

WHO IS VICTIM: A LEGAL FRAMEWORK TO PREVENT VICTIMIZATION UNDER THE CRIMINAL JUSTICE SYSTEM

*DHEERENDRA KUMAR BAISLA

INTRODUCTION:

This chapter deals with mainly the provision increasing “the role of victim in participation under criminal proceedings and anomalies in the provisions contain in criminal procedure code, 1973, with reference to Indian penal Code 1890, Indian evidence act 1872.

“If the criminal process is the taking over by the state of the vengeful instincts of the injured persons-butressed by the recognition that the harm to the victim is also harm to the state-then it would seem, at first blush, that the victim at least has a right to be informed of, and where appropriate involved in, the process that have led to whatever is the state settlement of the harm that has been done to him¹.”

-G.S Bajpai

The wheel of criminal justice system starts once the crime has been committed to the victim and state take the responsibility to prosecute the criminal by giving him fair and just opportunity to prosecute, following due process with strict proof of standard that is proof beyond reasonable doubt these are the high esteem principles which were further endorsed by the “²that it is better 100 guilty Persons should escape than that one innocent Person should suffer.” But question arises does these sort of things complete the wheel of criminal justice system? Is it not one wheel left out from the criminal justice system that is victim, who is considered to be “forgotten man” of the criminal justice system³. Victim primarily victimized by the offence and secondary by the negation, expulsion, unresponsiveness by the system and society. However in the recent years specifically after the United nation declaration of the basic principles of

¹ Prof. G.S Bajpai, “Victim rights and criminal procedure models”, published in criminal justice system reconsidered: victim & witness perspective, published by serial publication 2012.

² Benjamin Franklin, letter to Benjamin Vaughan. ”*The Writings of Benjamin Franklin*”, ed. Albert H. Smyth, vol. 9, p. 293 (1906).

³ Kumar Askand pandey Remembering the “Forgotten Man” a plea for victim rights in the Indian criminal justice system.

justice for the victims of crime and abuse of power⁴ the victimological approach steps ahead into the criminological system of justice. Basically there are two models of criminal justice system i.e. adversarial model and inquisitorial model⁵. Out of these two models adversarial model is more inclined towards the accused safeguards, process, participation, standard of proof in comparison to the inquisitorial models wherein need of victim better assigned. But the present approach of criminal administration laws are considering victim as a witness and accordingly the legal framework were framed in the manner of participation, protection, rehabilitation & reparation Internationally in:-

1. International Criminal Court.
2. International Criminal Tribunal on former Yugoslavia (ICTY).
3. International Criminal Tribunal of Rawanda (ICTR).

as well as Nationally the legal framework of India:-

1. The Constitution of India
2. The Code of Criminal Procedure, 1973.
3. The Indian Penal Code, 1890.
4. The Indian Evidence Act, 1872.

As well as in U.K, U.S.A, Europe, Canada.

If we see the present legal framework still the position of victim is not much clear though the recognition were given to victim as to who is victim and who will be considered as victim apart from this position also not clear about the remedial aspect as to apart from compensation what set of assistance are provided to different categories of victim even after the united nation declaration in 1985. The present legal framework itself shows how the victimization is still exist and part with the criminal justice system.

⁴ United Nation Declaration of basic principles of justice for victim of crime and Abuse of power available at <www.un.org/documents/ga/res/40/a40r034.htm>

⁵ Herbert L. Packer Two Models of the Criminal Process, 113 U. Pa. L. Rev. 1 (1964). Available at: http://scholarship.law.upenn.edu/penn_law_review/vol113/iss1/1.

To understand the position of victim in legal framework firstly there is need to define who is victim under the criminal law and what are the various forms of victimization are there.

As per Oxford dictionary means

“Victim is a person who is put to death or subjected to misfortune by another, one who suffers severely in body or property through cruel or oppressive treatment: one who is destined to suffer under some oppressive or destructive agency: one who perishes or suffers in health etc. from some enterprise or pursuit voluntarily undertaken⁶.”

Status of Victim in International Legal frame work

The adoption of United nation declaration on basic principles of justice for victims of crime and abuse of power⁷ is the first international instruments which provides victim rights and interest in the administration of criminal justice system. Its aim to provides basic standard for the criminal justice system internationally as well as nationally criminal court follow to ensure justice to the victim, in this regard there are four basic essentials which every criminal justice must followed to reduce victimization to victim these are:-

- Access to justice and fair treatment to the victim.
- Restitution i.e. restoration of rights to victim or to put in same position as he was earlier without the crime being committed to him.
- Compensation i.e. to provide financial assistance.
- Assistance i.e. in the form of Medical, psychological, Social assistance to curb the secondary victimization from the crime as well as from the criminal justice system.

⁶ <www.oxforddictionaries.com/definition/english/victim>

⁷ United Nation Declaration of basic principles of justice for victim of crime and Abuse of power available at<www.un.org/documents/ga/res/40/a40r034.htm>

Apart from this the declaration provides very broad definition of victim which even not accepted by India in its full essence. As per the Declaration of basic principles of justice for victims of crime and abuse of power defines victim as

“Victim means the person 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 within member states, including those laws prescribing criminal abuse power.

The term “victim” also includes, where appropriate, the immediate family or dependants of the direct victim and person who have suffered harm in intervening to assist victims in distress or to prevent victimization⁸”

The special feature of the above mentioned definition is that Firstly, victim is person not only violation of there criminal law but also as of fundamental rights, Secondly, the word harm is of any kind whether physical, mental, emotional, financial, Thirdly, which very special feature is that apart from family and dependants of victim, the person while assisting the victim suffered harm of any kind above-mentioned also termed as victim.

After such recommendation none of International statute provide such elaborate definition of victim although prevention, protection, and reparation program are well establish for victim to curb the victimization.

In this regard International criminal court establish under the Rome statue introduce various provisions under the ICC statute⁹ and the ICC rules of procedure and

⁸ United Nation Declaration of basic principles of justice for victim of crime and Abuse of power available at <www.un.org/documents/ga/res/40/a40r034.htm.>

⁹Article 43 paragraph 6 of Rome statue of international criminal court specifically states that the registrar shall setup victim and witness unit to provide measures to the victim.

Article 68 of Rome statue of international criminal court specifically states protection of victim and witness and their participation in the proceedings.

Wherein court shall take appropriate measure to the safety, physical and psychological well being of victim.

Wherein the personal interest of victim affected the court shall permit their view at any stage of proceedings without prejudicial to and inconsistent with the rights of the accused and fair and impartial trail.

Wherein it is also mentioned that the victim may advise prosecutor or the court as to what kind of protective measures, assistance, arrangement they need.

Article 75 of Rome statue of international criminal court specifically states as to Reparation to victims.

evidence¹⁰ to provide participation, protection, assistance i.e. physically as well as mentally, arrangements in the form of legal representation to the victim and witness as per their satisfaction and need starting from the registration of case under registry till the final chamber. It is the first time in history wherein the international criminal court recognized the rights of the victim to participate and to reparation in international criminal proceedings as well as provide an independent status to the victim. In this regard as per the International criminal court under rule 85¹¹ defines victim as:-

There are two sets of definition one for natural person i.e. human being and other is legal persons that is organizations or institutions

1. Victims means natural persons who have suffered “harm” as a result of the commission of any crime within the jurisdiction of court.
2. Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

But the definition is not clear about the notion of “harm” to the victim whether it include direct harm which is suffered personally or it also include Indirect harm without involvement of personal harm for the purpose of participation in proceedings. This issue later on resolved by the famous trail held in Lubanga case which held that to qualify as the victim, the harm suffered does not have to be direct harm but it must

Article 79 of Rome statute of international criminal court specifically state as to creation of a trust fund for the benefit of victims of crimes.

Article 93 paragraph 1 of Rome statute of international criminal court specifically states as to measures to protect victim and providing assistance.

¹⁰Rules 85 to rule 99 of Section III provides procedure regarding victim and witness of international criminal court, Rules of procedure and evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000).

¹¹ Rule 85 provides definition of victim under International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000).

be of personal in nature, who may further lead to evidence at trial and to challenge the admissibility of evidence¹².

In comparison to this the ad hoc tribunal which is created before establishment of Rome statute are International criminal tribunal for former Yugoslavia (ICTY) and International criminal tribunal for Rwanda (ICTR) apart from protection program to victim and witness¹³ does not provide for participation of victim. Even if we see the definition of victim¹⁴ under both the statute is very limited in their nature which provide the victim means the person who suffer from the consequences of crime, but those who are not specifically targeted, are not recognized as victim.

Status of the victim in the Indian Legal Framework.

"The role of the victim in the criminal trial can never be lost sight of. He or she is an inseparable stakeholder in the adjudicating process."

Dr. Arijit Pasayat justice¹⁵

"It need to be emphasized that the rights of the accused have to be protected at the same time the rights of the victim have to be protected and rights of victim cannot be marginalized. They stand poised equally in the scales of justice."

Dr. Arijit Pasayat justice¹⁶

"A person at whose behest an investigation is lunched by the police is not altogether wiped out of the scenario of the trial merely because the investigation was taken over by the police and the charge sheet was laid by them. "

K.K Thomas justice¹⁷

¹² Decision issued by ICC appeals chamber on 11 July 2008 in the *Prosecutor v. Thomas Lubanga dyilo* (situation in the democratic republic of the Congo) ICC-01-04-01-06-1432-ENG available at <https://www.icc-cpi.int/drc/lubanga> (accessed on 14 May 2016).

¹³ Article 22 of international criminal tribunal for the former Yugoslavia specifically states protection to the victim and witness.

Article 21 of international criminal tribunal for Rwanda specifically states protection to the victim and witness.

¹⁴ Rule 2(A) of the Rules of procedure and evidence of both the tribunal specifically states Victim is a person against whom a crime over which the tribunal has jurisdiction has allegedly been committed.

¹⁵ *National Human Rights Commission v. State Of Gujarat & Others* (2009) 6 SCC 767 specifically held in paragraph 34.

¹⁶ *National Human Rights Commission v. State Of Gujarat & Others* (2009) 6 SCC 767 held in paragraph 26

¹⁷ Held in *J.K. International v. State Government of NTC* (2001) 3 SCC 462.

With these above mentioned principles it can very well inferred that how the judicial activism evolving and balancing the rights of the victim in the criminal justice system. In India the criminal justice system is governed by the adversarial model of administration which is considered as accused centric model as primarily burden of proof lies upon the prosecution which is prof beyond reasonable doubt apart from this accused are having enormous right i.e. right to silence, presumption of innocence and various other rights¹⁸ as compare to the victim.

Presently Indian criminal justice governed by the four main legislations which govern criminal justice system. These legislation are:-

- The Constitution of India
- The Code of criminal procedure 1973
- The Indian evidence act 1872
- The Indian penal code 1890.

Almost after the two decade ago after the United Nation declaration on victim rights, Indian criminal justice system is aware as to who is victim through the inculsion of new provision in the code through the amendment in the code of criminal procedure (amendment) Act 2008 which defines the victim in restricted manner

As per section 2wa¹⁹ Victim means

“a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression “victim” includes his or her guardian or legal heir.”

If we particularly reads the parts of definition various contingencies arises regarding the ambit of victim the expression loss and injury does not defines though the it was held that the expression loss and injury mean a person who suffered mental, physical and emotional suffering²⁰. But the main problem is that to qualify as victim in the

¹⁸ Article 20(2) of the constitution of India specifically states right against double jeopardy.

Article 20(3) of the constitution of India specifically states right against self-incrimination.

Article 21 of the constitution of India specifically states right to fair and speedy trail.

Article 22(1) of the Constitution of India specifically states right to assistance of council.

Article 22(2) of the constitution of India specifically states right to produce before magistrate within 24 hours.

¹⁹ The Code of Criminal Procedure, 1973, Section 2wa.

²⁰ *Tata steel v. Atma Tube Products 2013(1) ILR 719 (P&H).*

Ram Phal v. State And Others (CrL.A.1415/2012).

above mentioned definition the accused person must have been charged so the definition is conditional upon the accused charged, this show still after the amendment the position of victim remains intact as compared to united nation declaration wherein no such condition mentioned. Is it not Indian criminal justice system does unfair to victim as in order to curb the victimization it does nothing regarding who is victim.

Apart from this several provisions are introduced in the in above mentioned legal framework for the purpose of protection, participation, rehabilitation, reparation, prevention of victimization but still there is a lot more to do. There are various types of victim which can be categorized as victim of sexual offence, elderly victim, child victim, victim of offence against human body and property but the position of victim is that of witness who has very limited role, to protect the interest of these victims several statutory provisions are enumerated.

Firstly regarding the participation of victim it is the code of criminal procedure 1973 which provides for the procedure to administer justice in this participation of victim in the criminal process starts after the crime has been committed against the victim, the first approach is to register an F.I.R²¹ against the person who has committed crime which is mandatory to police to register²², and provide copy of it with free of cost²³, in that process if the police officer refuse to register the F.I.R the victim may approach the superior officer of police²⁴ and as well as court to register the F.I.R²⁵. After this during the investigation no role has been assigned to victim except for the examination as a witness²⁶ and to confirm the identity of accused²⁷ as well as material

²¹ Section 154 (1) of the code of criminal procedure, 1973 specifically states Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant.

²² Held in *Lalita kumari v. Govt. of U.P & others* (2014) 2 SCC 1.

²³ Section 154 (2) of the code of criminal procedure, 1973 specifically states A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.

²⁴ Section 154 (3) of the code of criminal procedure, 1973 specifically states Any person, aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned.

²⁵ Section 156 (3) of the code of criminal procedure, 1973 specifically states Any Magistrate empowered under section 190 may order such an investigation as above- mentioned.

²⁶ Section 161 of the code of criminal procedure, 1973 specifically states examination of witness by police.

object received, as the investigation is an exclusive function of police. But when once the investigation completed and the time of submitting the police report as well as closure report comes it is duty upon the superior officer of police to inform the person by whom the information relating to offence first given²⁸, so that such person may have an opportunity to file protest petition before the court in the investigation is not done by filling of closure report or if proper investigation not conducted by the police. Here though the specific mentioned of victim is not used in the section but it is presumable that victim generally the first person who give information related offence.

After the investigation stage it is the stage of charge framing and trial wherein different forms of trial prescribed under the code of criminal procedure, 1973 i.e. Trial before a court of session, trial of warrant cases by magistrates, trial of summon cases by magistrate, and summary trial. There is no single provision in the process of charge framing and trial wherein victim has a role to participate though the public prosecutor who act on behalf of victim very wide role is assigned to him at the same time no single provision were there which cast duty upon the public prosecutor to inform the progress of victim case. Apart from this dual fresh opportunity is given to the accused on the question of sentence even after the submission of arguments at the time of judgment of acquittal or conviction²⁹.

Even at the stage of trial very limited role is assign to victim in case of bail victim can participate for the cancellation of bail³⁰ as well as in case of compounding of

²⁷ Section 9 of the Indian evidence Act, 1872 specifically states which establish the identity of anything or person whose identity is relevant.

²⁸ Section 173(2)(ii) of the code of criminal procedure, 1973 specifically states “the officer shall also communicate in such manner as may be prescribed by the state government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.”

²⁹ Section 239(2) of the code of criminal procedure, 1973 reads if the accused is convicted, the judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence to him according to law.

Section 248(2) of the code of criminal procedure, 1973 reads as where in any case under this chapter, the magistrate finds the accused guilty, but does not proceed in accordance with the provision of section 325 or section 360, he shall after hearing the accused on the question of sentence, pass sentence upon him according to law.

³⁰ Section 439 (2) of the code of criminal procedure, 1973 specifically states A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

offense³¹ victim has a role to play as it is the interest of victim which has to be achieved.

Apart from this there is another area of participation to the victim in the criminal justice system introduced through the amendment act 2005 with the introduction of new chapter³² on plea bargaining wherein it is impossible to carry out mutually satisfactory disposition without the participation of the victim of police case³³ as well as complainant case³⁴. The word used “shall” under the provision of 265C (a)&(b) cast mandatory duty upon the court to issue to the victim.

In case if the victim needs to transfer his case from one court to another he may file an application in that regard to put his contention as the word used “party interested” in the provisions³⁵ of chapter xxxi of the code provides participation to the victim in transfer of criminal cases.

In the post trial phase that in the cases of appeal significant amendment brought in this regard to the preferring of appeal under the provision of 372 proviso of the code of criminal procedure which gives right to the victim to prefer appeal but the provision is unclear as who is victim for the purpose of preferring appeal and still there is no unanimity amongst different-different high court. But the provision is good in the sense that it prevent the secondary victimization upon the victim is minimize the participation of states and stepping victim ahead.

At the same time their in no provision while pronouncement of sentence, execution, suspension, remission, and commutation of sentence in case of death, imprisonment and levy of fine so as to put the views of victim in sentencing.

³¹ Section 320 of the code of criminal procedure, 1973 specifically states Compounding of offence.

³²The code of criminal procedure, 1973 chapter XXIA reads as Plea Bargaining.

³³Section 265C clause (a) of the code of criminal procedure, 1973 specifically states “in a case instituted on a police report, the court shall issue a notice to the public prosecutor, the police officer who has investigated the case, the accused and the victim of the case to participate in the meeting to work out a satisfactory disposition of the case.”

³⁴ Section 265C clause (b) of the code of criminal procedure, 1973 specifically states “in a case instituted otherwise than on the police report, the court shall issue notice to the accused and the victim of the case to participate in a meeting to work out a satisfactory disposition of the case.”

³⁵ Section 406(2) of the code of criminal procedure, 1973 specifically states “the supreme court may act under this section only on the application of the attorney -general of India or of a party interested.”

Section 408(2) of the code of criminal procedure, 1973 specifically states “the sessions judge may act either on the report of the lower court, or on the application of a party interested or on his own initiative.”

Secondly regarding protection of victim

In terms of criminal procedure code, 1973 to protect the interest of the victim the code of criminal procedure (amendment) Act 2008 introduce amendment under section 24³⁶ to give right to the victim to choose advocate of his choice but he only act to assist the prosecution. So role of private lawyer is in limited manner he has to act as per the prosecution. As per section 301³⁷ victim can also appoint & instruct private lawyer but he has to act only under the directions of public prosecutor firstly. Secondly, private lawyer can only submit written argument only after the closure of evidence this role of private lawyer pointed out by the supreme court in Shiv kumar v. hokum chand³⁸ more or less as junior counsel who assist senior. Thirdly, in magistrate trial under section 302³⁹ wherein private lawyer can conduct case but in session trial under section 301 exclusive authority is given to the public prosecutor. In terms of Indian penal code 1890 there are provision which act as to prevent the secondary victimization one of these are disclosure of identity of the sexual offence victim⁴⁰ which is punishable offense. There are situations wherein victim threatened to give false evidence in such a situation section 195A of Indian penal code act to protect the victim. In terms of Indian evidence act 1872, at the time of examination of the victim the defense may ask any kind of question to the victim but at the same time some questions are such which cause psychological harm to the victim and in order to prevent such questions the court may forbid to put indecent and scandalous question⁴¹ as well as question intended to insult or annoy⁴².

³⁶ Section 24 (8) proviso of the code of criminal procedure, 1973 specifically states “provided that the court may permit the victim to engage an advocate of his choice to assist the prosecution.”

³⁷ Section 301(2) of the code of criminal procedure, 1973 reads as “the pleader so instructed shall act under the directions of the public prosecutor or assistant public prosecutor.”

³⁸ 1999 7 SCC 467.

³⁹ Section 302 of the code of criminal procedure, 1973 specifically states “permission to conduct prosecution.”

⁴⁰ Section 228A of the Indian penal code 1890, reads as “whoever prints or publishes the name or any matter which may make known the identity of the any person against whom an offence under section 376, 376A, 376B, 376C, & 376D is alleged to have been committed (hereafter in this section referred to as the victim) shall be punished.”

⁴¹ Section 151 of the Indian evidence act 1872, reads as “the court may forbid any question or inquiries which it regards as indecent or scandalous, the Court may forbid any questions or inquiries which it regards as indecent or scandalous.”

⁴² Section 152 of the Indian evidence act 1872, read as “the court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the court needlessly offensive in form.”

Thirdly regarding rehabilitation, restitution, Assistance, & reparation.

Basically there are various provisions⁴³ which provides for rehabilitation for the purpose of reparation to the victim, though these are not completely in the form of restitution to put the victim in the same position as he was before the crime has been committed upon him but to some extent work as restitution. Currently these three provisions are providing financial assistance in the form of compensation to the victim apart from this there is no specific mention to take into consideration the views of victim regarding granting of compensation as well as to assist victim emotionally, & psychologically. Under section 357 court can grant compensation when fine forms part of sentence and also when fine does not part with sentence.

Under section 357A it is the mandatory duty upon the state to prepare scheme for the purpose of compensation but in regards to that as per the recent supreme court judgment issue is raised regarding the difference in compensation scheme for the same crime between different- different states and require for Uniform victim compensation scheme.

Under section 482 wherein in the interest of justice victim may claim compensation from the high court.

⁴³ Section 357 of the code of criminal procedure, 1973 specifically states as “order to pay compensation.”

Section 357A of the code of criminal procedure, 1973 specifically states as “victim compensation scheme.”

Section 357B of the code of criminal procedure, 1973 specifically states “compensation to be in addition to fine under section 326A or section 376D of Indian penal code.”

Section 357C of the code of criminal procedure, 1973 specifically states “treatment of victim.”

Section 482 of the code of criminal procedure, 1973 specifically states “saving of inherent power of high court.”

Article 21 of the constitution of India specifically states “right to life and personal liberty.”