

## REALITY OF JUSTICE TO VICTIMS

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### ABSTRACT

The objective of a criminal justice system is to prosecute criminals and their behavior in furtherance of maintenance of law and order, which makes it criminal-centric that bases classification of deterrent behavior and punishment on the act of criminal, rather than the victim who becomes the object of a criminal act being executed over. This is a parallel where witnesses themselves become victims in the expedition of access to justice. The hitch between organized crimes and corruption often place witnesses in a situation either of hostility or distress, which is seen in acts of whistle-blowers as they act as witnesses to aid investigation, trials and procedural justice.

State being the guarantor of fundamental rights, has a duty both to protect citizens against crime and criminals, and to provide redressal mechanism for vulnerable sufferers such as women and children under the wide ambit of Part III of the Constitution<sup>1</sup> and other statutory mechanisms to be discussed in the paper. Globally, across various jurisdictions, sophisticated investigation and trial procedures essentially include witness protection schemes in order to protect the person who provides deposition forming an essential part of evidence. The realm of criminal justice must not just suffice to entailing punishment to the criminal, but to restore the law and faith in justice in the mind of the victim through perspectives of reparation and compensation.

**Keywords:** Victim, Victimology, Witness, Criminal justice

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<sup>1</sup> National Human Rights Commission v. State of Gujarat and Ors. (2009) 6 SCC 767

## INTRODUCTION

Justice Albie Sachs from the Supreme Court of South Africa said: “*Justice isn't solely within the finish result; it's conjointly within the process*”. The rationale behind having a criminal justice system would ultimately aim at providing peace and security to the world order in a society of a varying nature but undergoes a gruesome procedure which may/may not promote justice. However, the attainment of a successful and organized criminal justice system bases itself on various factors including the crime *per se*. Often the criminal justice system disregards victims and sufferers of the crime or the witnesses who in turn become the victims of crimes, which is highly dismaying. The impact and extent of crimes in society at large is a valid proof of exploitation of victims who present themselves at Courts in pursuit of justice, therefore go through grift and time-consuming process. In order to counter this additional agony by victims, the criminal justice system must focus on restoration of peace and order to the victims rather than involving in correctional process of reforming the criminal. Therefore, this paper aims at finding a means of answering the hypothesis of provision of protection to victims and creation of compensation based criminal justice system centralized upon victims.

## ‘VICTIMS’ CENTRAL TO CRIMINAL JUSTICE SYSTEM

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereinafter referred to as “the Victims’ Declaration”) defines victims as ‘*persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are violations of criminal laws operative within member states, including those laws prescribing criminal abuse of power*’.<sup>2</sup> The Code of Criminal Procedure defines ‘victim’ as ‘*a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged*’ and the expression “victim” excludes his or her legal heir. The Supreme Court has stated that the role of a victim in a criminal trial can never

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<sup>2</sup> UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 29 November 1985, 96<sup>th</sup> Plenary meeting.), Article. 1.

be lost sight of, and that such a person is an ‘inseparable stakeholder’ in the adjudicating process.<sup>3</sup>

Though the terms ‘victim’ and ‘witness’ are used synonymously, there exists certain distinctions. Witnesses include victims primarily, but also others such as medical experts, which enlarges the ambit of interpretation. However, the protection required by victimized witnesses and victims themselves, is of a proportionate degree that must be introduced in the system of restorative justice to avoid witnesses being exploited and made victims of consequential crimes. For instance, the Supreme Court<sup>4</sup> has observed that the procedures being followed in the criminal justice system to be one of reasons for a person to abhor becoming a witness. In *Rattan Singh v. State of Punjab*<sup>5</sup>, the Court noted “*It is a weakness of our jurisprudence that the victims of the crime, and the distress of the dependents of the prisoner, do not attract the attention of the law. Indeed, victim reparation is still the vanishing point of our criminal law*”.

Victims who are denied protection under the wide realm of law would retort to compensatory crimes. By seeking restitution or through retaliation, the victim can reduce the distress suffered as a result of the victimization. Compensatory crime is an alternate way in which victims may compensate losses resulting from crime which seems to be a logical response to victimization.<sup>6</sup> To avoid a higher degree and increase in number of crimes, a compensatory and restorative criminal justice system must be introduced.

## **SOCIO LEGAL ANALYSIS OF THE PROBLEM**

The role of a victim in the Indian criminal justice system is one that is insignificant. The issue of disregard to victimology begins with imbalance of provision of multiple rights and privileges to the accused persons and convicts through Art. 20, 22 and so on in the Indian Constitution on one hand, and victims being provided bare minimum protection in one part of a statute rather

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<sup>3</sup> *National Human Rights Commission v. State of Gujarat and Ors.* (2009) 6 SCC 767, p. 30, para 34.

<sup>4</sup> *Swaran Singh v. State of Punjab*, AIR 2000 SC 2017.

<sup>5</sup> *Rattan Singh v. State of Punjab*, (1979) 4 SCC 719; 1980 SCC (Cri) 17, p.721.

<sup>6</sup> Jo- Anne M. Wemmers, VICTIMS IN THE CRIMINAL JUSTICE SYSTEM, Studies on Crime and Justice, A series from the Dutch Research and Documentation Centre, Kugler Publications, p. 26.

than integrating a stronger bundle of rights to the class of victims which include women, children and the vulnerable sections of the society. This situation gives an insight as to how the Courts have never looked at the other side of the coin of crime where the victim suffers in plight while the offender scots free either through remission or acquittal. A parallel issue is the one that of whistle blowers, who on a journey of expedition of truth, set themselves to be victims of crime at the hands of the criminals.<sup>7</sup>

In recent times, many criminal justice system reformers have focused on shifting the paradigm from a criminal justice system to a more victim-oriented system consisting of greater respect and consideration towards victims and their rights during the process of investigation and prosecution. This growth resulted in an initiation, which was the Victims' Declaration<sup>8</sup> considered to be the 'magna carta' for victims which is conclusive of the basic framework of principles lately, vociferously debated and converted as victims' rights by some of the developed countries. The international standards expected of the countries in the treatment of victims at different stages of the criminal process have been elaborately detailed in the UN Handbook on Justice for Victims.<sup>9</sup>

## **EVOLUTION OF VICTIM BASED CRIMINAL JUSTICE SYSTEM**

Development of victim rights had its inception in India with the 154th Law Commission of India report with recommendations on compensation scheme. Justice Malimath Committee<sup>10</sup>, in 2003 made a series of recommendations to have a separate legislation to deal with all the issues pertaining to victims of crime to remould the criminal justice system. One of the agenda of this committee was to focus on the role of protecting the innocent and the victims. They also focused on how the victims do not get their legal rights and protection that they deserve, for the role that they play in the criminal justice system. With this general observation, the Committee reviewed the positions of victims and the provisions that are in existence for their compensation.

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<sup>7</sup> Abhinav Chandrachud, PROTECTION FOR WHISTLEBLOWERS: ANALYSING THE NEED FOR LEGISLATION IN INDIA, (2004) 6 SCC (Jour) 91

<sup>8</sup> *Supra*, at 1.

<sup>9</sup> United Nations Office for Drugs and Crimes, 1999, chapter III, p.56-76.

<sup>10</sup> Vol. I, Report of Committee on reforms of Criminal Justice System, Ministry of Home Affairs, Govt. of India.

There are certain Constitutional provisions in favour of victims of Crime, where the law of the land promotes and provides fundamental rights guaranteed under Part III and Directive Principles of State Policy under Part IV of the Constitution. Both these primordial set of rights laid down the foundation of a new social order in which both social and economic justice, would bloom in the national life of the country. Article 41 of the Constitution which has a relevance to victimology in a wider perspective, mandates, *inter alia* that the State is bound to make effective provisions “*in securing the public assistance in case of disablement and in other cases of undeserved want.*” There are other provisions like Article 51-A which discuss how it is a fundamental duty of every citizen of India “*...to protect and improve the natural environment... and to have compensation for living creatures*” and “*...to develop humanism*”. But at the end of all these, the right to life and liberty guaranteed under Article 21, if deprived, has in its elements obligating the state to compensate victims of Criminal violence.

## **POSSIBLE OUTCOMES AND SOLUTIONS**

A lacuna of indifference towards victims in expulsion of justice since the inception of criminal justice system in India steadily revamped by introducing protection to victims under the statutory laws of Indian criminal justice system that involve mandates for police officers not to disclose the identity of witness, if it is not essential in the interest of justice or is inexpedient in the public interest.<sup>11</sup> Further, there is punishment prescribed for publishing/ disclosing the identity of a victim of rape and juveniles.<sup>12</sup> Rules of evidence protect victims from being questioned scandalous, offensive, indecent questions intended to insult or annoy them.<sup>13</sup> Criminal Courts are also obliged to order payment of reasonable expenses incurred by the witness or complainant for attending the Court.<sup>14</sup> In spite of theoretical presence of victim protection clauses in statutory laws, there has been a lack of enforcement of the same, where the Court itself, has been a ghastly spectator of exploitation of victim providing testimony

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<sup>11</sup> § 173(6) of the Code of Criminal Procedure and § 21 of the Juvenile Justice (Care and Protection of Children) Act, 2000 respectively.

<sup>12</sup> § 228A, Indian Penal Code, 1860.

<sup>13</sup> § 151 and § 152, Indian Evidence Act, 1872.

<sup>14</sup> § 312 of the Code of Criminal Procedure

during a scandalous cross-examination.<sup>15</sup> Subsequently, there was an attempt made by the judiciary compelling for in-camera trials to prevent hostile environment to victims and witnesses.<sup>16</sup> Post 2002, the National Human Rights Commission filed a Special Leave Petition to obtain guidelines and directions for victim protection that resulted in mandates for redressal of victims.<sup>17</sup>

#### A) Reparation:

A Draft National Policy on Criminal Justice, 2007, brought focus to the scheme of 'reparation' to victims of communal violence.<sup>18</sup> On contrary to disregarding victim protection through creation of a special statute by the Legislature, multiple instances prove that the judiciary has undertaken a step ahead in providing compensation to victims in cases of violation of fundamental rights<sup>19</sup> such as in *R. Gandhi v. Union of India*<sup>20</sup>, due to the large-scale riots and damage to property, especially to the Sikh Community, the Madras High Court, directed the payment of compensation for the losses to the property of the Sikh community. The compensatory scheme in statutory laws began with the Criminal Code, 1898, where compensation was limited to the substantive fines that were imposed.<sup>21</sup> This provision was amended to § 357 of the CrPC, 1973 that allows a Court to direct the accused to compensate even if imposition of a 'fine' is not a part of the sentence while taking account of the quantum that could be paid by the accused<sup>22</sup>. It is an initiative towards victim protection from harassment at the hands of a lengthy trial accompanied with a gruesome examination process, but sadly, there is a shortfall in practical application. However, through cases such as *Bodhisattwa Gautam*<sup>23</sup>, *Nilabati Behera*<sup>24</sup>, *Delhi Domestic Working Women's Forum*<sup>25</sup> and *Chandrima Das*<sup>26</sup> and further through other

<sup>15</sup> *Yad Ram v. State of Rajasthan*, RLW, 2008, (2) Raj 1659.

<sup>16</sup> *Bhanwari Devi v. State of Rajasthan*, (2011) 15 SCC 493: (2012) 4 SCC (Cri) 631

<sup>17</sup> *Supra*, at 2

<sup>18</sup> Vahida Nair, Saumya Uma, PURSUING ELUSIVE JUSTICE, Oxford University Press, 2013, p. 261.

<sup>19</sup> *Rudal Shah v. State of Bihar and Anr.*, AIR 1983 SC 1086.

<sup>20</sup> *R. Gandhi v. Union of India*, AIR 1898 Mad 205

<sup>21</sup> S.Muralidhar, 'RIGHTS OF VICTIMS IN THE INDIAN CRIMINAL JUSTICE SYSTEM', Journal of the National Human Rights Commission, 2004.

<sup>22</sup> *Sarwan Singh v. State of Punjab*, (1978) 4 SCC 111.

<sup>23</sup> *Shri Bodhisattwa Gautam v. Ms, Subhra Chakraborty*, AIR 1996 SC 922.

<sup>24</sup> *Nilabati Behera v. State of Orissa*, AIR 1993 SC 1960.

<sup>25</sup> *Delhi Domestic Workers' Forum v. Union of India*, (1995) 1 SCC 14.

<sup>26</sup> *Chairman, Railway Board v. Mrs. Chandrima Das and Others*, AIR 2000 SC 988.

statutory laws<sup>27</sup>, reparation as a means of punishment to restore a victim's right in the judicial process is being incorporated. A crucial set back in such flawed implication of legislations has been perceived in cases such the *Bhopal Gas Tragedy*<sup>28</sup>, lack of fulfilment of reparation by Gujrat Government in 2008, Kandalmal Violence<sup>29</sup> etc.

**B) Rehabilitation:**

*Palaniappa Gounder*<sup>30</sup> case was unique in bringing about a transformation in restorative justice by blending the punishment of offender rehabilitation with victim compensation. Subsequently, in the case of *Hari Krishna and State of Harayana v. Sukhbir Singh and others*<sup>31</sup> the Court stated: “The power under Section 357 Criminal Procedure Code is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is, to some extent, a re-compensatory measure to rehabilitate to an extent the beleaguered victims of the crime, a modern constructive approach to crime, a step forward in our criminal justice system ... The payment by way of compensation must, however, be reasonable depending upon case to case basis”.

**C) Restitution:**

Restorative justice was enhanced through rehabilitation schemes directed in *Delhi Domestic Workers' case*.<sup>32</sup> Other forms of restorative justice such as restitution has not yet gained momentum in Indian criminal justice system.<sup>33</sup> inaction' where in the State and the agencies are expected to examine the losses that have incurred or the damages caused on to the public and private property in certain situations, where the potential victims who have suffered the maximum have no control over.

## **RECENT INITIATIVES TO INCREASE VICTIM AND WITNESS PROTECTION**

<sup>27</sup> Fatal Accidents Act, 1855; The Motor Vehicles Act, 198; The Probation of Offenders Act, 1958 and constitutional remedies for human rights violations.

<sup>28</sup> *Union Carbide Corpn. Ltd. v. Union of India*, (2006) 13 SCC 641

<sup>29</sup> Saumya Uma, (2010), *KANDHAMAL: THE LAW MUST CHANGE ITS COURSE*, Vrinda Grover (ed.), Delhi: Multiple Action Research Group, p.81.

<sup>30</sup> *Palaniappa Gounder v. State of Tamil Nadu*, AIR 1977 SC 1323

<sup>31</sup> *Hari Krishna and State of Harayana v. Sukhbir Singh and others*, AIR 1988 SC 2127

<sup>32</sup> *Delhi Domestic Workers' Forum v. Union of India*, (1995) 1 SCC 14.

<sup>33</sup> *Supra*, at 18, p. 263.

The Supreme Court has given guidelines for witness protection<sup>34</sup> to determine whether police protection must be provided to the victim, the procedure of the protection measures, obligation of police etc. On considering these guidelines, a Witness Protection Scheme in 2015<sup>35</sup> was introduced in Delhi where, the Delhi State Legal Services Authority (DSLISA) passes protection orders in each case after evaluating the threat to the victim and the Commissioner of Police is responsible for the overall implementation of the witness protection orders. Protection measures can include armed police protection, regular patrolling around witnesses' house, installing closed-circuit television cameras, and relocation. On receiving the application by DSLISA, a threat analysis report from a senior police officer of the district or unit investigating the case is sought. DSLISA is required to interact with the witness or others linked to the prosecution to determine protection needs and make a final order within 7 working days of the application being filed and pass interim protection orders, if needed.

## CONCLUSION

The excruciating need in criminal justice system is to gain an equilibrium between victim-based approach and criminal based approach by assimilating the importance of protection of victims. The same requisite applies to witnesses and whistle blowers who often are victims in a cruel world of criminals and the corrupt exploiting the thin lines of privileges provided to certain sectors of the society. In order to seek a workable solution of introducing restorative justice, there requires a system of compensation and reparation as elucidated above, as a result of which, crime rates might reduce as the society responds faster to punitive measures. It is a well-known fact that there cannot be a blatant procedure for all cases as they vary by a large margin in their nature and characteristics. However, efforts need to be made to ensure that the needy are not left without a remedy, and the powerful do not abuse the legislation enacted in good faith. Ultimately, all three organs of the State have to amalgamate the essence of victim-based approach to justice and make it practically efficient to the society at large.

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<sup>34</sup> *Neelam Katara v. Union of India*, 2003 SCC OnLine Del 952; ILR (2003) 2 Del 377 at page 386.

<sup>35</sup> Delhi Witness Protection Scheme, 2015.