

Victimology and Victims' Rights

Introduction

'Why in history has everyone always focused on the guy with the big stick, the hero, the activist, to the neglect of the poor slob who is at the end of the stick, the victim, the passivist –or maybe, the poor slob (in bandages) isn't all that much of a passivist victim –maybe he asked for it?'
[Hans von Hentig –*The Criminal and his Victim* –1948]

The quote above illustrates that, in the past, there was a lopsided focus on the criminal event and the person acting in violation of criminal laws. For centuries, legal philosophers and lawyers have been preoccupied with the principles of criminal law, the criteria for criminalization, and the rights of the defendant; while criminologists typically concentrated on the characteristics of criminals, what caused their criminal propensity and how to prevent crime. Their point-of-departure was always the offender, never the person who suffered as a result of the crime. It was only fairly recent, around the 1940s, that academics also started to take an interest in victims of crime and their standing in criminal procedure.

The scientific study of crime victims is called '**victimology**', after Benjamin Mendelsohn who coined the term in 1947. Comparable to criminology, where the offender plays a central role, the focus of victimologists lies with the victim and the different aspects of victimization. Victimology is:

'the scientific study of the extent, nature, and causes of criminal victimization, its consequences for the persons involved and the reactions hereto by society, in particular the police and the criminal justice system as well as voluntary workers and professional helpers.'

Causes of Victimization

One of the first aspects that scholars started to study was the role the victim himself had played in the commission of the crime. Instead of studying the offender in isolation, crime victimization usually involves at least two persons, and the criminal event may be the result of a certain dynamic between these two persons. **What personal characteristics and what types of behaviours from the side of the victim influence the risk of falling victim to a crime?** Early 'victimologists', such as Benjamin Mendelsohn, Hans von Hentig, Marvin Wolfgang, Stephen Schafer and Menachem Amir, investigated which **behavioural, psychological and biological factors determined a person's propensity to crime victimization and how his behavior related to the degree of culpability in the criminal event** ('victim precipitation').

The result was often a typology ranging from victims who were ‘completely innocent’ to victims who were actually more blameworthy than the person who committed the crime. Some of these primary studies had a negative, victim-blaming connotation, suggesting that victims were largely responsible for their own victimization.

Nowadays, victimological studies into the causes of victimization tend to focus more on the concept of ‘victim facilitation’ –which unintentional actions on the part of a person facilitate in his victimization –rather than the concepts of ‘victim precipitation’ or ‘victim provocation’, which suggest blame and responsibility and have a negative undertone. Modern-day studies have largely moved away from investigating the degree to which the victim can be held responsible for his own victimization and have tried to come up with theories that explain victimization without necessarily placing blame upon the victim.

An example of such a theory is the one on repeat victimization as proposed by, inter alia, Ken Pease and Graham Farrell. They proved that, contrary to general beliefs, people do not run an equal chance of victimization, but that victims run a far greater risk of becoming victims again. In other words, a small proportion of the general public experiences a large proportion of all crimes. This is true for domestic violence, but also for property crimes, such as burglary. Pease and Farrell discovered, for instance, that a house that has been burgled before is at greater risk to be burgled again. The fact that the burglar knows how to get in and knows what loot will await him can explain the increased risk of re-victimization. He even knows the best time for committing another burglary: After approximately one month the insurance company will have cashed out and most goods will have been replaced by brand new items. In the mind of a burglar, the fact that the burglary succeeded the first time, increases the chance that it will succeed a second time as well. One of the solutions to end this victimization cycle is to concentrate on victim oriented crime prevention. Vulnerable characteristics of the house –such as poor lighting or lack of an alarm system –need to be tackled to make them less attractive for burglars.

Nature and Extent of Victimization

A second goal of victimologists is to measure the nature and extent of crime victimization in the general (or a specific) population. Crime victimization can be measured in various ways. A first source of information could be the official crime statistics gathered by the police and the criminal justice system. The problem with these data is that they only represent a certain (small) percentage of all the crimes that have occurred in reality. There is a so-called dark number: the number of crimes that –due to underreporting or some other reason –do not come to the attention of the police. Furthermore, official crime data seldom contain detailed information on the victims that were harmed by the crime, because this information is less relevant for prosecutorial purposes.

A more accurate and reliable manner to measure crime victimization is therefore to conduct national or international crime victimization surveys and ask a representative sample of the general population directly whether they have been victimized. Although these surveys have their limitations too –victims may, for instance, not be able to recall what has happened to them –but these are less detrimental to the generalizability of the results than official police data.

A first remarkable finding from the numerous crime victimization surveys that have been conducted since the 1960s is that crime victimization is widespread. Research has shown that almost everyone will, at some point during his or her life, become the victim of theft or property damage and that almost all men will have suffered at least one incident of criminal bodily injury. It turns out that property crimes are more prevalent than violent crimes, with theft being the most common property crime and simple assault the most common violent crime.

Crime victimization surveys also demonstrated that men have an increased risk of falling victim to a violent crime in comparison to women. Only in the case of rape and other forms of sexual violence are women more likely to be victimized. Females were also more likely to be victimized by an intimate partner, while violence perpetrated by a stranger was typically targeted at male victims. Furthermore, teenagers and adolescents run a higher risk of being victimized – which decreases throughout adulthood –and the same goes for inhabitants of urban areas and persons with a ‘risky’ profession (police officers, taxi drivers, prison guards, prostitutes).

Other characteristics linked to a higher risk of crime victimization are related to a person’s behaviour. Spending more hours outside ones’ home, going out at night, frequenting pubs and discos, associating with criminals or engaging in criminal activities yourself are all risk factors that increase the likelihood of ever experiencing crime victimization. These behaviours bear witness of a ‘risky lifestyle’.

Consequences of Victimization

The consequences of crime victimization also form part of the victimological canon. These consequences can broadly be categorized under three headings: physical injury, mental health consequences, and economic consequences. Physical injuries can vary from light bruises and scratches to permanent disfigurements or even death. Economic costs derive from direct property losses, costs for medical care, legal costs, a reduced ability to earn an income, or immaterial damages such as costs related to pain and suffering or loss of quality of life. Mental health consequences are, for instance, depression, reduction in self-esteem and anxiety, while severe forms of violence can even result in post-traumatic stress disorder (PTSD).

Although crime victimization is commonly associated with trauma and PTSD, victimological studies have shown that most crime victims do not develop this psychiatric condition. The chance that someone develops PTSD as a result of a crime largely depends on the type and seriousness of the crime, the victim’s social context, and pre-existing psychological characteristics. Despite the fact that it is normal for victims of severe forms of violence to

display symptoms associated with PTSD –such as re-experiencing the traumatic event, avoiding certain places or being overly vigilant –most people do not develop PTSD. Only when these – and other –serious complaints last for more than one month can PTSD be diagnosed.⁸Most victims, however, are surprisingly resilient and their symptoms usually diminish without professional support. Still the impact of crime in terms of mental and physical health issues and economic costs should not be underestimated. The costs for crime victims are in the order of tens of billions on an annual basis.

Reactions to Victimization

A final aspect that academics are interested in is the reaction from other people and society at large to victimization. One would suspect that, given the detrimental effects of crime victimization, victims would meet with sympathy and respect everywhere they go. Surprisingly, quite the opposite is true. Many victims are blamed for what happened, their characters and appearances are derogated, and it is often believed that they ‘got what they deserved’. The underlying mechanism causing this negative reaction to crime victimization may be the prevalent belief in a just world. Melvin Lerner discovered that people generally assume that good things happen to good people and bad things to bad people.⁹This belief in a ‘universal moral balance’ is important for people to maintain their own well-being and guide their actions: As long as one acts in accordance to certain moral standards, nothing bad can happen. The victimization of innocent people, however, threatens this ‘justice motive’ and causes distress. It implies that ‘bad’ things can happen to ‘good’ people too. One of the strategies to restore the belief in a just world is to attribute blame to a person who has suffered from a crime, to derogate this persons’ character or to distance oneself psychologically from this person. People’s suffering is rationalized on the grounds that they deserve it. The problem is that not only ‘ordinary’ people share this delusional belief in a just world, but that criminal justice officials may (subconsciously) be guided by this principle as well.

Victim’s Justice in India

At the International arena, the adoption by the General Assembly of the United Nations at its 96th Plenary on November 29, 1985, of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, hereafter UN Declaration) constituted an important recognition of the need to set norms and minimum standards in international and national legal framework for the rights of victims of crime. The UN Declaration recognised four major components of the rights of victims of crime: (i) access to justice and fair treatment; (ii) restitution (iii) compensation (iv) rehabilitation.

- i. **Access to justice and fair treatment** – This right includes access to the mechanisms of justice and to prompt redress, right to be informed of victim’s rights, right to proper assistance throughout the legal process and right to protection of privacy and safety.

- ii. **Restitution** – including return of property or payment for the harm or loss suffered; where public officials or other agents have violated criminal laws, the victims should receive restitution from the State.
- iii. **Compensation** – when compensation is not fully available from the offender or other sources, State should provide financial compensation at least in violent crimes, resulting in bodily injury for which national funds should be established.
- iv. **Assistance** – victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary and community based means. Police, justice, health and social service personnel should receive training in this regard.

Historically speaking the victim's justice in India, the references are from the Manusmiriti to compensation being paid to the victims of criminal offences. Even in the recent times the Anglo-Saxon system of Criminal Justice was introduced in India, the victim was not completely neglected. References to victim's compensation are also found in the 'Code of Hammurabi'. It is said that it was quite common for the early civilisation to extract payments for the victims from the offenders, which process is not known as restitution. However, the picture began to change with modern criminal justice in which the government assumes responsibility for dispensing justice by bringing the offenders to book, but it also meant that, with the appropriation of the fines to the State Coffers, the victim was left with ineffective remedies. As a modern state emerged and the government took on itself the responsibility of enforcing justice, the offender gradually became in the criminal justice arena.

The criminal justice system in India is basically concerned with criminals, whether it is their conviction, treatment, reformation or rehabilitation. The purpose of criminal justice system appears, at present, to be confined to the simple object of ascertaining guilt or innocence of an accused. The role of the victim of a crime in the present criminal justice system is restricted to that of a witness for the prosecution – even though he or she is a person who has suffered harm – physical, mental, emotional, economical or impairment of his/her fundamental rights. Since, the central object of legal process is to promote and maintain public confidence in the administration of justice, there is an urgent need for giving a well-defined status to the victim of crime under the criminal law. His interest in getting the offender punished cannot be ignored or completely subordinated to the social control by the State. Neither at the stage of the framing of a charge or passing of an order of discharge, are the views of the victim ascertained, let alone considered. He is not to be consulted during the trial. Even after the case ends up in a conviction, it is the State, which defends the judgment of the trial court in appeal, if any, filed against the conviction and sentence.

It is necessary to give a central role of the victims of crime, as otherwise, the victim will remain discontented and may develop a tendency to take law into his own hands in order to seek revenge and pose a threat to the maintenance of Rule of Law, essential for sustaining a democracy. This challenge was noticed by the Supreme Court in *P. Ramchandra Rao v. State of Karnataka*, when it expressed its concern for the plight of the victims of crime who, if left

without a remedy might “resort to taking revenge by unlawful means resulting in further increase in the crimes and criminals”. As at present, broadly speaking, there are two systems of dispensation of criminal justice-Adversarial and Inquisitorial. The system, followed in India, for dispensation of Criminal Justice System, is Adversarial System of common law inherited from the British rulers. In this system the accused is presumed to be innocent and the burden of proving his guilt beyond reasonable doubt lies on the prosecution. The accused also enjoys the “right of silence” and he cannot be compelled to answer the queries. In the adversarial system truth is supposed to emerge from the respective versions of the facts presented by the Prosecution and the defense before a neutral judge. The judge acts as a referee and decides whether the prosecution has been able to prove the guilt of an accused beyond a reasonable doubt. The system, per-se appears to be fair and justified, but viewed from the perspective of the victim, it is heavily loaded in favour of the accused and it insensitive to the rights of the victims or their plight because generally the judge in his anxiety to maintain his position of neutrality, fails to take initiative to find out the truth.

In order to respond to the interests of victims more effectively, it is important to ensure that they play an active role during investigation and trial. The problem with the existing statutory scheme is that once an investigation starts, the role of the victim is minimal. In many instances the police personnel proceed very slowly on investigations, thereby losing out on the opportunity to gather relevant evidence and opening up the possibility of corruption. Conversely, investigations involving well-connected and influential persons as victims tend to be taken up in a relatively expeditious manner. Even during the course of trial, the victim’s role is confined to that of acting as a ‘prosecution witness’ since the prosecution is entirely conducted by the State. The lawyers working as Public Prosecutors at the district level often lack the necessary competence and function in a manner that is not accountable to the victim in any way. As a result trials are unduly delayed either on account of the disinterest or conversely the heavy workload faced by the Public Prosecutors. The Justice Malimath Committee on Criminal Justice Reforms (2003), Second Administrative Reforms Commission in 5th Report on “Public Order” (2007) and Law Commission of India’s 226th Report on “Compensation to the Victims” (2010) have recommended various measures for victims empowerment and rehabilitation.

Remedial Measures to Victim’s Empowerment

Over a period of time, the following measures have been initiated in India for empowerment of victims of crime and human rights violations:

Legislative and Administrative Measures

- i) Victims’ Compensation in the Criminal Procedure Code, 1973 u/s 357-59

Section 357(1) concerns itself with the grant of compensation out of the fine imposed on the offender at the time of sentencing the convict. Sub-clause 1(a) of Section 357 empowers a criminal court to indemnify the prosecuting agency against expenses incurred in the prosecution

by way of fine imposed on the convict. Sub-Clause 1(b) of Section 357 entitles the court to award compensation for any loss or injury caused by the offence to the victim but this is subject to the condition that compensation must be recoverable by the victim in a civil court. This condition i.e. the word “recoverable” may be construed in two ways:

1. That the victim is entitled to sue the offender for damages in a civil court and that the offender is liable to pay,
2. That the offender had the capacity to pay the compensation.

Section-358 of the Criminal Procedure Code, 1973 provides for payment of compensation up to Rs. 100/- to persons groundlessly arrested. While sub-clause of Section 359 of the criminal procedure code, 1973 empowers a court to award costs in non-cognisable cases to the complainant who is generally a victim of the crime, from the offender, providing further that if the offender did not pay costs as ordered, he shall suffer simple imprisonment up to 30 days.

The recent amendment in the of the Criminal Procedure Code (Amendment) Act, 2008 has provided long debated issue of victims’ compensation scheme. Besides victims compensation scheme the CrPC amendment Act has also empowered the victims to engage an advocate of his choice with the permission of the court to assist the prosecution (Section-24). This lawyer will also be authorised to present separate arguments, examine witnesses and produced evidence if permitted by the court. This aside, the victim may file an appeal against an acquittal of the accused, conviction for a lesser offence or the award of an inadequate sentence (Section-372). These provisions have given a legitimate space to the victims in the Criminal Justice System.

In crux the following are the salient features of the Criminal Procedure Code (Amendment) Act, 2008:

- 1) “Section 357A. (1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose overcompensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.
- 2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).
- 3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under Section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

- 4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.
- 5) On receipt of such recommendations or on the application under sub-section (4) the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.
- 6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.”

Compensation to the Victims in the Special Laws

- a) Under the Probation of Offenders Act, 1958

According to Section 5 of Probation of Offenders Act, 1958, a court directing the release of an offender under Section 3 or under Section 4 of the Act may, if it thinks fit, at the same time, a further order directing him to pay such compensation as the court thinks reasonable for the loss or injury caused to any person due to the commission of the offence by him.

- b) The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, provides the monetary relief to the victims of crime ranging from Rs 25,000 to 2,00,000 depends on the nature of offence and circumstances of the case. Generally 25 per cent of the monetary support is provided at the time of submission of charge sheet, 75 per cent at the time of conviction by the lower court but in case of heinous crimes as murder, the victims are provided 75 per cent relief after the post-mortem and 25 per cent at the time of conviction by the lower court. In case assault on the women with intention to dishonour or outrage her modesty and exploit her sexually, 50 per cent of the monetary relief is given at the time of medical examination and the remaining 50 per cent of the relief is given at the end of trial respective of the outcome thereof. However, the field reality is that majority of cases registered under SC/ST Act are not reaching to the logical conclusion. As the matter of fact in 70 per cent cases the accused are not punished by the court due to procedure lapses. The recent example is judgment delivered by Nagpur Bench Bombay High Court in CBI v Sakru Mahgu Binjavar & Others. This judgment has received sharp reactions from Dalit leaders as well as human right activists across the country broadly on two aspects;

- i) It commutes the Trial Court's death penalty for the accused to life imprisonment;
- ii) It refuses to accept the killings as Caste atrocity.

In view of this, how far the provisions of the Acts in providing monetary relief to the victims of caste atrocities could have been useful is the subject of further inquiry?

Domestic Violence Act, 2005

This Act provides for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family setting as domestic violence. In this context, Sections 20 to 24 are relevant in protection of victims of domestic violence through compensatory justice. The trial court may on an application being made by the aggrieved person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by that respondent.

The Custodial Crimes (Prevention, Protection and Compensation) Bill, 2006

The proposed bill aims to prevention and protection against custodial crimes and also provides compensation to the victims of custodial offences.

The Communal Violence Bill, 2005

The Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005 provides for (a) prevention and control of communal violence, (b) speedy investigation and trials, and (c) rehabilitation of victims. Currently, the National Advisory council(NAC), Government of India has constituted a core group of human rights activists to examine the efficacy and effective of the bill in the context of rights based approach to the victims of communal violence.

Prevention of Torture Bill, 2010

The Prevention of Torture Bill (passed by Lok Sabha without any debate on 6 May 2010 and Rajya Sabha referred the Bill to a select committee on August 31, 2010), in its present form, is being dubbed by the commentators as the “ Sanction of Torture Bill”. The critique of the proposed bill is made on mainly on two aspects-definition of torture and weak redressal mechanism; and lack of compensatory provisions for the survivors of torture and their families.

Administrative Measures

During last decade, the Government of India has framed various schemes to strengthen victim’s justice however their implementation at grassroots level has always been questioned due to procedural lapses. Among others, the following schemes are worth mentioning;

- a) Scheme for relief and rehabilitation of victims of rape

- b) Scheme for compensation to the victims of violence by left wing extremists
- c) Central Schemes for Assistance to victims of terrorist and communal violence
- d) Rehabilitation packages to provides relief to the victims of 1984 riots
- e) Ujjawala Scheme for prevention of trafficking and rescue, rehabilitation and re-integration of victims of trafficking for commercial and sexual exploitation

Schemes for relief and rehabilitation of victims of rape

The Hon'ble Supreme Court in a leading decision in case of the Domestic Working Women's Forum v. Union of India and others writ petition (CRL)No.362/ 93 had directed the National Commission for Women to evolve a "scheme so as to wipe out the tears of unfortunate victims of rape". The Supreme Court observed that having regard to the Directive principles contained in the Article 38(1) of the Constitution, it was necessary to set up criminal Injuries Compensation Board, as rape victims besides the mental anguish, frequently incur substantial financial loss and in some cases are too traumatised to continue in employment. The Court further directed that compensation for victims shall be awarded by the Court on conviction of the offender and by the Criminal Injuries compensation board whether or not a conviction has taken place.

This landmark case gives the relief and rehabilitation of the rape victims under the following ways and means;

- 1) A rape victim will be entitled to get compensation up to of Rs. 2,00,000, provided she testifies in a court of law against the accused.
- 2) Constitution of Criminal Injuries Compensation Board at District/State/ National Level.
- 3) The Board shall take into account the pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurs as a result of rape.
- 4) Provision of budgetary requirements for the scheme, which would be transferred to the States as Grants-in-Aid;
- 5) Setting up of District Level Committees headed by District Magistrate, to consider the claims.

Central Schemes for Assistance to victims of Terrorist and Communal Violence

In India, there is no comprehensive legislation for compensation to the victims of terrorism. However, Government of India, Ministry of Home Affairs (MHA), has notified a scheme entitled "Assistance to Victims of Terrorists and Communal Violence" which is being implemented with effect from April 1, 2008 (detailed scheme is annexed). The scheme provides financial assistance

to the family member(s) in the event of death or permanent incapacitation of the victim in terrorist violence. The assistance would be given over and above ex-gratia or any other relief from the State government or its agencies. The salient features of the scheme are summarized below:

- i) An amount upto Rs.3 lakhs would be given to the affected family, irrespective of the number of deaths in the family in a particular incident;
- ii) The principal amount would be deposited in a nationalised bank for lock-in period for 3 years and the interest on the above sum will be credited to the beneficiaries' saving account on quarterly basis;
- iii) A district level committee under the chairmanship of District Magistrate will identify beneficiaries;
- iv) While examining eligibility claims, the District Committee would look into the FIR, post-mortem certificate etc. for determining the rightful beneficiary/ claimant;
- v) The MHA after examining the case would issue the cheque in the name of the beneficiary and this would be sent to the District Magistrate (DM) for disbursement;
- vi) In case of employment if given to any family member of a victim of terrorist violence, the family will not be entitled to assistance under this scheme;
- vii) Those permanently incapacitated, and the member of the victims killed/ permanently incapacitated in the terrorist violence would be give a health card by the District Health Society funded under National Rural Health Mission, Rashtriya Arogya Nidhi, and the National Trauma Care Project. This card will provide free medical treatment for victims and their families.

An analysis of this scheme shows that the scheme is mainly based on welfare approach and not on rights based perspective. The victim does not have any right to get compensation; however, the financial assistance would depend on recommendations made by the bureaucrats, police officials and the doctors. Further, this does not include any component for other support systems such as counseling, assessment of loss/damage/property, financial expenses and other out of pocket expenses by victims and their families and also medical expenses incurred in the private hospitals. The procedure to get the financial support is very cumbersome and time consuming. The whole process gives lot of discretionary powers to the bureaucrats and therefore this will result in delay in the disbursement of the compensation the victims. The element of corruption may also not be ruled out while awarding the compensation for the victims.

Ujjawala Scheme for victims of trafficking for commercial and sexual exploitation

Ujjawala is a comprehensive scheme for the prevention of trafficking, rescue and rehabilitation of women and child victims of trafficking for commercial sexual exploitation in India. It was launched in 2007 by the Ministry of Women and Child Development. It consists of certain mechanisms for the reintegration and repatriation of victims including cross border victims. The Target Group or main beneficiaries of this scheme are women and child victims who have been trafficked for commercial sexual exploitation as well as those women and children who are vulnerable to becoming victims of this crime. These vulnerable sections include slum dwellers, children of sex workers, refugees, homeless victims of natural disasters and so on. This scheme is being implemented by various Non Governmental Organisations to provide direct aid and benefit to victims of trafficking. Immediate relief to victims includes the provision of food, shelter, trauma care and counseling to the rescued victims. Later on, victims are provided skill training, capacity building, job placement and guidance in income generating activities to empower them and help them live independently. Broadly, this scheme contains five components- prevention, rescue, rehabilitation, re-integration and repatriation to the victims of trafficking.

Payment of Compensation ordered by the Hon'ble Supreme Court in respect to convicts in the prisons

Advancing the philosophy of restorative justice, the Supreme Court in *State of Gujarat v. Honorable High Court of Gujarat* (1998 7 SCC 392) has directed that the prisoners should be paid equitable wages for the work done by them, every prisoner must be paid wages for the work done by him and the state concerned make law for setting a part a portion of the wages earned by the prisoners to be paid as compensation to deserving victims of the offence. This is a significant development in providing restorative justice to the victims of crime.

Recent Development

More recently, Government of India, Ministry of Home Affairs has issued two advisories for all for all States and Union Territories to prevent – victimisation of vulnerable sections of society such as women, children and marginalised people etc. Broadly, the advisories focused on the following measures to be taken into considerations by the criminal justice functionaries in safeguarding the human rights of the victims of crime.

- I) Set up exclusive 'Crime against Women/Children' desks in each police station. There should be no delay, whatsoever, in registration of FIRs in all cases of crime against children. All out efforts should be made to apprehend all the accused named in the FIR immediately so as to generate confidence in the victims and their family members. The administration and police should play a more proactive role in detection and investigation of crime against children and also ensuring that there is no under reporting.

- II) Cases of crime against children should be thoroughly investigated and charge sheets against the accused persons should be filed within three months from the date of occurrence without compromising on the quality of investigation. Proper supervision of such cases should be ensured from recording of FIR to the disposal of the case. Speedy investigation should be conducted in heinous crimes like rape, murder etc. The medical examination of rape victims should be conducted without delay.
- III) Steps may be taken not only to tackle such crimes but also to deal sensitively with the trauma ensuing the crime. Counselling to the victim as well as to the family may be provided by empanelling professional counsellors. Exploring the possibility of associating NGOs working in the area of combating crime against children and other vulnerable sections of the societies. Developing a community monitoring system to check cases of violence, abuse and exploitation against children and take necessary steps to curb the same;
- IV) The local police must be advised to collabourate with the 'Childline-1098 Service' (which is an emergency service being operated by the Childline India Foundation (CIF) all over the country catering to the needs of children in emergency situations) and NGOs for mutual help and assistance wherever and whenever required. A Reception Officer (of the rank of Head Constable) must be available round the clock in every Police Station. Equal and fair treatment must be given to every petitioner/complainant irrespective of his/ her status, class or creed and a proper receipt should be given for every complaint forthwith. The disposal of the complaint should normally be ensured within two days by holding an on the spot enquiry in the ward/ village concerned. Wherever found appropriate, the complaint should be converted into an FIR.VI. Whenever an FIR is registered, a signed copy of the FIR must be provided to the complainant on the spot. The State Governments/ UT Administrations must ensure registration of cases round the clock and deal sternly with any dereliction of duty in this regard.VII. 'Crime against Women/Children' desks may be set-up in every police station.

Judicial Measures

- a) Right to Victims' Compensation (Supreme Court U/A-32, High Court U/A-226)

In the scheme of the Constitution of our country, the judiciary works as a sentinel and guardian of the Constitution and as also custodian of the rights of the people. Article 32 and Article 226 of the Constitution have conferred powers on the Supreme Court and High Courts to pass appropriate orders which include to ensure the rights of the victims as well. In the absence of statutory provision in any other law, for the first time the Supreme Court of the country recognised right of compensation to the victim for violation of human rights in the landmark judgment in Rudal Shah v. State of Bihar(1983 4 SCC 141). That was case in which the petitioner was illegally detained in Ranchi Jail for 14 years ever after his acquittal by the court

after trial. The Supreme Court while directing releasing the petitioner awarded a total sum of 35,000/- by way of compensation. This judgment was later followed in subsequent judgments of the Supreme Court as well as the High Courts.

Custodial violence is an unacceptable abuse of power and an abhorrent violation of human rights by the protectors of the law themselves. It not only violates Article 21 of the Constitution of India which guarantees the fundamental right of life and liberty, but also infringes upon Article 3 of Universal Declaration of Human Rights (UDHR) and Article 6 of the International Covenant on Civil and Political Rights, that every person has the right to life, liberty and security and no one shall be arbitrarily deprived of life. Further, Article 5 of UDHR and Article 7 of the Covenant on Civil and Political Rights lay down explicitly that no one shall be subjected to torture, or cruel, inhuman or degrading treatment or punishment. Article 9 of Universal Declaration of Human Rights and Article 9 of the Covenant emphasis that no one shall be subjected to arbitrary arrest, detention or exile. These provisions also lay down that anyone who is arrested shall be informed of the reasons of his arrest and shall be promptly informed of the charges against him. Article 22 of the Constitution protects the rights of the individual in case of arrest and detention and essence incorporates the principles of these United Nations documents. It is a fundamental right under this Article, that the arrested person must be produced before the nearest magistrate within twenty-four hours. In this regard, the Supreme Court in the case of *D. K. Basu v. State of West Bengal* (AIR 1997 SC 610), which dealt with the principle *Ubi jus, ibi remedium* i.e., there is no wrong without a remedy. The law wills that in every case where a man is wronged and damaged, he must have a remedy. A mere declaration of the invalidity of an action, or the finding of custodial violence or death in a lock-up, does not by itself provide any meaningful remedy to a person whose fundamental right to life has been infringed. Much more needs to be done. While there is no express provision in the Constitution of India for grant of compensation for violation of the fundamental right to life, the Supreme Court has judicially evolved a right to compensation in cases of established unconstitutional deprivation of personal liberty or life. The Court observed that the claim in public law for compensation for unconstitutional deprivation of the fundamental right to life and liberty, the protection of which is guaranteed under the Constitution, is a claim based on strict liability and is in addition to the claim available in private law for damages for torturous acts of public servants. Public law proceedings serve a purpose different from private law proceedings. Award of compensation for established infringement of the indivisible rights guaranteed under Article 21 is a remedy available in public law, since the purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system where in their rights and interests shall be protected and preserved. The grant of compensation in proceedings under Article 32 or Article 226 of the Constitution of India for the established violation of the fundamental rights guaranteed under Article 21, is an exercise of the courts under the public wrong on the State which failed in the discharge of its public duty to protect the fundamental rights of the citizen.

The quantum of compensation will, of course, depend upon the particular facts and circumstances of each case. The relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. However, the liability of the State for damages for violation of the Constitutional rights to life, liberty and dignity of the individual has been recognised and established as a part of the public law regime. In decision of the Apex Court, in particular, in cases of Francis Coralie Mullin v. Administrator, Union Territory of Delhi (1981 1 SCC 608) and Nilabati Behera v State of Orissa, (1993 2 SCC 746) the constitutional and juristic foundations of this liability of the State have been formally and finally laid down. Even the claim of sovereign immunity arising out of the State discharging sovereign functions is held to be no defense at all against the acts of violation of the constitutionally guaranteed Foundational Human Rights (Annual Report of National Human Rights Commission, 1999-2000).

Compensation (Interim and Final Relief) Awarded by Human Rights Commission (u/s-18 of PHRA, 1993)

The Protection of Human Rights Act, 1993(as amended in 2006) provides an additional forum to address violation of human rights through National/State

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Human Rights Commissions and Human Rights Courts across the country. Upon receiving the complaint, and after enquiry, human rights commissions may recommend to the government any or all of the following:

- a) register a criminal case against the guilty persons;
- b) pay immediate compensation to the victim or to the victim's family;
- c) take disciplinary action against the guilty persons;
- d) stop a particular act if it is violating human rights;
- e) properly perform its duty and protect those whose human rights are being violated; and
- f) take preventive measures so that human rights violations do not take place in future.

Human rights commissions may award an immediate compensation to victims or their families. It is paid so that money can be made available to them for rehabilitation, without delay. It does not affect the right to claim further compensation in court by filing a civil case against the offender. It is therefore termed 'interim relief' by human rights commissions. Though there is no hard and fast rule, typically complaints regarding serious violations of human rights such as death in custody, torture, rape, illegal detention, kidnapping, destruction of private property,

insults to personal dignity, and negligence by police, security forces or government agencies qualify for payment of immediate compensation. This recommendation to pay immediate compensation is made either to the government under whose jurisdiction the violation has taken place or the government that controls the department responsible for the violation. Sometimes after paying immediate compensation, the government concerned recovers the amount from guilty officials. Immediate compensation amounts vary from case to case depending upon the circumstances and from commission to commission.

During the last 13 years, the Commission has recommended for payment of interim relief to the extent of Rs. 10,44,97,634/- to be paid in 716 cases, recommended disciplinary action in 223 cases and prosecution in 74 cases against the public servants who were prima facie found responsible for their acts of omission and commission resulting in violation of Human Rights of the people. Added to this, the Commission has also recommended a total of Rs. 23,24, 25,000/ - to be paid to the next of the kin of 1245 deceased in the matter of Punjab Mass Cremation case. The enormous increase in the number of complaints indicates the awareness of Human Rights among the people and the confidence people have in the Commission. However receiving of more and more complaints of violation of human rights may not be a happy situation (Journal of The National Human Rights Commission, India, Vol-5, 2005-2006, pp.141-42).

Right to Victims' Rehabilitation:

In a landmark case – Custodial Torture of Rakesh Kumar Vij by Uttar Pradesh Police (NHRC Case No. 12982/96-97), the NHRC asked the UP Government to constitute a Medical Board to assess the extent of physical disability suffered by the victim due to torture by UP Police. The Medical Board, gave a report to the Commission, stating that the victim did not suffer from any gross structural damage, on which the victim raised doubts and communicated to the Commission. In view of grave apprehensions of miscarriage of justice, the Commission got the victims examined by the Delhi Trauma and Rehabilitation Centre, which gave an entirely different report and assessment. Then, the Commission thus directed the UP Government to pay Shri Rakesh Vij Rs. 10 lakhs by way of immediate interim relief. The Government was also directed to arrange for the complete medical treatment of victim. The expenses of the treatment as well as the traveling expenses of victim along with one attendant, from his native place to the place of medical treatment at AIIMS, New Delhi or PGI, Lucknow, would also be borne by the State Government. This way the Commission has recognised the right to rehabilitation of victims in holistic manner.

Besides establishments of NHRC and SHRCs at National and State level, under Section 30 of the Protection of Human Rights Act, the State Governments may, with the concurrence of the Chief Justice of the concerned High Court, by notification specify for each district a Human Rights Court to try the offences arising out of the violation of Human Rights. The NHRC time and again has stated that in order to give a better focus to this laudable provision and to provide justice at the district level itself in case of human rights violations, the section needs amendment.

Further the lack of clarity as to what offences, precisely, can be clarified as human rights offences, has been the biggest impediment in the effective functioning of human rights courts, which have been set up by some of the states. The NHRC urged the Central Government through its annual reports for amendment Section 30 of the Protection of Human Rights Act,1993. It is rather unfortunate that the Central and State Governments have so far failed to resolve issues that are creating impediments in the setting up of fully functioning human rights courts.

In order to provide access to justice for victims of human rights violations including victims of crime at the local level (District level) the human rights courts could be an effective and speedy justice mechanism, however due to lack of clarity of offences to dealt by these courts and procedure to followed, this mechanism is under utilisation.

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