

# Recognizing and Balancing the Rights of the Victims within the Indian Justice System

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**Abstract** - The Code of Criminal Procedure defines a 'Victim' to be one who has suffered any loss or injury caused by an act or omission of another person. Criminology identifies a victim as a person who has been harmed directly by a perpetrator rather than one who has been harmed by the society as a whole. A victim to a crime is someone who has suffered 'physical or emotional harm, property damage or economic loss' which is caused as a result of a crime. So, let us consider the Victim as someone who has lost something to someone and the Criminal as someone to whom the victim has lost something to, and who has thereby gained that something in a way that is legally and socially unacceptable. In this scenario the satisfaction rate of the Victim is lower than that of the Criminal. This is proved by the basic loss aversion theory which states that human satisfaction decreases more rapidly in cases of losses than it increases in cases of gain. In this analysis there are three important factors, Firstly, the Victim – The Loss Incurred which will include mental, physical and monetary injury and loss. Secondly, The Crime Committed, crimes are committed against individuals but they violate rights in rem so, the accused has to face the Wrath of the Society i.e. the Punishment he incurs. Lastly, The Victim experiences dissatisfaction as being part of the society so the measures the state takes to alleviate that dissatisfaction also needs to be analysed.

**Keywords:** Victim, damages, Indian Judicial System, Punishments, Dissatisfaction.

## I. INTRODUCTION

Law aims at the Protection of Individual life, liberty and Property. Under the Existential Criminal Law, it is important to note that each state gives due importance to deterrence and to also ensure that what wrong has happened does not occur again and that is where, the rights and the role of the 'victims' in the Indian Judicial System play a major role<sup>i</sup>. The U.N., 1985 Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of powers states that there exist four major components in the recognition of the rights of the victims of crime and to ensure their access to justice and a fair trial. They are *Fair Treatment, restitution, Compensation and Assistance*<sup>ii</sup>. This has been recognized to set out the standard for the treatment of victims, and although not legally binding it has been considered to be the Magna Carta of the International Victims' Movements. In India when we look objectively there exist provisions for compensating a victim but when the wholesome perspective is presented, it is apparent that (a) Victims borderline have no rights in criminal proceedings conducted by the state for their welfare, unlike the accused; (b) Victims are left to suffer silent injustice in the hands of law when the Authorities of the State fail to Prosecute the Offenders in a suitable manner; In order to justify what has been put forth, The existing legislations in the nation will be elaborated and demands for a better, more popular legislation which parallels the international norms are suggested which tries to overcome the existing lacunae and facilitates in the improvement of victims' rights<sup>iii</sup>.

## II. SAFEGUARDS AVAILABLE TO VICTIMS UNDER THE INDIAN LAW

The Right of Victim Protection is given under Article 21 of The Constitution of India. The importance of the rights of was examined by the courts when the very initiator of the litigation felt left out and thereby was losing confidence in the adjudication procedures. This led to the victim developing a kind of detachment from the adjudication process, due to the fact that while his human rights were protected not much importance was given to the rights of Victims; the victim should not be passive objects but active components in Judicial Proceedings. The need of the hour is that the amount of attention that is given to the accused is what should have been provided to the victim, while punishments are an established system for the creation of the deterrence principle in the society, the victims are not benefitted out of it<sup>iv</sup>. When the principle of equity is applied the victim has much to lose when there is a lack of adequate compensation provided for the harm or damage inflicted. The Indian criminal Justice System is inclined towards providing the accused with basic human rights such as those under Article 20, 21 and 22 of the Constitution and by doing this it becomes too accused oriented rather than victim oriented by making the role of the victim extremely minimal and the victims needs not being adequately addressed.

However, no one can deny the Indian Judiciary the credits for the measures it has taken to strengthen the Victim's Rights in India. During the 1980's Justice. Krishna Iyer, stated that the importance of compulsory compensation or recoupment by wrongdoer of the damaged is essential. Also, the 154<sup>th</sup> Law Commission Report<sup>v</sup> had also made radical recommendations on the same and included aspects of the introduction of a compulsory justice system with a well-established victim compensation scheme. The Justice Malimath Committee<sup>vi</sup> in 2003 made a series of

recommendations regarding victims of crime. The Indian Criminal Law has failed to enact victim-oriented legislations to safeguard victim's rights, and the justice point of view. This amendment to the criminal procedure code by way of Section 357 (a) was incorporated in order to provide for the state government to prepare in coordination with the central government a scheme which was called 'Victim compensation scheme' for 'the purpose of compensation to the victim or his dependents who suffered loss or injury as a result of the crime.'

### III. ACCESS THAT VICTIMS GET TO JUSTICE AND FAIR TRIAL

A Victim is someone who initially sets the Criminal Justice Mechanism into motion. Women and Children victims have not been given due importance by the Indian Laws. The Law while recognizing several aspects to the protection of the rights of the criminal has failed to do the same with the victims. The Indian laws fails to address relevant questions such as providing a mechanism to ensure that the victim is treated with dignity, protection from intimidation, a ready access to legal aid, rehabilitation and several other mechanisms of law. Inadequacies such as (a) Lack of 'in camera trials' when victim is a child. (b) No schemes for the rehabilitation of Rape Victims etc, have not been addressed by the law and are glaring. In *Delhi Domestic Working Women's Forum v. Union of India*<sup>vii</sup>, the victims sought the courts protection from the harassers and the 'expeditious and impartial investigation of the officers. This Supreme Court Case in 1995, laid down the guidelines and provided the broad parameters for assisting victims of rape. A victim of a crime is supposed to have access to legal assistance at every stage of the case, this is a right under the law provided to victims.

### IV. COMPENSATION TO VICTIMS

As previously mentioned, under the Right to life and liberty under Art. 21 a petitioner right to claim compensation has been recognized as an integral part of it. The Indian Constitution lacks specific rights for victims however Part IV, the Directive Principles of State Policy, Article 41 and Part V, Article 51 A and Fundamental Duties are said to have laid down 'the right to public assistance in cases of disablement and in other cases of undeserved want.', to 'have compassion for living creatures' and 'for other cases of undeserved want.' In 1983, Chandrachud C.J. ensured the recognition of the petitioner's right to claim compensation for illegal detention and also awarded a compensation of Rs. 35,000: This concept was recognized in *Rudul Shah v. State of Bihar*<sup>viii</sup>. This judgment made right to compensation an integral component to the right to life. After this landmark judgment pronounced in 1983 there were several other judgments which strengthened the issue of right to compensation as an essential component of right to life. There are several legislations in existence for the payment of compensation to victims, either by the trial court or a claims tribunal – **Consumer Protection Act, 1986; Fatal Accidents Act, 1855; Merchant Shipping Act, 1958; Motor Vehicles Act;** etc<sup>ix</sup>.

The 152<sup>nd</sup> Law Commission Report made distinct categories for compensation such as: losses incurred due to (a) Injury; (b) Damage to Claimants property (c) Death from injury inflicted which results in loss of support to the dependants. In *Gudalore M.J. Cherian v. Union of India*<sup>x</sup>, The State of U.P. was directed to pay Rs. 2,50,000 to victims of Rape whose assailants were unidentified. In *State of Gujarat v. Hon'ble High Court of Gujarat*<sup>xi</sup>, the Court recommended a law that sets apart a portion of the wages earned by the prisoners to be paid as compensation to victims of the offence. The Indian Criminal Law has time and time again failed to enact victim-oriented legislations to promote victims' rights and safeguards. The 2008 amendments to the Criminal Procedure Code such as Sec 2 (wa), Sec 24 (8), Sec 156 (3), Sec 157 (1), Sec 357 A (3) and Sec 357 A (4). Sec 372, 377 and 378 need to be changed when the victims 'absolute right power point of view' is considered. Although the amendments were a step in the right direction there needs to be more done on victims' rights in India.

### V. RESTITUTION

The right of a victim of crime to restitution has not received any statutory recognition yet. The principle that is involved in restitution is that of 'culpable inaction' under which the state and its agencies are expected to anticipate the losses incurred to public and private property in situations over which the victim has no control over. The courts have established the liability of the state only in cases where the loss or damage was due to a 'definite failure' on the states part. In *R. Gandhi v. Union of India*<sup>xii</sup>, which was the case that dealt with the 1984 riots after the assassination of Prime Minister Indira Gandhi, large scale riots which spread across the country like wildfire and led to the loss of property of members of Sikh community. This Madras High Court Judgment acted on the reports of the commissioner which accessed damages to the property and awarded varying amounts of compensation to the Sikh community in Coimbatore. However, this plea was rejected in *Sri Lashmi Agencies v. Government of Andhra Pradesh*<sup>xiii</sup>, where the court declined to compensate for the loss, injury, destruction and loss of property that followed the murder of a sitting member of the legislative assembly.

### VI. CURRENT SCENARIO AND LACUNAE IN INDIA

Victims in India face several hurdles during the prosecution and investigation of crimes. In certain studies, such as those conducted by People's Watch, a National Human Rights Organization which undertook fact-finding missions across 47 districts in 9 states and came up with startling revelations such as the police's failure to act upon victims' complaints on private persons.

Core Rights of Victims in India include (a) The right to attend criminal proceedings; (b) The right to apply for compensation; (c) The right to be heard and to participate in criminal proceedings; (d) The right to protection from intimidation and harassment; (e) The right to prompt return of personal property seized as evidence. (f) Right to a speedy trial; (g) The Right to enforce these rights; These rights are

made enforceable in one way or the other, but as mentioned previously when an overall perspective is provided, they seem lacking<sup>xiv</sup>.

The plight of Female victims is also an important area that should be taken into consideration. There are states wherein there existed no *Women's commissions to safeguard the rights of female victims of sexual harassment, rape and other gender related crimes*. Secondly, due importance is to be given to Witnesses of Crimes, who need protection. For instance, in the *Best Bakery Case*<sup>xv</sup>, both the high court as well as the trial court had convicted 21 accused of murder due to insufficient evidence after 37 of the 73 witnesses, including key witness *Zahira Sheikh* who turned hostile. The Supreme Court later decided upon this case when *Zahira* stated that she was threatened, and that *the Public Prosecutor* took no steps to hold the trial in camera nor protect the witnesses. The Supreme Court noted in this case that the trials courts cannot abdicate their duty to arrive at the truth and satisfy the ends of justice

As observed the Indian focuses mainly on the payment of compensation to victims of crime, rehabilitation and also in some cases helps in financial assistance. The status of the victims talks about their access to justice and fair trial, and is appreciated in four stages namely, (a) The Right to instigate the criminal justice system in action by filing a FIR. (b) The Rights of a victim during an investigation needs to be ensured. (c) The Victim needs to be protected during the trial. (d) There needs to be a system in existence which ensures that the rights and status of a victim is protected after the judgment in a criminal case. The Most evident lacunae existing in Providing Victims of Crimes with more rights are (a) The right to participate in proceedings i.e. the victim does not have significant role to play. (b) There is a lack of Rehabilitation facilities which are being provided, although the Malimath Committee had recommended for the same. (c) Victim Protection – The CRPC provides for it but the Indian law is silent about whereas in countries such as South Africa, France, The United States of America there are separate provisions for Victim protection. (d) The victim has a right to move to the court for cancellation of bail u/s. 439 (CRPC) but very little importance is given to the victim even then<sup>xvi</sup>.

#### VII. FOREIGN LEGISLATIONS ON VICTIM RIGHTS

The Current Practices in Countries elsewhere needs to be talked about, in order to develop a comprehensive statutory scheme to redress the needs of the Victims of Crime. The European Convention on Compensation of Victims of Violent Crimes, 1983 provides victims with many rights which have been recognized in the U.N. Declaration. The Criminal Injuries Compensation Act, 1995 in the United Kingdom also addresses the same. The Victims of Crime Assistance Act, 1996 of Victoria in Australia, the Victims and Witnesses Protection Act, 1982 of the USA, make use of statements known as '*Victim Impact Statements*' which involve recording the victims' side of the story and the victim's emotions and standpoints regarding the offence<sup>xvii</sup>.

And also, in several countries there are established associations which are involved in the protection of victim rights. South Africa has a separate victim protection mechanism under the Witness Protection Act, 1998. It established a mechanism to offer protection to victims and also ensured that there was a protective blanket established to protect them.

#### VIII. INDIAN AND FOREIGN CASE LAWS ON VICTIM RIGHTS: A CORRELATION

The Indian Supreme court has recognized the rights of victims and also that the dignity of the victim should be maintained irrespective of the character of the victim and also, not to hold unrelated past biases to cover justice with a veil, In *State of Maharashtra v. Madhukar N. Gardikar*<sup>xviii</sup>, it was held that even a prostitute had a right to privacy and no one could rape her, just because of the reason that she was a woman of easy virtue. Similarly, *D.K. Basu v. State of West Bengal*<sup>xix</sup> deals with the guidelines to protect victims from custodial violence which includes rape and that the same could be compensated as if they had violated the Rights to life and personal liberty which have been guaranteed under Article 21 of the Indian Constitution. In the U.S. the year 1970's marked the beginning of victim centric legislations. The U.S. Supreme Courts decision in *Linda R.S. v. Richard D.*<sup>xx</sup> was high watermark which made sure that people recognized that the U.S. laws were not victim-centric rather it made clear that the victim did not have any formal status beyond that of a witness or of a piece of evidence. While this judgment hinted at the problems and lacunae that was existent it also paved the way for Victim Right's Legislations in The U.S.<sup>xxi</sup>. The U.S. has always had a number of restitution statutes but the first state to introduce a comprehensive compensation enactment was the state of California. When we compare the U.S. Criminal justice System to that of India, although there are there is the common federal and different state legislations for the same in the U.S. and India having common principles applied uniformly the spirit of the laws can be elaborated upon. Similar to R. Gandhi<sup>xxii</sup>, the Madras Riots case, a similar parallel is drawn to Japan where in *X et al v State*<sup>xxiii</sup>, the state had to pay victims when it infringes its obligations under humanitarian laws. This was later affirmed by two other judgments namely, the Japanese Germ Warfare Units in China (1941) and the Massacre of Chinese Villagers in Liaoning (1932). The ICC recognizes the rights of Victims using four facets they are: (a) To ensure Victim Participation in Proceedings<sup>xxiv</sup>; (b) To Protect Victims and Witnesses during criminal proceedings; (c) Validated the Right of Compensation and Reparations made to the Victims; (d) Create a trust fund out of which reparations can be made; In *Selmouni v France*<sup>xxv</sup>, the ECHR stated that it was the states responsibility '*to ensure thorough and effective investigation which was capable of leading to the identification and punishment of the people responsible for the commission of the crime while there exists a mechanism in motion so that the victim may be protected*'<sup>xxvi</sup>.

## IX. COMMENTS AND SUGGESTIONS

In 1960's the U.S. Launched a survey which revealed that while the rate of arrests was high, the proportionate victim numeral was low and this showed the failure of victims to report the crimes. Victims cited reasons such as poor treatment by the criminal justice system, long wait for the trials, confusing instructions, inadequate child care as well as transportation facilities as the chief reasons for their inability to adhere to state regulations and file complaints. Thus, in 1982, the Victims and Witnesses Protection Act was introduced, this act consisted of provisions to aid victims and witnesses of serious crimes. U.S. President Ronald Reagan<sup>xxvii</sup> urged the authorities to devote special attention to the needs of victims, and to make the criminal justice system more responsive to the 'forgotten entities' who were the victims for whom the criminal justice system was created. To Protect the 'forgotten entities' after observation of large-scale protests in the nation for the introduction of substantial legislation for victim protection the senate passed the 1982 Act. It is thus pertinent that the Indian Government, our central government as well other state governments of India to formulate a legislation that would not only protect victims but also bring forth a sort of corporation between the authorities, victims and witnesses which would in return ensure speedy justice, quick solving of the cases and a mutually beneficial scenario for all parties concerned.

1. **Victim Compensation** is an Integral part of the provisions under Section 357 (a) CRPC, it is the financial compensation that has been provided to the victim. Fine and Compensation cannot be awarded at the same time *to a victim who is facing fine as well as imprisonment or one of the above*. Thus, the courts can award the fine and later realise it as a compensation which has to be provided to the victim.
2. It is expectant of the state and it is supposed to meet the monetary compensation of **the Victim** in situations and certain instances where the accused has no means for the payment of the fines imposed by the court. It is a **legal right of a victim to be so compensated**.
3. When the state is providing the Victim with Rights which are inalienable the burden should also be on the victim to provide explanations when he resiles from a **particular standpoint which his previous statement was indicative of**.
4. **The Protection of Victims** in a Diverse country like India is a must. In certain cases, such as allegations

relating to rape and grievous injury there could be a mechanism set up to take the statements made to establish a substantive piece of evidence.

5. **Compensation to the victim should be provided irrespective of the results**, as conviction or acquittal related solely to the appreciation of evidence and has nothing to do with the injury i.e. mental or physical that victim has suffered.

6. **Victims can be given more importance during the conduction of the trial**, by trying to actively involve the victim in the procedure, while not compromising the rights that have been given to the accused.

7. **A study conducted in Eastern U.P. by D.P. Saxena (2005)<sup>xxviii</sup>** reveals significant findings regarding the treatment of victims by the courts. The major problems in accordance to *'the study are the unconcerned attitude of the officials, lack of legal aid, frequent adjournments, difficulty in getting the property when it is ceased by the courts, insufficient allowances, lack of information about the progress of the case etc. There should be an efficient mechanism established in the courts for the victims to avoid these barriers to obtain justice.'*

8. There should be a **victim specific act passed** in India for the solely for the protection of victims, upon analysing the lacunae that exist in the current scenario.

9. **The accused-centric approach to the trial should shift to a certain methodology** which protects both the accused and the victim and it should be balanced properly.

## X. CONCLUSION

Thus, limitations that the state cites in the creation of a 'Victim Assistance Fund' should not be further be talked about. As discussed in correlation to International Standards set, the State has a responsibility to the victim for speedy conclusion of investigation and prosecution and that the burden of identification of the accused also lies on the state. The U.N. Declaration serves as a very useful standard and check in addressing the needs of victims. The compensation to victims out of fines imposed has been very sparingly made and this is why there needs to be a new legislation on the same. The state should also be more empathetic towards the victim and move away from the concrete, strict and the very inefficient ways with which it deals with victims and witnesses.

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<sup>v</sup> Law Commission of India Report, *Victimology in 154<sup>th</sup> Report on the Code of Criminal Procedure 1973* (Act No.2 of 1974) Chapter XV, pp. 57-65.

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