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Intimidated Victims & Witnesses: Treated with Hostility

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**TOWARDS A LEGAL REGIME FOR PROTECTING
THE RIGHTS OF VICTIMS & WITNESSES**

- Saumya Uma*

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

Introduction

The recent Best Bakery case, where witnesses were forced to give false testimonies in the trial court under duress, threat and intimidation, has provided the impetus for persons concerned with justice and accountability within the country to think seriously about protecting the rights of victims and witnesses. The need for protection of witnesses and their families came in for further discussion after the twin blasts in Mumbai on 25th August this year, when a key witness, Shivnarayan Pandey, had to be protected by the Mumbai police.

Till date, the victims' perspective was perceived as a complication, an inconvenience and a phenomenon that is marginal and avoidable. Post-Best Bakery case, a discussion has ensued on how rights and interests of victims and witnesses needs to be incorporated and institutionalized within the Indian legal system in order to ensure that the ends of justice are served.

A perspective on rights and interests of victims and witnesses includes three key issues: protection of victims and witnesses; victim participation in the proceedings; and the right to reparations. The present article focuses on the first issue, as this is of utmost importance in the present context of the Best Bakery case as well as several other cases pending in the trial courts in Gujarat pertaining to genocide and crimes against humanity committed on Muslims in Gujarat last year.

Punishing Hostile Witnesses for Being Intimidated

The Best Bakery case rocked the conscience of the civil society with a total absence of protective measures for victims and witnesses even in important cases involving heinous crimes. However, in August 2003, six weeks after Zahira Sheikh spoke in a packed press conference in Mumbai about why she was compelled to lie in court, and the extent to which she and her family were subjected to threats and coercion, the Union Cabinet ironically cleared an amendment bill that prescribed stringent punishment for witnesses who turn hostile!ⁱⁱ The message seems to be loud and clear

– punish the Zahiras, for they are liars who cause blotches on an otherwise impeccable justice delivery system!

In justifying the amendment, government officials have been focusing on the practice of giving false testimony in court for financial / material gains, as though this were the only motive for witnesses to turn hostile. For example, Sushma Swaraj, the Parliamentary Affairs Minister, pointed out that witnesses change their position due to “money and muscle power”, indicating that the bill would arrest this trend.ⁱⁱⁱ The government has intentionally turned a blind eye to the predicament of thousands of victims and witnesses in Gujarat, who continue to live in hiding till date due to threats from “absconders”, and the similar situation of many more victims and witnesses in other parts of the country who are intimidated by accused who are influential persons.

It is surprising that though the Bill closely followed the heels of the Best Bakery case, the government considers hostile witnesses only as culprits and not as victims at all.^{iv} Without any doubt, the act of giving false testimonies in court for material gains cannot be tolerated. However, while providing for a stringent punishment for perjurers, if the government was really committed to justice, why did it not prescribe a stringent punishment for persons who threaten, intimidate and coerce victims and witnesses as well?

The government’s contradictory stand on witness protection becomes obvious if we recall its formulation of the Prevention of Terrorism Act (POTA), 2001 - a draconian legislation on terrorism - a few years ago. At that time, the same government showed a sudden and unprecedented concern for the interests of witnesses, and added a provision that the identity of the witness may be withheld from the accused if the court or the prosecutor considered the witness’ life to be in danger. This clause would prevent an accused from preparing an effective defence, thereby undermining fair trial guarantees.^v The bona fides of the government’s proclaimed concern for protection of witnesses is, therefore, suspect.

The Malimath Committee can be credited with at least accurately stating the obvious - that the absence of a law on witness protection has resulted in a growing trend of hostile witnesses.^{vi} However, its recommendations could have gone beyond merely advocating for adoption of such a law.

Why Talk about Rights of Victims & Witnesses?

To understand the victims and witnesses’ perspective, we must first comprehend why victims, survivors and witnesses go to the altar of the court in the first place. They would do so for a variety of reasons: the desire for the truth to be known, to speak for the dead, to demand accountability and to demand justice.^{vii}

Justice traditionally has been understood to involve prosecution, conviction and punishment of guilty in order to restore public order, security and respect for rule of law. The rate of conviction is often looked upon as an indicator of the extent to

which justice is dispensed with. The report of the Malimath Committee is a recent example.^{viii} Some years ago, Justice Albie Sachs said: “Justice is not only in the end result; it is also in the process.”^{ix} These words spell out the expanded meaning of justice in the present day’s context. The preoccupation of the justice delivery system ought to be not only with whether a conviction or acquittal was secured, but whether the judicial system was able to inspire the confidence of victims and witnesses to truthfully testify before it in order to ensure conviction of the guilty.

In one sense, the entire criminal legal system functions primarily and substantially to provide justice to the victim. Giving the victims and witnesses a voice to testify in court without fear, participate in the court proceedings and have their rights and interests protected is of utmost importance for the legitimacy of the justice delivery system. Moreover, the present day understanding of justice necessarily includes accessibility to courts of law. Unless the judicial system is accessible to the people who demand justice, the system would exist only in name and not in substance. Needless to say, victims and witnesses would be amenable to accessing the system and give truthful testimonies only if the system guaranteed a protection of their and their families’ privacy, security, identity and dignity.

Moreover, it is a fact that in India, thousands of violent offences go unreported. The effects of crime, evaluated in terms of the psychological and physical damage caused to hundreds of thousands of Indians every year, can be devastating. A programme that protects the interests of victims and witnesses can encourage reporting of crimes – the first essential step towards achieving justice and accountability for the offences.

The police and the prosecution are also under a constant attack for not apprehending criminals, especially those who are highly placed, powerful and influential. However, it is a fact that the victims and relatives are reluctant to divulge any information concerning heinous offences, due to fear of victimization by and reprisals from the perpetrators. Given this state of affairs, crime detection (especially in heinous offences) and crime prevention can become arduous jobs for the police. Undoubtedly, the role of witnesses in assisting police investigations and giving evidence in court is crucial to the success of criminal prosecutions.

The absence of a programme protecting the rights and interests of victims and witnesses also contributes to a sense of powerlessness of victims. It shapes the public perception of the justice delivery system as serving the needs of perpetrators rather than victims’ needs. This has the potential to lead to a quest for retributive justice through informal means, which is criminal in nature. Victimisation creates an intense fear and cynicism of society and it is through victim aid that some of this faith can be restored. Aid to victims, whether through financial compensation, counselling, or medical assistance, is essential as it indicates to victims that they have not been abandoned, and that there is concern about their plight. Giving her testimony in court can contribute to the healing process of the victim. Hence a victim-centred approach to criminal justice is imperative.

Some experts say that the alienation and sense of powerlessness of the victim / witness, coupled with traditional problems surrounding the credibility of justice redressal machinery and the lack of public confidence in the criminal justice system as a whole, can lead to a situation of revenge and retribution through private mechanisms. Individuals and communities who perceive themselves to be unprotected and under attack could in fact become very threatening.^x

Programmes with protective measures for victims and witnesses are often viewed simply as 'remedial' measures that are required after a heinous offence has occurred. However, persons working on crime prevention state that in reality, if untreated, today's victim is potentially tomorrow's perpetrator.^{xi} Therefore, victim and witness support programmes are also required to intervene in the cycle of violence in a proactive manner, and contribute to prevention of crimes.

In addition, law casts an obligation on every citizen to give testimony in a criminal trial with regard to a crime that has come to her knowledge. This obligation is fair and meaningful only if the victim / witness does not have to fear for her life, security, dignity, privacy, livelihood and that of her near and dear ones.

Existing Safeguards under Indian Law

Criminal law in India was codified by the British with the sole purpose of facilitating repression of Indians and to prevent the 'natives' from acting against the colonial masters. Within this scheme of things, a victims' and witnesses' perspective would have been a misfit. Independent India inherited and has continued to use a substantial body of criminal law as was codified by the British. Therefore it is hardly surprising that rights of victims and witnesses barely feature under the existing criminal laws. At a practical level, victims have been silent partners in the legal process, and their role is nothing more than that of a prosecution witness.

Notwithstanding this glaring shortcoming, some legal provisions do exist in this regard. For example, rules of evidence protect victims and witnesses from being asked indecent, scandalous, offensive questions, and questions intended to annoy or insult them.^{xii} Criminal courts are also obliged to order payment of reasonable expenses incurred by the witness or complainant for attending the court.^{xiii}

In addition, thanks to judicial activism, some basic protective measures for victims and witnesses are now being provided during trial. These measures include holding an in camera trial – a procedure that is prescribed by the criminal law. Though in camera trials do not guarantee that the dignity of the victim / witness will be protected (remember Bhanwari Devi's case?)^{xiv}, this is a provision which might be useful at times when the testimony of the witness / victim may be otherwise vitiated by a hostile court atmosphere. In addition, courts sometimes order suppression of the identity of a victim or witness from all official documents in order to protect her privacy. Recently, the apex court has also made a move towards recording of evidence by way of video conferencing.^{xv}

Ultimately the extent to which the dignity, privacy and other interests of the victim / witness are protected in court, depend on the judge's discretion and whether she wishes to be proactive. To the author's knowledge, no specific legal provision exists for protective measures to victims and witnesses either before or after trial.

Some Positive Initiatives

In recent months, the Mumbai police have formulated a four-point plan to protect vital witnesses in bomb blast and other sensitive cases. The plan involves shifting the witness to another city, providing her the same work that she had been doing, giving her a fresh identity and relevant documents in that name and offering security cover for her family.^{xvi} This initiative is a result of the need felt by the city police to protect a key witness, Shivnarayan Pandey, after the twin blast case in Mumbai in August this year. The vital clues given by Pandey had led to the arrest of four persons. The witness is now being kept by the police in an undisclosed location for security purposes. The plan to protect witnesses is motivated by the fact that with terrorist acts being on the rise, the police desperately needs witnesses to play an important role.

In a totally unrelated case, Neelam Katara filed a petition in the Delhi High Court last year, seeking a direction to the central government for evolving a mechanism for protection of witnesses. Her son was allegedly kidnapped and killed by the son of Rajya Sabha M.P. D.P. Yadav. Neelam Katara petitioned the High Court after several witnesses turned hostile during the trial of her son's murder, allegedly due to pressure from the accused and their sympathizers. The direction she sought was to ensure that, in the absence of a law as was available in other countries, the court lays down guidelines until the time a legislation was passed to protect victims and witnesses.^{xvii} On 14 October 2003, the Delhi High Court responded positively to the petition and issued witness protection guidelines in cases punishable with life imprisonment or death.^{xviii} It named the member secretary of the Delhi Legal Services as the competent authority to whom complaints of threats to witnesses in the specified cases would be made and protection sought. The judges said it would be the duty of the investigating officers of these cases to inform witnesses that they had protection against threats of any kind. They directed the Delhi police commissioner to publicise the guidelines through the media, and further clarified that the guidelines would remain in force till Parliament enacted a suitable law for protection of witnesses.^{xix}

In September 2003, the Punjab and Haryana High Court ruled that it would be appropriate for both the Central and state governments to expeditiously adopt a programme for the protection of witnesses.^{xx} The court said: "Since it is not for us to direct the administration to formulate the guidelines, rather than leaving the decision on the absolute discretion of the district authorities, who may or may not like to draw upon secret service funds, we would like to bring on record the desirability of the legislature or the administration to try and emulate the advances in this field made in other countries."

These are some preliminary tentative steps being taken by authorities concerned with delivery of justice. Clearly, India needs a comprehensive law on protection of rights and interests of victims and witnesses. Till such a law is formulated, courts and the police would continue tackling the issue in a piecemeal and sporadic manner.

Experiences of Other Countries

While in India, we are thinking about a Victim and Witness Protection Programme (VWPP) for the first time, such programmes are not new to the jurisprudence of other countries. Many European, African and North American countries have a functional programme of this kind. An examination of these programmes may give us valuable information for the formulation of our own programme, given the specific socio-economic, legal and political conditions of the country.

The United States, Canada, Scotland and Australia have legislated for formal protection programmes for witnesses and victims. In the United States, the law sets out what a witness is entitled to and what the different agencies are responsible for. The programme, aimed at cracking down on drug gangsters and international terrorists, helps a mafioso who becomes an approver in the court. In December 2002, the witness protection programme of the United States hit the headlines after the government offered protection for defecting Iraqi scientists.

In attempting to strike a balance between the rights of victims, witnesses and the accused, New Zealand has experimented with new methods that aim to satisfy both offenders and victims. Through "restorative justice", it tries to satisfy victims, offenders and their families by bringing them together in informal meetings to discuss the offence. The object of restorative justice is for offenders to compensate victims for damages, with the offender's family sharing responsibility. The method has been successful in juvenile cases, but how it would work with more serious crimes, such as murder or rape, is unclear.^{xxi}

In South Africa, the Truth and Reconciliation Commission constituted in 1995 to deal with gross human rights violations committed during the apartheid regime, significantly included a victims and witnesses protection programme.^{xxii} Subsequently, South Africa legislated upon this issue and has institutionalized protection programmes for witnesses and victims.^{xxiii} The legislation seeks to provide for the protection of witnesses through the institution of witness protection programmes, which will be administered by a central Office for Witness Protection. The South African VWPP includes the following elements: it is used only for violent crimes that are clearly listed; a potential witness, a dependant of that witness or her family member can be admitted to the programme; allowances are paid to the witness, not for testifying but as a reimbursement for any proven loss of income; the witness will be kept at a safe location but may be moved around; and the programme includes resettlement of the witness upon conclusion of the criminal case.^{xxiv}

In European countries such as Italy, Germany and Netherlands, the VWPP is used for organized crimes, terrorism, capital and other violent crimes especially where the accused already knew the witness / victim.^{xxv} Similar to the South African programme, in all the three countries, a Memorandum of Understanding (MoU) is entered into with the witness. The MoU is a code of conduct prescribing what the witness should and should not do under various circumstances; it is not a contract from which the witness can derive any rights. The witness protection scheme ranges from the regular observation of an individual's residence to complete resettlement, and, if required, intensive personal guidance and support.^{xxvi} Unlike in popular imagination, change of the victim's / witness' identity is rarely resorted to due to the legal and bureaucratic problems involved, as well as the possible psycho-social repercussions on the victim / witness.

Programmes in International Tribunals

Under international law, the victims' perspective has been spelt out in three instruments of the United Nations – UN Declaration of Basic Principles for Victims of Crime and Abuse of Power^{xxvii}; 'Van Boven Principles'^{xxviii} and 'Bassiouni Principles'.^{xxix} In the first of these instruments, the international community agreed on the following rights for victims:

- The right to be treated with respect and recognition;
- The right to be referred to adequate support services;
- The right to receive information about the progress of the case;
- The right to be present and give input to the decision-making;
- The right to counsel;
- The right to protection of physical safety and privacy;
- The right of compensation, from both the offender and the State.

Victim and witness protection programmes in international courts and tribunals have been premised on principles enshrined in these three instruments.

In an international environment a victim and witness protection programme is a very complex activity, involving high level negotiations with several states in order to ensure cooperation with the court / tribunal. At the first glance, an international tribunal's victim and witness protection programme may seem irrelevant to national jurisprudence since the former relies heavily on geopolitical dynamics and negotiations that would be absent in the latter. However, laws relating to international courts and tribunals being standard-setting mechanisms, it would be a relevant exercise to examine the content of such programmes and explore ways and limits to which these can be adapted to the Indian situation.

The ad-hoc tribunals prosecuting for gross violations committed in former Yugoslavia (ICTY)^{xxx} and Rwanda (ICTR)^{xxxi} each have a witness protection programme. A

Witnesses and Victims Support Section has been established in the Office of the Prosecutor in both the tribunals to implement this programme. The ICTY, in its jurisprudence, explicitly set out the duties of the Tribunal in relation to victims and witnesses, under five broad categories:^{xxxii}

- preventing the identification of victims and witnesses to the public and media
- preventing re-traumatisation caused by confronting the accused
- ensuring anonymity from the accused and defence counsel
- delaying the disclosure of witness identity prior to trial
- general measures concerning the protection of witnesses and victims in and around the premises of the Tribunal

The Section is responsible for preserving the anonymity of protected witnesses and ensuring the security and safety of all witnesses – both of the Prosecution and the defence. Anonymity of victims and witnesses is ensured by allowing testimony to be given by one-way closed circuit television and the use of voice and image altering devices. Special measures including closed session (in camera) hearings are envisaged to prevent identification of victims and witnesses to the public and media. In addition, the programme includes responsibility for ensuring the safe travel of protected witnesses to and from their homes to the Tribunal, by providing a transport with an escort, and for testifying in a safe and conducive environment. The programme also envisages provision of medical care, counseling, a safe accommodation, food, clothing and other expenses to witnesses.^{xxxiii}

Despite the comprehensive nature of the programmes, the tribunals have had to address several problems in the actual implementation of these programmes. For example, the ICTY faced serious questions about its programme in 1998 when it did not give protection to witnesses before and particularly, after they testified. Women refugees feared reprisals if they were sent back to Bosnia after testifying.^{xxxiv} It is surprising but true that at inception, the ICTR did not include any protection in the post-trial phases, which was critical. Both the tribunals, through their years of experience, have found the necessity to address problems relating to issues including internal and external relocation of witnesses.^{xxxv} The ICTR had permanently relocated 35 witnesses deemed particularly vulnerable to risk to their safety upto last year.^{xxxvi} The VWPP has also imposed a heavy operational burden on the Registry of both the Tribunals.

From the experience of the ICTR, it was found necessary to draw clear lines of responsibility for witnesses during the investigative stage, between the Victims and Witnesses Unit and the parties. The Prosecution and the Defence have responsibility for the protection and well-being of the witness whilst conducting their investigations, including temporary protection measures, while the Unit takes responsibility for protection during and after the proceedings.

Programme of International Criminal Court

The Rome Statute of the International Criminal Court (ICC) is the first permanent international court that would prosecute individuals committing the most heinous crimes under international law – war crimes, crimes against humanity and genocide.^{xxxvii} Since the ICC has been established specifically to end the existing climate of impunity worldwide, it is imperative that the ICC cannot serve the purpose for which it was established unless it inspires the confidence of victims and witnesses to come forward and tell the truth.

The Rome Statute has comprehensive provisions on protection of victims and witnesses.^{xxxviii} At a conceptual level, it kept in mind the provisions in the three major instruments of UN mentioned above; at the operational level, its provisions have been formulated after careful consideration of the experiences of ICTR and ICTY. Moreover, provisions in the Rome Statute are a culmination of several years of international concern for and campaign on the rights of victims and witnesses.

The Statute and Rules of Procedure and Evidence provide for measures to guarantee the safety, physical and psychological well-being, dignity and privacy of victims, witnesses and their families. A Victims and Witnesses Unit has been established in the ICC's Registry – the court's administrative organ - for this purpose. Unlike in the ICTR and the ICTY, the Unit is established in the Registry, which is an impartial body as compared to the Office of the Prosecutor. This Unit will provide protective measures, security arrangements, counseling and other appropriate measures not only to victims and witnesses that appear before the ICC but also to their family members and other dependents. There is a clear recognition that family members of some victims and witnesses are at grave risk because of the testimony given in court. The Unit includes experienced staff, trained to deal with traumatized individuals, including victims of sexual violence and child victims.

The ICC Statute and Rules provide for protective measures for victims and witnesses not only during trial but also before and after trial. Moreover the responsibility for these measures is assigned to the Office of Prosecutor, the Pre-Trial Chamber and the Trial Chamber. At the stage of investigation and prosecution of crimes, Prosecutor is duty-bound to take appropriate protective measures. The Statute also provides for the Prosecutor to withhold, until the trial, evidence and information regarding a victim or witness, and submit only a summary of the information, if it may lead to a grave endangerment of her or her family's security. The Pre-Trial and Trial Chambers are also required to provide for the protection and privacy of victims and witnesses. The ICC may also protect the identity of victims and witnesses from the press and public by conducting any part of the proceedings by video camera or allow the presentation of evidence by electronic or other special means.

The ICC has a special obligation to protect women victims and witnesses, in particular, where the crimes involve sexual or gender violence. The protective measures ought to be such that they are not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. As an exception to the principle of public hearings, any part of the proceedings may be conducted in camera (closed to

the press and the public) or allow the presentation of evidence by electronic or other special means. While this would apply to all cases of violence, the measures would be implemented particularly in cases of victims of sexual violence.

Effort has also been taken to protect child victims and witnesses from further traumatization through the court proceedings. The Court is obliged to provide protective measures taking into account all relevant factors relating to the victims and witnesses including their age and nature of crime, and in particular, violence against children. The Prosecutor is required to appoint advisors with legal expertise on violence against children.^{xxxix} In addition, both the Prosecutor and the Registrar must have regard to the requirement of expertise on violence against children in the appointment of their staff.^{xl} The Rules of Procedure and Evidence further provide that in order to facilitate the participation and protection of children as witnesses, the Victims and Witnesses Protection Unit may assign a child support person to assist the child through all stages of the proceedings, with the agreement of the child's parents or legal guardian.^{xli}

In short, by keeping victims' interests, concerns and rights among its primary objectives, the ICC Statute is poised to do "justice" with a human face and help in the healing process and the recovery of the victims, which is and ought to be the ultimate goal.^{xlii} However, the efficacy of the VWPP will actually get tested on ground only when the ICC starts becoming functional and when its VWPP starts being implemented.^{xliii}

Lessons for India

An examination of VWPP in other countries and in international tribunals and courts provides several lessons for India, some of which are enumerated below:

- Protection of victims and witnesses is a very complicated issue; hence it requires serious thought, a thorough discussion, meticulous planning and committed implementation.
- The programmes must operate on the basis of specific ground rules to protect against potential miscarriages of justice.
- The programmes are designed to serve the interests of key individuals who can provide essential evidence, victims of crime and innocent bystanders.
- VWPP necessarily involves coordination between a number of agencies – including the police, prosecutors and courts, a large financial allocation, several buildings and human power among other resources.
- Due to the heavy expenses involved, the programme is usually restricted to cases of very serious crimes, and is resorted to only in extreme situations.
- Even the best protection programme can be penetrated, causing grave harm to victims and witnesses.
- All such programmes have faced difficulties and set backs; none have had a hundred percent success.

- Most programmes are more successful in ensuring the physical safety of witnesses, than in their and their family members' mental and social well-being.
- Individuals who live under witness protection programmes usually experience a total disruption of their and their family members' lives; they essentially trade in their old life for a new one. This includes relocation, resettlement, a virtual severance of communication with one's family and friends, and a change of one's identity.
- Some witnesses get frustrated with the confinement, which is necessary to protect the witness from intimidation; most witnesses face difficulties in rebuilding their lives in a new community;^{xliv} some find the pressures of concealment and pretence too great, leading to problems of mental illness and even suicide.^{xlv}
- Many people who live under such programmes in other jurisdictions are "supergrasses" - criminals who turn on their underworld associates.
- Police and prosecuting authorities are deeply concerned that if the life of the victim / witness improves, even marginally, as a result of the programme, that gives scope to the court to see their evidence as bought or tainted.

Conclusion: Issues and Dilemmas

Even while examining international experiences on the issue, formulating a viable and comprehensive victim and witness protection regime for India raises several uneasy questions. Crucial issues and dilemmas include: Does India have the resources? Would this programme be a luxury that a poor country like India can ill-afford? Or can we demand a diversion of funds from other budgetary heads in the national budget?

Given the present government and its clear Hindu right wing leanings, as well as its current exercise at thwarting justice for victims of the Gujarat carnage, does a political will exist to make such a programme a reality? Since such a programme will essentially involve coordination with the police, with the Indian police failing to liberate itself from political diktats, will a victim / witness protection programme work in India?^{xlvi} Given the high level of bureaucracy in India, would it be possible to actually have the requisite level of coordination between various government agencies for the success of the programme? In the context of a high level of corruption among government officials, would the programme be implemented efficiently and serve the real needs?

How do we change the mindset of the justice delivery system that looks at victims and witnesses as mere pawns in a criminal trial and not as real people whose interests we try to further? Does the registry of every court have the commitment, sensitivity and more necessarily the neutrality required to implement such a programme in the manner required?

Given the problems of terrorism and crimes committed by the underworld in large metropolitan cities within the country, it is reasonable to expect that a prospective

programme on protection of victims and witnesses would necessarily protect criminals involved in such crimes who turn on their accomplices. In the context of increased advocacy of death penalty for heinous crimes within India, can we not expect an adverse public reaction to a programme that actually protects such persons? How can such a reaction be countered?

How do we balance the inherent tension between protection of rights and interests of victims and witnesses, and aspects of fair trial, including protection of rights of the accused? Maintaining the balance is a challenging but important exercise, in order to maintain our commitment to democracy, justice and rule of law. Given the present trend where India is moving towards a 'hard' state, as indicated by the recommendations of the Malimath Committee, would a victim / witness protection programme provide yet another opportunity to the government to violate aspects of fair trial even more? If so, how can such an attempt be thwarted?

Issues and dilemmas are many. And there are no easy answers. However, it is gratifying to know that we have already made a beginning by thinking and talking about the need for a victim / witness assistance programme. The first tentative step has been taken – to ensure that we have justice with a human face.

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ⁱ United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principle 4

ⁱⁱ The proposed amendment to the Code of Criminal Procedure, 1972, envisages insertion of Section 164 A, under which, a police officer investigating any offence, punishable with death penalty or imprisonment of seven years or more, is mandated to produce "all persons whose statement appears to him to be material and essential for investigation of the case, to the nearest Magistrate, for recording of their statement." Under the present system, the police records statements of witnesses.

ⁱⁱⁱ 'Union Cabinet Clears CPC Bill', NDTV, 12 August 2003

^{iv} 'Law Will Target Hostile Witnesses, Offers no Relief to Zaheeras', THE INDIAN EXPRESS, 12 August 2003

^v For further details, see Rajinder Sachar, 'POTO: Unleashing Tyranny by Law' in MANUSHI, Issue 127, and 'Rights at Risk', AMNESTY MAGAZINE, November / December 2001

^{vi} The Committee on Reforms of the Criminal Justice System, headed by Justice Malimath, was appointed by the present government in 2001 with a broad mandate "to examine the fundamental principles of criminal jurisprudence, including the constitutional provisions relating to criminal jurisprudence, and see if any modifications and amendments are required." The Committee submitted its report to the government recently.

^{vii} Vahida Nainar, Giving Victims a Voice, UN CHRONICLE No. 4, 1999

^{viii} Supra n. 6; The recommendations that the Committee recently submitted to the government have come under severe criticism both internationally and domestically.

^{ix} Justice Albie Sachs is a member of the Supreme Court of South Africa. Statement delivered at the University of Toronto Faculty of Law, October 1999.

^x For further details on the philosophy behind support of victims and witnesses, see Graeme Simpson, 'Crime and Violence: The Need for Victim Support in South Africa', published in Monograph 7: PUTTING VICTIMS ON THE AGENDA, November 1996

^{xi} Ibid

^{xii} Sections 151 & 152, Indian Evidence Act, 1872

^{xiii} Section 312, Code of Criminal Procedure, 1973

^{xiv} In Bhanwari Devi's case, the court had ordered an in camera trial to prosecute accused persons for gang-raping the victim. The trial resulted in isolating the victim behind closed doors, facilitating further victimization by the defence lawyers, their assistants and accomplices, with the male judge and policemen being mute spectators.

^{xv} The Supreme Court has recently stated that recording of evidence by way of video conferencing is permissible, provided it is recorded in the presence of the accused, and that such evidence would be as per "procedure established by law". (2003) 4 SCC 601

^{xvi} 'Cops Plan Witness Protection', MID-DAY, 25 September 2003

^{xvii} 'High Court Pushes for Law on Hostile Witnesses', TRIBUNE, 11 March 2003

^{xviii} The guidelines were issued by a Division Bench of the Delhi High Court, comprising of Justices Usha Mehra and Pradeep Nandrajog.

^{xix} Ibid

^{xx} The Bench, comprised of Mr Justice Amar Dutt and Mr Justice Virender Singh; for further details, see 'Mechanism Required for Protection of Witnesses, says High Court', THE TRIBUNE, 9 September 2003

^{xxi} 'Offenders have Rights, But Do Victims?', PRESS KIT BACKGROUNDER NO. 5, Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, DPI/2088/AC February 2000

^{xxii} Charles Villa-Vicencio, A SOUTH AFRICAN EXPERIMENT IN JUSTICE, Paper presented at All Africa Conference on African Principles of Conflict Resolution and Reconciliation, Addis Ababa, Ethiopia, 8-12th November 1999

^{xxiii} Witness Protection Act, 1998 (Act 112 of 1998)

^{xxiv} WHAT THE WITNESS PROTECTION PROGRAMME IS ALL ABOUT, Issued by Department of Justice, South Africa, 11 June 1997

^{xxv} Toon van der Heijden, WITNESS PROTECTION PROGRAMMES COMPARED, Paper presented at the 2nd World Conference on Racism, Durban, December 2001

^{xxvi} Ibid

^{xxvii} This is also known as “the Victims’ Declaration”, adopted by the General Assembly in November 1985

^{xxviii} The Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law of 1996

^{xxix} The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law of 1999

^{xxx} The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY), was established by the United Nations Security Council in May 1993 to bring to justice those responsible for committing genocide, crimes against humanity and war crimes in the territory of the former Yugoslavia since 1991. The seat of the Tribunal is The Hague.

^{xxxi} The International Criminal Tribunal for Rwanda (ICTR) was established by the United Nations Security Council to prosecute individuals responsible for genocide, crimes against humanity and serious violations of international humanitarian law committed in Rwanda during 1994. The Tribunal is located in Arusha, Tanzania.

^{xxxii} The Trial Chamber of ICTY in Prosecutor vs. Dusko Tadic, a/k/a/ “Dule”, 7 May 1997

^{xxxiii} For further details, see ICTR FACT SHEET 9: WITNESSES AND VICTIMS SUPPORT SECTION, February 2001

^{xxxiv} Human Rights Watch World Report 1999: The Role of the International Community

^{xxxv} Adama Dieng, THE INTERNATIONAL CRIMINAL COURT: LESSONS FROM THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA – POTENTIAL PROBLEMS FOR THE REGISTRAR, Paper presented at a conference on "Towards Global Justice: Accountability and the International Criminal Court", Sussex, February 2002

^{xxxvi} Ibid

^{xxxvii} The Treaty to establish the ICC was adopted in Rome on 17 June 1998; it came into force on 1 July 2002, after the required 60 ratifications were reached.

^{xxxviii} For details, see Amnesty International’s INTERNATIONAL CRIMINAL COURT FACT SHEET 6, 7 & 8

^{xxxix} Art 42(9) of the Rome Statute of the International Criminal Court

^{xl} (Art. 44 (1)) of the Rome Statute of the International Criminal Court

^{xli} FACT SHEET 8, supra n. 38

^{xlii} Supra n. 7

^{xliii} Appointment and election of the key officials of the Court has been recently completed. The ICC is expected to hear its first case shortly. For more details, see www.iccnw.org

^{xliv} For details on difficulties faced by relocated witnesses in rebuilding their lives, See Nicholas R. Fyfe and Heather McKay, ‘Desperately Seeking Safety’, THE BRITISH JOURNAL OF CRIMINOLOGY, 40: 675-691 (2000)

^{xlv} Dr Nick Fyfe, PROTECTING INTIMIDATED WITNESSES, Ashgate Publishing, 2001

^{xlvi} 'Charlie's Angels Won't Work Here', THE INDIAN EXPRESS, 10 July 2003