

THE EFFECT OF WITHDRAWAL FROM PROSECUTION ON VICTIMS RIGHT: AN ANALYSIS

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ABSTRACT

Every civilized State has obligation to protect its citizens in all sphere of life. This is one of the predominant duties of the State in the modern period. The duty of the State in Civil sphere is to ensure and protect the people rights and in Criminal sphere is to protect the people from culprits and to maintain the law and order in the society. Therefore, the administration of justice is the firmest pillar of government. This is to fuel the legal justice through which ensures uniformity and certainty in the administration of justice.

The foremost object of the Code of Criminal Procedure is to ensure fair, just and reasonable trial to every accused person. The notion of the criminal trial is very relevant to the human rights. The Code of Criminal Procedure has adopted the concept of adversary system of trial based on accusatorial method. The adversary system of trial enables and ensures independent, impartial, reasonable and just trial which should be conducted in the open and competent court. However the Criminal Procedure Code provides certain anarchy provision which says the State has power to withdraw the prosecution case at any stage of a case. This provision has obviously in violation of the basic judicial tenets of the natural justice which leads to the suppression of the victim rights and moreover certain circumstance it also against the maintenance of the social order in the State. In this backdrop, this paper analysis the criminal administration system, State's role on prosecution, provisions on the withdrawal of prosecution in the Code of Criminal Procedure, its effect on victim's right and role of supreme court to protect the victim's rights.

Keywords: Withdrawal from Prosecution, Victims' Rights and Natural Justice

INTRODUCTION

*"Justice requires that we work to restore those who have been injured"*ⁱ

India is one of the largest democratic countries in the World. India is habitat of different people living in different parts with distinctive culture, language, race and religion. However they are living in common brotherhood as an Indian. The modern judicial system in India was introduced by British in the Judicial Plan of 1772.ⁱⁱ This was based on the impartial system for disposition of justice. The judicial plan has 37 regulations dealing with civil and criminal laws. The main features of the plan were to ensure the civil and criminal justice to every subject in the British-India territory. At criminal justice the Mofussil Faujdari court had been established to try the criminal cases but these courts had an exception that the sentence of death should be tried by the Sadar Nizamat Adalat.ⁱⁱⁱ In this way after the enactment of Judicature of Indian High Court Act, 1861- the procedural aspects of law had been time to time modified.^{iv} The present code of criminal procedure has been adopted by Parliament in 1973 and it came into force on 1st April 1974. The main object of the Code is to be tried the cases of Indian Penal Code, 1960 and other Acts enumerated offences in accordance with the procedures prescribed in the Code.^v In short, the Code of Criminal Procedure is to administer the substantive criminal laws.

Therefore, the Code provides the machinery for the detection of crime, apprehension of suspected criminals, collection of evidence, determination of the guilt or innocence of the suspected persons and imposition of suitable punishment for accused person. Apart from these, it also deals with prevention of offences, maintenance of wives, children and parents and public nuisance. However the provision of the Code has provision relating to the withdrawal of prosecution which confers power on the State to withdraw a case without considering the victim's sufferings in a crime. In this background, this paper analysis the administration of justice system, provisions dealing with the withdrawal of prosecution, role of supreme in

protection of the victim right generally and effect of withdrawal of prosecution on victim's rights particularly.

ADMINISTRATION OF JUSTICE SYSTEM

The origin and growth of administration of justice is immemorial and it may be contemporary to the origin and growth of man in the organized society. The nature of man is social animal.^{vi} This nature demands that he should live in the society so that several of conflict of interest would rise between men in the society. Therefore it creates for the administration of justice indispensable in the society for ensuring justice for aggrieved person. In primitive society, every person had to help himself to punish culprit of a crime and also personal vengeance was allowed. Primitive society has witnessed that the victim compensation provided for blood feuds.

After the primitive society i.e. the society politically organized, the system administration of justice has attained stage that the State prescribed rules for the regulation of private vengeance. In guise rules, the State enforced the concept of *a tooth for a tooth, an eye for an eye and a life for a life*^{vii}. The primitive system of vengeance of punishment has not fully abolished in the *Anglo-Saxon* period in British and the same was restricted and regulated. In the modern period, power is fully vested with the State. The State would be acted as judges to assess the liability and impose penalty. Thereafter the administration of justice is focused on the human oriented and wrongdoer is punished in accordance with the prevailing law in the State. Hence the rule of law has been emerged as one of the tool for administration of justice in the State.^{viii}

In India, the administration of justice has been ensured through enforcement of substantive laws through procedures prescribed in the procedural laws i.e. Civil Procedure Code, 1908 and Criminal Procedure Code, 1973.^{ix} The Code of Criminal Procedure has been acted as ensure criminal justice to victim of crime of its various provisions. However, the provision relating to the withdrawal from prosecution envisaged under the code is against the public policy because blatantly violates the tenets of justice as it violates the principle of natural justice. The same thing has been prescribed by the Learned Prof. P.K. Tripathi that rule of law can be operated

through the instrumentality of the courts.^x The section 321 of the Cr.P.C. acts obstacle in ensuring rights of victim of crime to be attained fruit of justice. It shows the obstacle in the Code of Criminal Procedure for ensuring justice to the victim of crime.

STATE'S ROLE ON PROSECUTION

It is one of the foremost duty of the modern State is to guarantee people rights and ensures peaceful life to everyone through maintenance of law and order in the Society.^{xi} The substantive criminal law enforced by procedures prescribed in the Code Criminal Procedure, 1973. Right to fair trail is one of fundamental right to the accused person and the same has been recognized as human rights in the Universal Declaration of Human Rights, 1948.^{xii} In this light the Code prescribes fair trial in all aspect of trial. The Code has incorporated an *adversary system* based on accusatorial method.^{xiii} Therefore, this system has specifically imposed an obligation on the State to appoint a Public Prosecutor to conduct a criminal case in the court. The various provisions of the Code apparently say that the case before the court shall be commenced by the Public Prosecutor.^{xiv} The law specifically required to convict an accused person only after the charges against him proved beyond the reasonable doubt also require that reasonable and fair opportunity shall be given to the accused person. Experience of the adversary system of trial has shown that truth may be merged at the fair trail so that it leads to protection of public interest when guilt is punished and private interest is protected when the case is not proved beyond reasonable doubt.

In the criminal administration, the State uses its agency for investigating a crime and also it appoints a public prosecutor to conduct a case. The accused persons in India have right to seek free competent legal service for conduct their case before the court.^{xv} This right has been guaranteed by the State because most of the accused are uneducated and poor and also they cannot engage lawyers for conduct their defences and lake of adequate knowledge and professional skills to safeguard their interests and the Hon'ble Supreme Court has also recognized in catena of cases.

THE WITHDRAWAL FROM PROSECUTION IN Cr.P.C. 1973

This is one of the methods prescribed in the Code of Criminal Procedure for disposal of criminal cases without full trial. This method is contemplated in section 321 of the Code. The object of criminal law is to punish culprits in the court of law but it has an exception that the trial of a criminal case can be halted on sound consideration germane to public justice. The consideration has been stated under section 321 of the Code which corresponds to section 494 of the earlier Code. This section enables the Public Prosecutor to withdraw from the prosecution of any accused person with the consent of the court.

Sec. 321 of Cr.P.C. states as follows:

“The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal,-

(a) If it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) If it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences:

Provided that where such offence-

(i) was against any law relating to a matter to which the executive power of the Union extends, or

(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or

(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty,

and the Prosecutor in charge of the case has not been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court

for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution.”^{xvi}

In the analyzing the above provision, the Code confers wide power on the Public Prosecutor while exercising this power, he must take his own decision without interference from any quarters by means of exercising or applying his judicial mind on par with the court. The proviso clause states that central governments consent must be obtained before the Public Prosecutor file a petition before the court for its consent. In this process, the court has also wide power because the Public Prosecutor has himself withdraw a case from prosecution without consent of the court. Even the Public Prosecutor merely act as an agent of the executive side of the government, he should exercise this power independently under Sec.321 of Cr.P.C. Further the Code employs the phrase such as *withdrawal from prosecution* and not *withdrawal of prosecution*. According to R.V. Kelkar, the withdrawal from prosecution means that retiring or stepping down the prosecution, in other words, withdrawal of appearance from prosecution or refraining from conducting or proceeding with the prosecution.^{xvii} The court consents to withdraw from prosecution then the accused should be discharged or acquitted in accordance with provisions of clauses (a) and (b) of section 321.

The Hon’ble Supreme Court has laid down certain procedure for invoking section 321 of the Code. The Court in *Sheo Nandan Paswan vs. State of Bihar and others*^{xviii} held that the trial court while dealing a petition under section 321 of the Code, should deal the judicial manner in terms of the assertion made by Lord Mansfield on the exercise of the judicial discretionary powers. In this case the court propounded the grounds for withdrawal from the prosecution. These grounds are as follows:-

- “1. *lack of prospect of successful prosecution in the light of evidence,*
2. *implication of persons as a result of political and personal vendetta,*
3. *inexpediency of the prosecution for reasons of State and public policy, and*
4. *adverse effects that the continuance of the prosecution will bring to the public interest in the light of the changed situation.*”^{xix}

Further the court in various cases advised to the Public Prosecutor would not act as a post box of the government. The power conferred under section 321 is a judicial power that would be

considered by applying judicial mind. Similarly the trial court while granting consent it should also apply its judicial mind.^{xx} Therefore this unique provision has been incorporated in the Code in this section 321 is on the longer grounds of the public policy and inexpediency of prosecution for reasons of State, larger interest of public, maintenance of public peace and harmony and changing circumstances of social, economic and political situations.

THE WITHDRAWAL FROM PROSECUTION ON VICTIM'S RIGHT

The Constitutional law of India is supreme law wherein the rights have been incorporated in Part-III^{xxi} and Part-IV.^{xxii} The Part-III enlisted the basic civil and political rights whereas Part-IV list out the social, economic and cultural rights. These rights would be available to all citizens including victim of crime. The Code would not provide any kind of assistance to the victim of crime in case of withdrawal from prosecution. The victim's rights jurisprudence has been evolved in recent years. The omission for providing assistance to the victim of crime obviously would be violation of dignified life of dependent of victim of crime and also violation of human rights as set out in the UDHR^{xxiii} and both Covenants.^{xxiv}

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 has urged to recognize the victims' rights. It defines that who is victim of crime and Part – A read as following:-

1. *'Victims of crime' are 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 in violation of criminal laws operative in Member States, including those laws prescribing criminal abuse of power.*^{xxv}
2. *A person may also be considered a victim regardless of whether the perpetrator has been identified, apprehended prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons*

who have suffered harm in intervening to assist victims in distress or to prevent victimization.^{xxvi}

The Declaration categorically recognized and set up the international norms for the protection of victims' rights. This declaration has recognized four rights such as access to justice and fair treatment; restitution; compensation; and assistance.^{xxvii} Section 321 of the Code expressly violated the *jus cogens*^{xxviii} norms of international law because it allows withdrawal from prosecution without considering victim of crime and it would definitely violates the victims' rights such as right to get fair justice and reparation from the wrongdoer. The provision of section 357^{xxix} has been incorporated and it provides power on court to impose compensation to victim of crime. This provision also failed to how much compensation to be imposed and whether it would replace the victims' contribution.

The right of victim of crime would not be codified in India so that by means of Blackstonian concept of incorporation, the General Assembly's Declaration enlisted rights of the victim of crime will be taken into consideration as per Sec.2(d)^{xxx} of the Protection of Human Rights Act, 1993. Hence these rights would be enforceable in India.

ROLE OF SUPREME COURT ON VICTIM RIGHTS

"Justice, though due to the accused, is due the accuser also. The concept of fairness must not be strained till it is a filament. We are to keep the balance true."^{xxxi}

The Supreme Court of India is the protector and guarantor of basic rights as contemplated under Part-III of the Constitution. The right to seek remedies becomes the cornerstone of the democratic society. The Supreme Court has to play the role of a sentinel on the *qui vive* while performing its Constitutional duties. Hon'ble Justice Untwalia in *Union of India v. Sankalchand Himatlal Sheth*^{xxxii} has explained the role of the Supreme Court as-

"Judiciary is like a watching tower above all the big structures of the other limbs of the State from which it keeps a watch like a sentinel on the functions of the other limbs of the State as to whether they are working in accordance with the law and the Constitution, the Constitution being supreme."^{xxxiii}

In this aspect the Court played vital role to guaranteeing accused and prisoners' rights in catena of cases by adopting the liberal interpretation of the right to life and personal liberty as contemplated under Art. 21 of the Constitution. For instance, the Supreme Court has alone sole authority to develop the compensatory jurisprudence in India. The court in first time recognized the compensatory jurisprudence in *Rudul Sha v. State of Bihar*^{xxxiv} wherein the court ruled that it has power to award monetary compensation in appropriate cases if warrants. Therefore in this case, the court has directed the State of Bihar to pay compensation of Rs. 30,000/- for gross negligence of the authority illegally detaining the petitioner in jail for 14 years after acquittal has been passed by the court. Similarly, a public spirited person D.K. Basu has founded the Legal Aid Services of West Bengal for safeguarding right of victim of custodial violence. He urged the court to form guideline relating to 'custody jurisprudence' in *D.K. Basu v. State of West Bengal*^{xxxv}. Thereby the court formulated certain guidelines in this aspect.

In this way, the Court expressed its anguish that in criminal administrative system, the accused has been provided much more rights but the rights of victim of crime has been neglected and the victim only considered as witness in the case. Justice Krishna Iyar, expressed the state of victim of crime in *Ratan Singh v. State of Punjab*^{xxxvi} follow as-

"It is a weakness of our jurisprudence that victims of crime and the distress of the dependents of the victim do not attract the attention of law. In fact, the victim reparation is still the vanishing point of our criminal law. This is the deficiency in the system, which must be rectified by the legislature."^{xxxvii}

The same view has been reiterated by Hon'ble Justice Krishna Iyar in *Maru Ram v. Union of India*^{xxxviii}. Further, the Supreme Court in *State of Gujarat v. Hon'ble High Court of Gujarat*^{xxxix} observed that the court would not leave to consider the rights of victim of crime while considering the rights of convict. The court has also taken into consideration sorrows of the poor victim and his family for the loss of sufferings in case of death and incapacity to earn livelihood because of crime committed by offender. Both these cases are forerunner for providing the rights of victim of crime.

In *M. N. Shankarnarayan v. P. V. Balakrishan*^{xl}, the Court while dealing with the petition under section 321 of the Code, the court should the petition with due care and its duty to see whether the permission sought withdrawal from prosecution is extraneous. Further, the court observed that "...it is the duty of the Court also to see in furtherance of justice that the permission is not sought on grounds extraneous to the interest of justice or that offences which are offences against the State go unpunished merely because the Government as a matter of general policy or expediency unconnected with its duty to prosecute offenders under the law, directs the public prosecutor to withdraw from the prosecution and the Public Prosecutor merely does so at its behest. It may grant permission only if it is satisfied on the materials placed before it that the grant of it sub serves the administration of justice and that the permission was not sought covertly with an ulterior purpose unconnected with the vindication of the law."

The Hon'ble Supreme Court in catena of cases considered it recognized various rights of victim of crime such as an opportunity to be heard before the decision in case the Magistrate to whom the investigation report is submitted under section 173 Cr.P.C decides not to take the cognizance of the case for sufficient grounds, the right to be heard in the pre-trial stage, victim's right to engaging a lawyer of his choice under Cr.P.C., and the right of participation in the trial by victim but to victim's right to restitution is not recognized in any law in India.

The Hon'ble Madras High Court in *R. Gandhi v. Union of India*^{xli} recognized the right of victim to get compensation. The court observed that the people when deprived the livelihood because of loss of their property, the State must pay for its failure in protecting their properties. But this decision has been created complications in fixing liability and amount of compensation. But in other co-ordinate jurisdictional court has not accepted the Madras High Court decisions because it severely affects the burden in the State exchequer.

CONCLUSION

The withdrawal from prosecution under section 321 of the Code assigns power on the Public Prosecutor and Assistant Public Prosecutor to withdrawal from prosecution at any stage of the case with consent of the court. But this provision did not provide to hear the victim of crime in

such situation. This amounts to violation of the principle of natural justice. Therefore it constituted as anarchy provision in the Code. But the Hon'ble Supreme Court held that even though the post of Public Prosecutor and Assistant Public Prosecutor constitutes executive post, they should not as merely a post box between the courts and State while exercising power under section 321, they should act in judicial mind without any interference. Similarly, the Court also may grant consents while granting withdrawal from prosecution after considering factual circumstances of the case after it applies its judicial mind. The power assigned under this section is judicial discretionary power. It must be exercised in judicial manner. The State, till date, would not consider enact law to compensate the victim of crime to lead dignified life as envisaged in article 21 of the Constitution. This would amounts to violation basic rights contemplated in Part-III of the Constitution. The Code confers rights on the accused, prisoners and convicted persons but it failed to provide codified rights of victim such to get compensation from offender or State in the circumstances of the case. Therefore the Code has employed the discriminatory practices in section 321. Hence, this article comes to conclusion that the necessary amendments should be carried out or the State must enact separate law in this aspect.

ENDNOTES

ⁱ Principle of Restorative Justice.

ⁱⁱ V.D. Kulshreshthas, Landmarks in Indian Legal and Constitutional History 78 (Eastern Book Co., Lucknow, 2008).

ⁱⁱⁱ *Ibid.*

^{iv} Judicature of Indian High Courts Act, 1861.

^v Universal's Concise Commentary on the Code of Criminal Procedure, 1973 (2 of 1974) 1 (Universal's Law Publishing Co., New Delhi, 2014)

^{vi} V.D. Mahajan, Jurisprudence and Legal Theory, 130 (Eastern Book Co., Lucknow, 1999).

^{vii} *Ibid.*, p.131.

^{viii} Fali S. Nariman, India's Legal System: Can it be Saved?, 27 (Penguin Books India, New Delhi, 2006)

^{ix} R. V. Kelkar's, Criminal Procedure, 1 (Eastern Book Co., Lucknow, 2015).

^x Rabindra KR. Pathak, Judicial process, 3 (Thomson Reuters, Legal (A Division of Thomson Reuters South Asia Private Limited), Gurgaon, 2019)

^{xi} Ratanlal & Dhirajlal, The Code of criminal Procedure, 3 (Wadhwa & Co., Nagpur, 2002).

^{xii} Art. 11 of Universal Declaration of Human Rights, 1948.

^{xiii} *Ibid.*, p.346, *Supra* note 9.

^{xiv} Sec. 225 of Code of Criminal Procedure, 1973.

^{xv} Sec. 303 of Code of Criminal Procedure, 1973.

^{xvi} Section 321 of Criminal Procedure Code, 1973.

^{xvii} *Ibid.*, p.471, *Supra* note 9.

^{xviii} (1983) 1 SCC 438.

xix *Ibid.*

xx *Ibid.*

xxi Fundamental rights enumerated in the Arts. 12 to 35 of the Constitution. These rights are justifiable and it can be enforced against State.

xxii Directive Principles of State Policy list out the social and economic rights. These rights are non-justifiable right and its role is to act as fundamental governance of the State. That is the State should apply these principles in governance of the State.

xxiii Universal Declaration of Human Rights, 1948.

xxiv International Covenant on Civil and Political Rights, 1966 and International Covenant on Economic, Social and Cultural Rights, 1966.

xxv Principle -1 of Part-A of the Declaration, 1985.

xxvi Principle -18 of Part-B of the Declaration, 1985.

xxvii Principles 1 – 17 of Part-A of the Declaration, 1985.

xxviii Pre-emptory norms of international law and it would not be derogatable in any event and it would be considered as a binding nature of the International law.

xxix Sec. 357 of Code of criminal Procedure, 1973.

xxx Sec. 2(1)(d) of the Protection of Human Rights Act, 1993 provides that the definition of human rights and it says that ““human rights” means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.”.

xxxi Justice Cardozo’s observation in *Snyder v. Massachusetts*, 291 U.S. 97.

xxxii AIR 1977 SC 2328.

xxxiii *Ibid.*

xxxiv AIR 1983 SC1086.

xxxv AIR 1994 SC.

xxxvi (1974) 4 SCC 719.

xxxvii *Ibid.*

xxxviii AIR 1980 SC 214.)

xxxix 1998 (7) SCC 392.

xl AIR 1977 SC 2266.

xli AIR 1989 Mad 205.