Justice in India

by Subhradipta Sarkar\*

In campaigning for criminal justice reform, human and civil rights activists have historically paid considerable attention to the rights of the accused, while neglecting to address to the same extent the impact of crimes on victims. No responsible authority or organization addressing violations of human rights law, however, can remain oblivious to the substantial suffering of victims. Recognizing that the rights of victims had not been adequately addressed, the General Assembly of the United Nations, in 1985, adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims' Declaration).<sup>1</sup> This document, although not a legally binding treaty, sets out the minimum standard for the treatment of crime victims, and has been heralded by some as the Magna Carta of the international victims' movement.<sup>2</sup>

In India, however, the rights of victims are still often overlooked. Unlike the accused, victims in India have virtually no rights in criminal proceedings, supposedly conducted on their behalf by state agencies. When state agencies fail to successfully prosecute offenders, as is oftentimes the case, victims are left to either suffer injustice silently or seek personal retribution by taking the law into their own hands.<sup>3</sup> Ironically, the "guilty man is lodged, fed, clothed, warmed, lighted and entertained in a model cell at the expense of the State, from the taxes that the victim pays to the treasury."<sup>4</sup>

Section I of this paper explores the current status of victims' rights in international law. Section II discusses the multitude of problems faced by victims in India, while Section III outlines the current status of domestic law and policy, including the role played by the judiciary. In Section IV, the author puts forward a demand for new legislation that more closely parallels international norms in order to improve protection of victims' rights. Finally, in Section V, the author expresses hope for a positive legal development to this end.

### PROTECTION OF VICTIMS' RIGHTS UNDER INTERNATIONAL LAW

The UN Commission on Crime Prevention and Criminal Justice (Crime Commission) develops, monitors, and reviews the implementation of the UN Crime Prevention and Criminal Justice Program (Criminal Justice Program). From its outset in the 1950s, the Criminal Justice Program has sought to replace retributive criminal justice with more effective and humane



Courtesy of Manish Sharma.

Police van in Delhi, India.

policies. Respect for the human rights of offenders and prisoners were key early considerations behind the standards and norms for crime prevention and criminal justice adopted by the UN in subsequent decades. In the 1980s, the Committee on Crime Prevention and Control, the predecessor to the Crime Commission, widened the Criminal Justice Program's focus to include better treatment for crime victims, resulting in the adoption of the Victims' Declaration by the General Assembly.<sup>5</sup>

Apart from insisting on the need to treat victims with "compassion and respect for their dignity," one of the striking and progressive features of the Victims' Declaration is that it considers an individual to be a victim, regardless of whether the state identifies, apprehends, prosecutes, or convicts the perpetrator. The term "victim" also includes the immediate family or dependants of the direct victim and individuals who have suffered harm while trying to prevent victimization, such as witnesses or human rights defenders. The available judicial and administrative mechanisms should enable victims "to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible." The Victims' Declaration advocates for restitution, compensation, and "material, medical, psychological and social" assistance in the interests of justice. Some of the specific rights enshrined in the Victims' Declaration include the right to be referred to adequate support services; the right to receive information about the progress of the case; the right to privacy; the right to counsel; the right to protection from intimidation and retaliation; and the right to compensation, from both the offender and the state.<sup>6</sup>

The right to a remedy for victims of violations of international human rights law is found in numerous international instruments ratified by India, including the Universal Declaration of Human Rights,<sup>7</sup> the International Covenant on Civil and Political

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Rights,<sup>8</sup> the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>9</sup> and the Convention on the Rights of the Child.<sup>10</sup> Most recently, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law<sup>11</sup> (Basic Principles and Guidelines) makes it obligatory for States Parties to the above mentioned treaties to “respect, ensure respect for and implement” the treaties in such a way that “their domestic law provides at least the same level of protection for victims as required by their international obligations.”<sup>12</sup> While it reiterates provisions for the protection and redress of victims similar to those mentioned under the Victims’ Declaration, it also emphasizes the need to prevent repetition of the same offenses by promoting the observance of codes of conduct and ethical norms by public servants; strengthening the independence of the judiciary; and reviewing and reforming laws in this regard.

### THE CURRENT SITUATION IN INDIA

India has largely ignored the protection of victims’ rights, irrespective of whether the perpetrator is the state or a private individual. While it is impossible to describe all of the problems faced by victims in a single paper, the following are several notable examples that should help illustrate the nature of victims’ rights in the country.

Victims in India face significant, and sometimes insurmountable, hurdles during the investigation and prosecution of crimes. The filing of an initial complaint, in and of itself, is a challenging endeavor. From 2006 to 2008, People’s Watch, a national human rights organization, undertook fact-finding missions on police torture across 47 districts in nine states in the country and came up with some startling revelations.<sup>13</sup> Out of 6,063 cases they monitored, almost twenty percent of the cases resulted in police acquiescence, where the police failed to act upon victim complaints against other private individuals.<sup>14</sup> In some states like West Bengal, the rate was found to be as high as 49 percent.<sup>15</sup>

Investigations in India are exclusively a police function, and therefore, victims play no role unless the police consider it necessary. Defective investigations are a serious problem throughout the country. Oftentimes persons belonging to a higher caste or those with political patronage influence the police to carry out sloppy investigations so that a charge sheet is not filed within the statutory time limit. Police investigations raise considerable doubts, particularly in cases where the police themselves are perpetrators. Such failures have often led to a call to entrust such investigations to agencies like the Central Bureau of Investigation, however its own investigations are not above suspicion.

As a result of faulty investigations, initiation of trials may be delayed for years because no charge sheet has been filed. Furthermore, once a trial has begun, the prosecution can seek withdrawal at any time without consulting the victim.<sup>16</sup> While the victim may proceed to prosecute the case as a private individual, without the assistance of the state,<sup>17</sup> this is a Herculean, if not impossible, task.

In spite of constitutional and legislative protection to ensure a competent criminal justice system,<sup>18</sup> one group particularly affected by such procedural lapses is the Dalits.<sup>19</sup> Dalits, historically considered as “untouchables,” are discriminated against and victimized every day in various ways, ranging from social boycotts to grave criminal offenses. More often than not, the perpetrators of crimes against Dalits get away with absolute impunity.

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act<sup>20</sup> (SC/ST Act), enacted to ameliorate the suffering of Dalits, ultimately failed in many respects. A study of judgments delivered by various courts in Gujarat conducted by a voluntary organization in Ahmedabad reveals that in many cases, offenders are acquitted and set free due to the sheer negligence of police authorities and prosecuting advocates.<sup>21</sup> For example, in Gujarat approximately 95 percent of cases prosecuted under the SC/ST Act have resulted in acquittal, mainly on account of defective investigations. Those Dalits that do attempt to file complaints concerning crimes perpetrated by members of

Courtesy of Maria Marques.



Women victims in India struggle to access justice.

the upper caste often face serious retribution, as was the case of Bant Singh in Punjab. When Singh complained against members of a higher caste who raped his daughter, he received justice from the court, but at the cost of both his arms and a leg.<sup>22</sup>

Another area of serious concern is the plight of female victims. In spite of recent developments, violence against Indian women of all ages persists. In many states, there is no Women's Commission to safeguard the rights of female victims of sexual harassment, rape, and other gender-related crimes. Even where such commissions exist, they are generally far from adequate. Moreover, no special provisions to support victims of rape exist to enable them to overcome trauma. Although the Indian Supreme Court outlined guidelines to help law enforcement in immediately assisting rape victims, compliance with these guidelines is rare.<sup>23</sup>

The fallout from the path-breaking Vishaka judgment helps to illustrate the situation of female victims.<sup>24</sup> After police and medical personnel prevented a social worker who was gang-raped by upper caste individuals in a village in Rajasthan from registering her case and providing evidence, social activists and NGOs brought a writ petition seeking legal redress for the sexual harassment of working women and to "assist[] in finding suitable methods for realisation of the true concept of 'gender equality.'"<sup>25</sup> Relying on the Convention on the Elimination of All Forms of Discrimination against Women, the Supreme Court both recognized sexual harassment of women in the workplace and outlined guidelines to prevent and redress complaints of such crimes.<sup>26</sup> Notwithstanding the landmark judgment, over a decade later those guidelines are still the only law on this issue; successive governments have failed to formulate adequate legislation. Concerned over the non-implementation of its own guidelines, in 2006, the Supreme Court directed the labor commissioners of all the states to take steps to implement them.<sup>27</sup> In the four years since, however, the circumstances have barely changed.

Witnesses of crimes, like victims, face tremendous obstacles. In a recent high profile case, the *Best Bakery* case, both the fast-track court as well as the High Court of Gujarat acquitted 21 individuals of murder due to insufficient evidence after 37 out of 73 witnesses, including key witness Zahira Sheikh, turned hostile. The individuals were charged with the murder of four-

teen people during a riot in Vadodara. Although at that time there was reasonable suspicion that witnesses were being threatened or coerced, the public prosecutor took no steps to protect the witness and made no request to hold the trial *in camera*. Afterwards, in an application to the Supreme Court, Zahira alleged that she was threatened and intimidated not to tell the truth and prayed for the re-trial of the case outside Gujarat. In a distinctive judgment,<sup>28</sup> the Supreme Court ordered a retrial and reinvestigation of the case in Maharashtra, which ultimately contributed to life sentences for nine of the accused. In its decision, the Supreme Court noted that "the [lower] Court can neither feel powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice."<sup>29</sup> Despite having exposed the harassment of witnesses, the Supreme Court, nevertheless, convicted Zahira of perjury.

### LEGAL SAFEGUARDS AVAILABLE TO VICTIMS

It would be misleading to assert that the courts or policy makers have not paid any attention to the issue of victims' rights. On the contrary, the Law Commission of India<sup>30</sup> and special committees like the Malimath Committee on Reforms of the Criminal Justice System have emphasized issues like witness protection, victim compensation, and victim participation in police investigations. Sadly, however, progress in terms of effective legislation has been sluggish. In a few of its provisions, the Criminal Procedure Code addresses the status of victims in Indian criminal proceedings. Nonetheless, these provisions are inadequate to address the multitude of problems faced by crime victims.

If a victim or any informant provides information about a cognizable offense to the police (commonly known as a First Information Report or FIR), after recording the statement, the police must supply a copy of the FIR to the informant. If the police refuse to record the information, the informant is allowed to send the statement by mail to the appropriate Superintendent of Police or to directly approach the appropriate magistrate.<sup>31</sup> If the police refuse to investigate the case for whatever reason, the police officer is required to notify the informant of that fact.<sup>32</sup> In spite of such legal safeguards, blatant violations of these provisions result in inexplicable hardship, with large percentages of complaints receiving no response by police, as illustrated by the data from People's Watch, discussed above. This problem is particularly prevalent for women alleging sexual assault and lower caste individuals. Even if these groups are able to successfully file a complaint, the police often manipulate the facts stated by the informant.

The compensation provision of the Criminal Procedure Code is of little value. According to section 357, when a monetary fine is imposed as the sole or an additional punishment, the court may, at its discretion, direct all or part be paid to the victim. Regrettably this power is sparingly used, and even if it is, compensation is minimal. In murder cases, the courts have paid compensation ranging from Indian Rs. 10,000 to 100,000 (approximately U.S. \$215 to \$2,150) depending upon the number of dependents of the deceased and capacity of the accused to pay.<sup>33</sup> However, if there is an acquittal or if the offender cannot be apprehended, there is no opportunity for victim compensation. In cases where the state is the perpetrator, the higher courts, exercising the writ jurisdiction for the violation of Fundamental

Rights of the Indian Constitution, sometimes order compensation to be paid by the state for certain crimes, including illegal detention and custodial torture.<sup>34</sup> Nevertheless, such remedies are extremely rare.

Organizations and commissions have, with little success, looked to the courts to standardize the rights of victims and witnesses. In response to the failure of the trial court in the *Best Bakery* case, the National Human Rights Commission, in a Special Leave Petition,<sup>35</sup> requested the Supreme Court develop guidelines for the protection of witnesses and victims in criminal trials, binding on both the prosecution and law enforcement agencies, as well as the lower courts. The Supreme Court, unfortunately, did not deal with this issue, utterly failing to develop any guidelines.

Arguably, the only legislation which concretely recognizes some degree of victims' rights is the SC/ST Act. The SC/ST Rules framed under the parent SC/ST Act provides for Protection Cells in every state. These Cells are responsible for, among other things, indentifying atrocity prone areas within the state; maintaining public order and tranquility in these areas; recommending to the state government the deployment of special police force; reviewing the status of cases registered under the SC/ST Act; and submitting a monthly report to the state government.<sup>36</sup> Additionally, under the SC/ST Act, travel expenses and daily allowances are provided to the victims, their dependents, and witnesses during court proceedings. Moreover, the District Magistrate, or any other Executive Magistrate concerned, are obligated to make arrangements for providing immediate relief in cash or kind to victims, their families, or both. Because of its lax implementation, however, such a conceptually sound law has failed miserably in accomplishing the purpose of its enactment.<sup>37</sup>

### **A CALL FOR VICTIMS' RIGHTS**

Protection and redress for victims of crime must become a primary concern in India. Cases like *Best Bakery* illustrate the predominant need to incorporate and institutionalize within the Indian legal system the rights and interests of victims and witnesses in order to ensure that justice is served. Incorporating into Indian law many of the rights enshrined in the Victims' Declaration could be a significant step towards this goal. This includes the right of victims to be heard from the time they become victims until the conclusion of the legal process.

The judiciary has a paramount duty to safeguard the rights of the victims as diligently as those of the perpetrators. Although the judiciary is actively engaged in finding redress for victims, the ultimate goal is to pass powerful, efficient, and creative legislation in order to strengthen the hand of the judiciary. New

legislation will allow judges' orders to reach victims and their families, assisting them in accessing justice and securing their rights.

India must also pay greater attention to reparation. Reparation is arguably the most comprehensive means of compensating individuals and groups whose rights have been violated. Reparation acknowledges that serious wrongs have been done and, consequently, that the injured person is entitled to remedy and redress.<sup>38</sup> The failure to provide reparation is tantamount to a grant of impunity to the perpetrator.

Reparation is commonly associated with paying monetary compensation. While this form of compensation is an important means to offset damages suffered, India should not overlook other, non-monetary, forms of reparations. According to the Basic Principles and Guidelines, reparation includes "restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition."<sup>39</sup> In addition to bolstering monetary reparations for victims, new legislation should also address other needs of victims, including medical and psychological care, economic care, immediate protection and security, and long-term rehabilitation. The quality of justice rendered by the judiciary will be further advanced when Indian courts not only have prosecutors and advocates for the accused, but also a special advocate representing the victims.

### **CONCLUSION**

*It is a weakness of our jurisprudence that victims of crime and the dependents of the victims do not attract the attention of law. In fact, the victim reparation is still the vanishing point of our law. This is the deficiency in the system, which must be rectified by the legislature.*<sup>40</sup>

Thus far, the Indian legal regime has failed to protect victims' rights in two fundamental ways: failing to enact suitable laws and, where it has, failing to implement both the letter and spirit of the law. An appropriate example of the second case is the SC/ST Act, discussed above. The latest amendment to the Criminal Procedure Code, which finally received the President's assent on January 1, 2010, after a year in abeyance, is encouraging. This legislation addresses some important aspects of victims' justice such as requiring the completion of investigations of rape and child abuse within three months; the right of rape victims to engage a lawyer of their choice to assist the prosecution; the ability of the trial court to award compensation in cases of acquittal to the victim under section 357 of the Criminal Procedure Code; and the right of the victim to rehabilitation.<sup>41</sup> Unless implemented properly, however, this new law, like the SC/ST Act, will fail to provide the justice that is the quest of victims in India.

**HRB**

## ENDNOTES: The Quest for Victims' Justice in India

- <sup>1</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. Doc. A/RES/40/34 (Nov. 29, 1985).
- <sup>2</sup> A.S. Anand, *Victims of Crime — The Unseen Side*, (1998) 1 S.C.C. (Jour) 13, 3-13.
- <sup>3</sup> N.R. Madhava Menon, *Victim's rights and criminal justice reforms*, THE HINDU, Mar. 27, 2006, available at <http://www.thehindu.com/2006/03/27/stories/2006032703131000.htm>.
- <sup>4</sup> See K.D. GAUR, COMMENTARY ON INDIAN PENAL CODE 1569 (Universal Law Publishing Co. 2006).
- <sup>5</sup> Jan Van Dijk, Officer-in-Charge, Human Security Branch, UN Office on Drugs and Crime in Vienna, Lecture delivered on the occasion of the presentation of the Hungarian National Strategy for Social Crime Prevention at the Hungarian Embassy, Vienna: *Crime Prevention and Human Security: a United Nations Perspective* (Feb. 25, 2004), available at [http://www.crime-prevention-intl.org/io\\_view.php?io\\_id=31&io\\_page\\_id=142](http://www.crime-prevention-intl.org/io_view.php?io_id=31&io_page_id=142).
- <sup>6</sup> Victims' Declaration, *supra* note 1, ¶¶ 5-6, 8, 12.
- <sup>7</sup> G.A. Res. 217 (III) art. 8, U.N. Doc. A/810 (Dec. 10, 1948).
- <sup>8</sup> International Covenant on Civil and Political Rights art. 2, adopted Dec. 16, 1966, 999 U.N.T.S. 171.
- <sup>9</sup> International Convention on the Elimination of All Forms of Racial Discrimination art. 6, entered into force Jan. 4, 1969, 660 U.N.T.S. 195.
- <sup>10</sup> Convention on the Rights of the Child art. 39, entered into force Sept. 2, 1990, 1577 U.N.T.S. 3.
- <sup>11</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, annex, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).
- <sup>12</sup> *Id.*, ¶ 2(d).
- <sup>13</sup> The author himself was involved with this project from its inception in July 2006 until February 2008. For the purpose of this project, the organization took into account the definition of "torture" under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. According to Article 1 of the Convention, "severe pain or suffering" caused due to "the consent or acquiescence of a public official or other person acting in an official capacity" also amounts to torture. Incidentally, India signed the Convention in 1997, but has yet to ratify it.
- <sup>14</sup> People's Watch, *Torture and Impunity in India Annex* (2008), available at <http://www.pwtn.org/tortureandimpunitybook.htm>.
- <sup>15</sup> *Id.*
- <sup>16</sup> See INDIA CODE CRIM. PROC. § 321.
- <sup>17</sup> *Id.* § 190.
- <sup>18</sup> E.g., INDIA CONST. art. 17; The Protection of Civil Rights Act, 1955, No. 22, Acts of Parliament, 1955; The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, No. 33, Acts of Parliament, 1989.
- <sup>19</sup> "Dalits" literally means "broken people." They belong to the lowest strata of society.
- <sup>20</sup> SC/ST Act, *supra* note 18.
- <sup>21</sup> See generally S.H. Iyer, *Atrocities Act — An Orphan Act*, COMBAT LAW, Apr.-May 2005, at 48-55, available at <http://www.indiatogether.net/combatlaw/vol4/issue1/index.htm>.
- <sup>22</sup> See generally Annie Zaidi, *Casteist assault*, FRONTLINE, Jan. 28, 2006, available at <http://www.flonnet.com/fl2302/stories/20060210003703300.htm>.
- <sup>23</sup> See *Delhi Domestic Working Women's Forum v. Union of India*, (1995) 1 S.C.C. 14.
- <sup>24</sup> *Vishaka v. State of Rajasthan*, A.I.R. 1997 S.C. 3011.
- <sup>25</sup> *Id.*
- <sup>26</sup> *Id.* (A cursory survey of various provisions of the Indian Penal Code, the principle criminal law of the country, protects women from such offences, but none of them directly and explicitly deal with the problem.)
- <sup>27</sup> *Sexual harassment at workplace: States told to set up panels*, THE HINDU, Jan. 23, 2006, available at <http://www.hindu.com/2006/01/23/stories/2006012304791400.htm>.
- <sup>28</sup> *Zahira Habibullah Sheikh v. State of Gujarat*, (2004) 4 S.C.C. 158.
- <sup>29</sup> *Id.* at 188-90.
- <sup>30</sup> See generally Law Commission of India, *135th Report on Women in Custody* (1989); Law Commission of India, *152nd Report on Custodial Crimes* (1994); Law Commission of India, *198th Report on Witness Identity Protection and Witness Protection Programs* (2006).
- <sup>31</sup> See INDIA CODE CRIM. PROC. §§ 154, 190.
- <sup>32</sup> See *Id.* § 157(2).
- <sup>33</sup> See generally GAUR, *supra* note 4, at 1575-76.
- <sup>34</sup> See generally *Rudul Shah v. State of Bihar*, A.I.R. 1983 S.C. 1086; *Nilabati Behera v. State of Orissa*, A.I.R. 1993 S.C. 1960; *Chairman, Railway Board v. Chandrima Das*, (2000) 2 S.C.C. 465.
- <sup>35</sup> National Human Rights Commission, *Special Leave Petition (Criminal) of 2003 in the Manner of National Human Rights Commission v. State of Gujarat* (2003), available at <http://www.ihrc.org/content/c0302.pdf>.
- <sup>36</sup> The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, R. 8, 1995, Gen. S.R. 316(E).
- <sup>37</sup> See generally P.S. Krishna, *Walls in minds*, FRONTLINE, Nov. 21, 2009, available at <http://www.hinduonnet.com/fline/fl2624/stories/20091204262402500.htm>.
- <sup>38</sup> See THEO VAN BOVEN, THE PERSPECTIVE OF THE VICTIM IN THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: FIFTY YEARS AND BEYOND 14 (Yael Dnaeli et al. eds., Baywood Publishing Co. 1999).
- <sup>39</sup> Basic Principles and Guidelines, *supra* note 11, ¶ 18.
- <sup>40</sup> *Rattan Singh v. State of Punjab*, A.I.R. 1980 S.C. 84.
- <sup>41</sup> See J. Venkatesan, *Cr.P.C. amendments come into effect*, THE HINDU, Jan. 2, 2010, available at <http://www.hindu.com/2010/01/02/stories/2010010253101200.htm>.