

Briefs

Compensation to the Victims Of Crimes:

A Jurisprudential Analysis

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COMPENSATION TO THE VICTIMS OF CRIMES: A JURISPRUDENTIAL ANALYSIS

Hameema Mohammed¹

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

- Justice V.R. Krishna Iyer

Rattan Singh v. State of Punjab, (1979) 4 S.C.C. 719

Introduction

Crime affects large number of victims who suffer physical, social, financial or emotional injury or harm which need to be promptly redressed by providing them with easy access to justice (Paranjape 2012: 633). It is only in recent decades that the impact of the victimization on crime affected persons, drew attention of criminal law jurisdictions around the world. They were convinced that the victims needed to be treated with compassion and their dignity must be protected and preserved. But more than fifty years ago, Justice Benjamin N. Cardozo of United States, Supreme Court wrote while deciding the case Snyder v. Massachusetts, “Justice, though due to accused, is due to accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true” (Sainer 1983: 354).

It is pertinent to note that the law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in

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ruins. Protection of society and stamping out criminal tendency must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of “order” should meet the challenges confronting the society. Friedman in his ‘Law in Changing Society’ stated that: “State of criminal law continues to be—as it should be—a decisive reflection of social consciousness of society.” Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix (*Shailesh Jasvant bhai v. State of Gujarat* (2006) 2 SCC 359).

But the rising crime rate and the inadequacy of the law in balancing individual’s liberty and state’s duty to ensure protection of life and liberty has made the criminal justice system a subject of heated debates but despite the concern over the shortcomings of the system to check the growing crime rate, we are still unable to check the rise in crime. But what appears to be certain is that more police, more prisons, more laws, more courts will not achieve the object of bringing about reform in the system of criminal justice and check the growing crime rate. Giving the victim of crime his rightful place and taking a serious note of his existence, his feelings and his rights with a view to offer redress to him for his “injuries” may in the long run help check the rising graph of crime (Anand 1997).

Moreover, the traditional criminal sanctions have been unsuccessful in furthering the aims of criminal justice. Detaining the offenders in our overcrowded and expensive prisons fails to rehabilitate the imprisoned or protect the society (Das, 1997: 52). Experiencing prison abuse and detrimental attitudes make them more dangerous to society than they were before. The public has become frustrated with the system of “assembly line justice”, through which convicted criminals are placed on parole or probation and are left free to commit further crimes, (Abner 1980: 189-90) which diminishes the deterrent effect of criminal sanctions. So also the treatment of prisoners in correctional institutions neither prevents reoffending nor helps the victim of crime to overcome any of their problems. The victim of crime did not become a subject of criminological research until after the end of Second World War. Otherwise, the issue was always the crime, criminal; his treatment, rehabilitation and punishment, never the victim, victimization, his rights and plights and remedies. The study and concern for the victim of crime can be marked out as follows.

Rationale of Victim Compensation and Restitution

In times of yore, the victims of crime were paramount figures on the stage of the criminal setting. There are references in Manusmriti, the Book of Exodus, and Homer’s Iliad to compensation being paid to victims of criminal offences. Even in recent times,

before the Anglo-Saxon system of criminal justice was introduced in India, the victims were not completely neglected (Rajan 1995: 8)

Ferri's in his essay states that, "The fundamental principle of the positive system of social defense against crime is that of indemnification for damage, on which the positive school has always dwelt, in combination with radical, theoretical, and practical reforms. Reparation of damage suffered by the victims of crime may be regarded from three different points of view:

- (1) As an obligation of the criminal to the injured party;
- (2) As an alternative for imprisonment for slight offences committed by occasional criminals²; and
- (3) As a social function of the State on behalf of the injured person, but also in the indirect and not less important interest of social defense."

So also, the Positivists believe that if the individual ought to be always responsible for the crimes which he commits, he also ought to be always indemnified for the crimes of which he is the victim. The State must indemnify individuals for the damage caused by crimes which it has not been able to prevent³.

Italy at that time had already a public fund financed by fines. This fund was used to compensate wrongfully sentenced offenders who had become victims of the justice system. Ferri proposes to widen its scope: Compensation for victims of crime is a social function of the state, compensation is part of social law. It was recompense for the violation of the social contract.

² In the language of victimology, this is called offender restitution. The offender is ordered to restitute the victim (Restitution orders). Clearly that does not correspond to the everyday language (compare the confusion about compensation or restitution already in Israel Drapkin and Emilio Viano: *Victimology, a New Focus*, Vol. Ila . Without any doubt, sciences develop their own terminology – victimology is no exception. It is a test how much authors are victimologists (developing allegiance to a victimological terminology) or how much they are still caught in the terminology of their "home faculties" (expressing adherence to a language which is no longer specific for the discipline.) See N.V. Paranjape (2012)

³ In the language of victimology, this is called compensation: the state compensates. Paranjape (2012).

The International Prison Conference in 1885 demanded in Paris: since it is the task of the state to protect the victim of crime effectively, the state has to compensate the victim. Compensation, a public function of the state, should be financed by a fund from all fines (Dussich 2012).

Edwin Sutherland (1924: 62-71), the nester of American criminology, quoted the works of Garofalo and Ferri in the chapter “The Victims of Crime” which deals with the losses caused by crime but does not even mention restitution or compensation⁴. A review of the backward methods of Lombroso is more important to him. That is consequent because – his topic is criminology which had in its focus the offender, not the victim.

Jeremy Bentham (1748-1832) the classical writer had pleaded for victim compensation with a view to provide additional punishment and deterrence to the offender (Hudson & Galway, 1975: 54-56). For Raffael Garofolo (1852-1934), the positivist, restitution had indeed become a distinct shift of emphasis – a forceful means of social defence against the law –breakers (Hudson & Galway, 1975, 43-53). Finally, Sara Margury Fryon, suggests Restitution Centre on the reconciliation of the offender with the victim (Hudson & Galway 1975, 54-56).

So in the past three decades, a flurry of academic, judicial and legislative interest has been directed toward proposals advocating an increased use of restitution in the criminal process (Boldt 1987). Although some scholarly attention has been given to the question of whether restitution⁵ should be used as a criminal sentence, the great bulk of writing in this area has been concerned with particular problems of implementation, including issues of notice, proof, and enforcement. One of the most vexatious problems has involved the question of what relationship, an order of restitution should hold to the “offense of conviction,” the specific offense (or offenses) of which an offender has been convicted. Some courts have held that an offender's restitutionary liability must be limited to injuries directly caused by the offence of conviction (Boldt 1987).

⁴Sutherland refers to Ferri’s “Criminal Sociology” generally and specifically to Garofalo’s “Criminology” Enrico Ferri: *Criminal Sociology*. Translated by Joseph I. Kelly and John Lisle. Edited by William M. Smither with an Introduction by Charles A. Elwood and Quincy E. Meyers, Boston (Little, Brown and Co) 1917. (In the same series see the most important works of Rafaele Garofalo, Cesare Lombroso, and of the European elite in criminology were made accessible to the American reader).

⁵ Strictly speaking, the terms "restitution," "reparation," and "compensation" are neither interchangeable nor overlapping. As used in the literature, restitution and reparation refer to remedies which draw wholly upon the resources of the offender. Compensation, on the other hand, refers to a making whole of the victim by the state. Restitution differs from reparation in that it contemplates a restoration in kind rather than by way of some monetary equivalent.

More over in search of new sentencing options, legislatures and commissions have increasingly turned to restitution as a constructive alternative to the severity of imprisonment and the leniency of probation. They suggest that “restitutive justice” should be the principal objective of criminal law, requiring the offender to repay the victim from his own resources or from wages to be earned by the offender in the prison.

Schafer's worldwide (29 countries) inquiry on victim compensation concerned the following questions: (i) whether the victim or his dependent has any legal right to claim restitution for damages from the offender; (ii) if so, to what offences does this right apply; (iii) whether damages are restricted to compensation for financial loss only or any other non-material injury; (iv) the nature of jurisdiction; (v) the manner of recovery. He found three systems which existed in paying compensation to victims:

- (a) Damage: awarded in civil proceedings only.
- (b) Restitution-, awarded both in civil and in criminal proceedings.
- (c) Compensation-, awarded through special procedure both in civil and criminal proceedings.

He, thus, concluded that the general situation involves the victim of crime in a helpless position with regard to his claim for compensation. Stephen Schafer studied existing compensation schemes in 29 countries in 1958-59 and gave the following suggestions:

1. Compensation to victims of crime could be brought within the purview of criminal procedure and dealt in the same criminal court which deals with the offence.
2. Compensation may be claimed by the victim but if he doesn't, the court should deal with it as part of its fundamental duties.
3. If the question of compensation leads to delay in the pronouncement of sentence, the court should pass a part of the sentence and may postpone its decision in relation to compensation.
4. Compensation should be fixed with reference to offender's economic and social position.
5. Where the offender is not in a position to compensate, the state must undertake its responsibility.
6. The state should set up a Compensation Fund with the aid of fine and other sources of revenue.

The Rights of Victims of Crimes-An Analysis

In 1985, the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The Declaration recognized four types of rights and entitlements of victims of crime. They are:

- (a) Access to justice and fair treatment
- (b) Right to restitution
- (c) Personal assistance and support services
- (d) Compensation

These inalienable rights (Irvin 2011:7) include (1) the right to recognition; (2) the right to information; (3) the right to assistance; (4) the right to reparation; (5) the right to be protected from the accused; (6) the right to participation and representation in the judicial process; (7) the right to effective victimization prevention policies; and (8) the right to implementation and oversight of real plans to address the preceding rights. Waller provides a comprehensive overview of the development of these rights and presents legislative and grass root attempts by advocates of victims' rights to progress towards them.

Waller retains his stance that the needs of victims of crime are not only undervalued but often purposely neglected by government officials, law enforcement authorities and legislators. This perspective fails to acknowledge competing interests and opposing value stances that resist the application of a universal standard of victims' rights.

Crime Victim's Rights Act (Part of the united States Justice for all Act 2004) of US identifies the following rights of crime victims (Nash 2008: 1422):

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate and timely notice of any public court proceeding or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4)The right to be reasonably heard at any public proceedings in the district court involving release, plea, sentencing or any parole proceeding.

- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

Regardless, the blatant contradictions of victims' involvement in adversarial justice, it is in UK that it was realized that victims deserve legitimate needs and rights on their own, and a voice that should be heard. Victim Charters were supposed to deal with these issues, but this attempt was deemed as unsuccessful, because no serious changes were brought except from a misleading language (Ashwerth 1993). Equal efforts have been made on an international level. First of all, The European Convention on Human Rights as well as the Human Rights Act 1998 enacted in England and Wales offers some limited protections for victims⁶. Framework Decision on the Standing of Victims in Criminal Proceedings legally binds England. Although the English law is reluctant towards the rights of victims and any measures tend to be based on interests, expectations and entitlements, there has been some willingness to recognize victim's rights. The Code of Practice for Victims implements the Framework and presents better prospects of enforceable victims' rights. Nevertheless, the Code is modelled around legitimate expectations and thus more concern is given to practical support, rather than rights. Moreover, the Code applies only to victims who have made an allegation to the police and in the case of breaching the Code, victims can only complain (Home Office (2008)). Again, these are fundamental drawbacks suggesting the misleading nature of the proposals that are supposedly aimed at enhancing the position of the victim. There is an element of intimidation in criminal processes which is also emphasized by the failure of the justice system to support, advice or provide information to victims that is why victims' rights bear a notable significance.

Victim's rights are closely connected to victims' needs and include (Wolhuter et al 2009:119-120) the right to receive support and assistance; the right to receive information concerning the pre-trial and trial process, the outcome and the subsequent release of the offender; the right to receive protection in appropriate circumstances, including instances where the victims is afraid to testify or fears intimidation by the

⁶ These include the right to life, the right not to be subjected to inhuman or degrading treatment, the right to physical integrity (Council of Europe, 1966)

offender; the right to participate in the pre-trial and trial proceedings; the right to compensation; the right to freedom from discrimination in the exercise of the above rights.

The criminal justice system in India would ensure efficacious and expeditious justice once the law recognizes the rights of victims and adequately provides for the compensation of victims. In 2008, the Government undertook major amendments to the Criminal Procedure Code of 1973 (*hereinafter* “CrPC”), in order to strengthen India’s criminal system. The amendment focusing on victim-justice, for the first time sought to define the term “*victim*” and renovate the obsolete laws related to the provision of compensation to victims (Section 2(wa) Cr,PC). Unfortunately, it once again leaves the provision of compensation under Section 357 Cr.PC, to the sole discretion of the judge; something that has been rarely exercised of their own accord, in the past the vanishing point of Indian victim compensation law (Chockalingam 1993: 72-81). However, Section 357(A) CrPC, inserted in 2009 (Code of Criminal Procedure, 1973), in pursuant to Malimath Committee Report, has laid down the foundation stone of modern compensatory jurisprudence because the other provisions are inadequate and have failed to fulfill the demand of time. This section envisages the new vision. Now the state governments with the co-operation of central government shall provide funds so that adequate compensation can be given to victims. Now the courts have been given the role of only recommendation for compensation and it is the State or District Legal Services Authority which will decide the quantum of compensation. Statutory Scheme for Compensation Amidst the increasing concern for compensation to victims of crimes, section 357A to give effect to Victim Compensation Schemes (VCS). The scheme made way for an institutionalized payment of compensation to the victim by the state for any loss or injury caused to him by the offender. The responsibility has been imposed on the states to create and maintain a fund for the purpose. In cases where compensation paid by the accused is inadequate or no such compensation is payable on account of acquittal or discharge of the accused or the offender not being traced or identified, the VCS is applicable. Such payment may also be allowed on the specific recommendations of the court, in addition to the compensable payable under s. 357 Cr.P.C., (1973). Section 357B Cr.P.C., (1973) specifically provides that in cases of acid attack (s. 326 A Indian Penal Code, 1860) and gang rape (s. 376D Indian Penal Code, 1860), the compensation payable by the state shall be in addition to the payment of fine to the victim under the said sections. The District Legal Services Authority (DLSA) or State Legal Services Authority (SLSA) has been authorized to decide the amount of compensation to be awarded to victims under the scheme, subject to the maximum limit prescribed by the State. In addition to payment of compensation, section 357A also attempts to respond to

the immediate needs to the victims for first aid or medical benefit as well as any other interim relief, as may be required. Pursuant to this legislative amendment, the states notified the scheme, though after an initial reluctance and prodding by the courts (Suresh v. State of Haryana 2014).

Indian Constitution Vis-A -Vis Criminal Justice Administration

The Constitution of India and the criminal justice administration have a reciprocal relationship (Bharti 2002: 1). The success of the Constitution largely depends upon the efficiency and effectiveness of the criminal justice administration. On the other hand, without constitutional support the principles and policies of the criminal justice administration cannot survive and hence, there is a reciprocal relationship between the Constitution and the criminal justice administration (Bharti 2002: 52).

Sound criminal justice machinery is necessary not only for preventing and punishing crimes but also for achieving the aims and objectives of the Constitution. Keeping in view the importance of the criminal justice administration, the framers incorporated many provisions in the Constitution relating to the administration of criminal justice. They intended to establish a society in India which ensures fair and speedy criminal justice to the people. This required a qualitative improvement in the performance of the criminal justice administration. However, the rising violent crimes, huge pendency and inordinate delay in disposal of criminal cases and declining conviction rate during the last four decades indicate that the performance of the criminal justice administration in post-independence period has been constantly deteriorating, instead of improving (Bharti 2002). It is, therefore, imperative to find as what has gone wrong and how? Whether the framers failed to make adequate provisions for a sound criminal justice administration or the State authorities and the people did not pay desired attention to enhance its efficacy. India derived its criminal justice system from the British model. Criminal process in India in its quest to ensure a fair and just trial accords a set of safeguards and confers a set of rights both constitutional and statutory to the accused.⁷

⁷ The constitution of India, the Code of Criminal Procedure 1973 and the Indian Evidence Act 1872 confer certain rights and privileges to the accused and provide for certain safeguards such as :Protection against arrest and detention (Ss.56, 57, 167, Cr.P.C.; and Art. 22(2)of the Constitution); rights to know grounds of arrest (Ss. 50, 173 of Cr.P.C. ;Art.22(2)of the Constitution); right to consult and to be defended by a lawyer of one's own choice (Ss. 303, 304, of Cr.P.C. and Art. 22(1)of the Constitution); Presumption of Innocence throughout the trial(Ss. 102, 105 of Indian Evidence Act.); Right against ex-post facto laws i.e. *nullum crimen sine lege and nullum poena sine lege* (Art. 20(1)) of the Constitution; Right to public trials (Sec.327, Crpc.) right to trial in his presence (Sec Sec 273, Cr.P.C.); Right to Cross examine Prosecuting Witness(Ss. 137, 138, 143, 145 Indian Evidence Act.); Protection against self- incrimination(Ss.313, 315(1) Cr.P.C. ; Art.30(3), of the Constitution); Right to bail (Ss. 389, 436, 437, 438, CrPC); Right against double- jeopardy i.e. *autrefois acquit and autrefois convict*(Ss.219, 221, 300, Cr.P.C. Art. 20(2), of the Constitution); Right to legal aid(S.

Moreover the penal philosophy in India has accepted the concepts of prevention of crime and treatment and rehabilitation of criminals, which have been reiterated by many judgments of the Supreme Court.⁸ It is highly important to hold the justice guaranteed by the Constitution to the victims of crime. The renaissance of the doctrine of natural rights that is equivalent to human rights across the globe is a great development in the jurisprudential field of the contemporary era. The principle of Victimology has foundations in Indian constitutional jurisprudence (154th Report on the Code of Criminal Procedure 1974).

Fundamental rights occupy a place of pride in the India Constitution. Article 14 guarantees equality before the law and the equal protection of the laws, which implicates the State to secure the operation of the legal system in such a way that it promotes justice on a basis of equal opportunity and ensures that the same is not denied to any citizen be it the victims of crimes. By reason of economic or other disabilities, equal opportunity must be afforded for access to justice. To serve the said purpose the law should treat all persons equally, irrespective of the prevalent inequalities. The law must function in such a way that all the people have access to justice in spite of disparities.

Article 21 provides "no person shall be deprived of his life or personal liberty except according to procedure established by law". Personal liberty, thus, is a sacred and cherished right under the Constitution. The expression "life or personal liberty" has

304 of the Cr.P.C., Art.39 of the Constitution); Protection of Life and Personal Liberty(Art.21 of the Constitution) which includes right to speedy trial as a fundamental right; See A. N. Chaturvedi (1984), Rights of accused under Indian Constitution, (Deep New Delhi).

⁸*Rudul Sah v. State of Bihar* AIR1983 1086 SC; *DK Basu v. State of West Bengal* AIR1997 610SC; *State of Maharashtra v. Madhukar N. Mardikar* [1991] 1 SCC 57.; *Balram Prasad v. Kunal Saha* Civil Appeal No. 2867 Of 2012; *Dr. Suresh Gupta v. Govt. of NCT of Delhi* [2004] 6SCALE 432.; *Sebastain v. Union of India*; *Poonam Verma v. Ashwin Patel* [1996] 4 SCC 332.; *Karthar Singh v. State of Punjab* (1994) 3SCC 569; *State of Rajasthan v. Jaggu Ram* (2008) 12 SCC 51; *Ankush Shivaji Gaikwad v. State of Maharashtra* (2013) 6 SCC 770; *In Re: Indian Woman says gang-raped on orders of Village Court* published in *Business and Financial News* (2014) 4 SCC 786; *Mohammad Haroon v. Union of India* (2014) 5 SCC 252; *Laxmi v. Union of India* (2014) 4 SCC 427; *Abdul Rashid v. State of Odisha and Ors.* (2014) 1 ILR-CUT-202; *Kewal Pati v. State of U.P.* (1995) 3 SCC 600; *Supreme Court Legal Aid Committee v. State of Bihar* (1991) 3 SCC 482; *Chairman, Railway Board v. Chandrima Das* (2000) 2 SCC 465; *Khatri (I) v. State of Bihar* (1981) 1 SCC 623; *Union Carbide Corporation v. Union of India* (1989) 1 SCC 674; *Delhi Domestic Working Women's Forum v. Union of India and Ors.* (1995) 1 SCC 14; *State of Gujarat and Anr. v. Hon'ble High Court of Gujarat* (1998) 7 SCC 392; *Rohtash @ Pappu v. State of Haryana* CrI.A. No. 250 of 1999; *Hari Krishan and State of Haryana v. Sikhbir Singh* AIR 1998 SC 2127; *Nilabati Behera v. State of Orissa* 1993 2 SCC 746; *Savitri v. Govind Singh Rawat* (1985) 4 SCC 337; *Shail Kumari Devi v. Krishan Bhagwan Pathak* (2008) 9 SCC 632.

been held to include the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries (Khatri v. State of Bihar; Suk.Das and Ors. v. Union Territory of Arunachal Pradesh; Motilal Saraf v. State of J & K). Article 21 of the Constitution of India guarantees “right to live with human dignity”. In *BodhiSatta Gautam v Subhra Chakraborty* (1996 1 SCC 490), it was held that “rape” as an offence which is violative of the Fundamental Right of a person guaranteed under Article 21 of the Constitution. The Court observed that:

“Rape is a crime not only against the person of a woman; it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. Rape is therefore the most hated crime. It is a crime against basic human rights and is violative of the victims most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21.”

Administration of justice is a state matter and Article 21 envisages a fair trial, a fair procedure and a fair investigation. By reason of such a right the victims of crimes are entitled to be informed each and every proceedings of police investigation. Although free and fair trial *is sine qua non quo* of Article 21 the apprehension of denial of such rights for both accused and victims are violative of article 21 so also speedy trial though not mentioned as a specific fundamental right in the constitution the supreme court has recognized the same to be the implicit in the spectrum of Article 21 and has derived the right of an accused to speedy trial from Article 21. The said right extends equally to all victims of crimes. The quick justice is now regarded as a right under Article 21. The Supreme Court has taken a big innovative step forward in humanizing the administration of Criminal Justice by suggesting that free legal aid to be provided by the state. Even though the court emphasized the Constitutional obligation to provide free legal aid on accused point of view. It extends to victims to adequate relief and remedy. There is an inbuilt guarantee against torture and catastrophe, inhuman treatment by state functionaries of criminal justice system. By transcending the notion of Article 21 in the form of adequate compensation as well as preventive reliefs the Honourable apex court set a model for all its inferior courts for those who are needy. Let’s examine how the Supreme Court effectuated the compensatory ideals for the derailment of fundamental rights in Criminal Law jurisprudence by setting a model for the subordinate judiciary in the matter of granting compensation.

The first landmark judgment where compensation to the victim ordered by the Madras High Court and upheld with some modifications by the Supreme Court of India was *Palaniappa Gounder v. State of Tamil Nadu*⁹.

The laxity on the part of Indian legislature is so much so that India has not made any legislation to give compensation to victim of crime when accused is acquitted despite of its obligation under various International Covenants. In this regard even Hon'ble S.C. in the case of *Delhi Domestic Working Forum v UOI* (1995 SCC (1) 14) has shown its concern in flowing words:

“It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board.....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. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result....”

In *Rattan Singh v. State of Punjab* (1979 4 SCC 719), Krishna Iyer J., held that it is a weakness of our jurisprudence that the victims of the crime do not attract the attention of law. The relevant portion of the judgment is reproduced hereunder:-

The victimisation of the family of the convict may well be a reality and is regrettable. It is a weakness of our jurisprudence that the victims of the crime, and

⁹ In this case the High Court after commuting the sentence of death on the accused to one of life imprisonment, imposed a fine of Rs.20,000 on the appellant and directed that out of the fine, a sum of Rs.15,000 should be paid to the son and daughters of the deceased under Section 357 (1) (c) of the Code of Criminal Procedure, 1973. The Supreme Court while examining the special leave petition of the appellant observed that there can be no doubt that for the offence of murder, courts have the power to impose a sentence of fine under Section 302 of the IPC but the High Court has put the “cart before the horse” in leaving the propriety of fine to depend upon the amount of compensation. The court further observed, “the first concern of the court, after recording an order of conviction, ought to determine the proper sentence to pass. The sentence must be proportionate to the nature of the offence and sentence including the sentence of fine must not be unduly excessive.” In fact, the primary object of imposing a fine is not to ensure that the offender will undergo the sentence in default of payment of fine but to see that the fine is realized, which can happen only when the fine is not unduly excessive having regard to all the circumstances of the case, including the means of the offender. The Supreme Court thus reduced the fine amount from Rs.20,000 to a sum of Rs.3,000 and directed that the amount recovered shall be paid to the son and daughters of the deceased who had filed the petition in the High Court. This is a case wherein the Supreme Court reduced the amount of fine and achieved a proper blending of offender rehabilitation and victim compensation. The important point, which emerged in the case, was the Supreme Court upholding the order of compensation. AIR 1977 SC 1323.

the distress of the dependants of the prisoner, do not attract the attention of the law. Indeed, victim reparation is still the vanishing point of our criminal law! This is a deficiency in the system which must be rectified by the legislature. We can only draw attention to this matter. Hopefully, the welfare State will bestow better thought and action to traffic justice in the light of the observations we have made.

In *Maru Ram v. Union of India (1981 1 SCC 107)*, Krishna Iyer J., held that while social responsibility of the criminal to restore the loss or heal the injury is a part of the punitive exercise, the length of the prison term is no reparation to the crippled or bereaved but is futility compounded with cruelty.

In *S. S. Ahluwalia vs. UOI (2001 4 SCC 452)*, Hon'ble Supreme Court held that in expanded meaning attributed to Article 21 of the Constitution, where the State fails to protect the life of the people, it could not escape the liability to pay compensation to the victims (Mukesh et al 2014). In *Ankush Vhivaji Gaikwad Vs. State of Maharashtra (2013 6 SCC 770)*, the matter was reviewed by the Hon'ble Supreme Court with reference to development in law in recognizing compensation to victims of crimes and it was observed thus:

The long line of judicial pronouncements of this Court recognised in no uncertain terms a paradigm shift in the approach towards victims of crimes who were held entitled to reparation, restitution or compensation for loss or injury suffered by them. This shift from retribution to restitution began in the mid 1960s and gained momentum in the decades that followed. Interestingly the clock appears to have come full circle by the law makers and courts going back in a great measure to what was in ancient times common place.

Victimology must find fulfillment, not through barbarity but by compulsory recoupment by the wrongdoer of the damage inflicted not by giving more pain to the offender but by lessening the loss of the forlorn.

The principle of payment of compensation to the victim of crime was evolved by Hon'ble S.C. on the ground that it is duty of the welfare state to protect the fundamental rights of the citizens not only against the actions of its agencies but is also responsible for hardships on the victims on the grounds of humanitarianism and obligation of social welfare, duty to protect its subject, equitable Justice etc.

While the Constitution sets certain ideals of securing justice to the people and maintaining unity and integrity of the nation, the criminal justice administration plays a crucial role in their achievement. The people cannot enjoy their constitutional rights freely in an atmosphere of distrust, hatred, fear and insecurity. Since it is the responsibility of the criminal justice administration to prevent violation of people's rights and maintain order, its performance has a direct impact on the process of achieving the aims and objectives of the Constitution. Failure of the criminal justice administration not only vitiates the constitutional guarantees but also jeopardizes the whole civil society leading it towards a chaotic situation where the Constitution will be nothing but a mockery.

Commiserating with the predicament of victims under Criminal Justice administration the constitution courts tend in to do justice to victims of crime by the using Constitutional jurisdiction against the instrumentalities of the state who failed to protect the rights of the victim.¹⁰the Supreme Court under Art 32¹¹ and High Courts in India under Art. 226¹², have of late evolved the practice of awarding compensatory remedies

¹⁰ Medical justice for the Bhagalpur blinded victims, rehabilitative justice to the communal violence victims and compensatory justice to the Union Carbide victims are examples of this liberal package of reliefs and remedies

¹¹ Article 32 of the Constitution of India reads as follows:

“(1) Remedies for enforcement of rights conferred by this Part.-(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.”

¹² Power of High Courts to issue certain writs.- (1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action , wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without-

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favor such order has been made or the counsel of such party, the High Court shall dispose of the application

not only in terms of money but also in terms of other appropriate reliefs and remedies by identifying the quandary of victims under Criminal Justice administration and taking a lead for the obligation to do complete justice under the Indian Constitution as a guardian of human rights. ¹³ *Nilabati Behera v. State of Orissa (AIR 1993 SC 1960)*, *Chairman, Railway Board v. Chandrima Das (AIR 2000 SC 988)* are illustrative of this new trend of using Constitutional jurisdiction to do justice to victims of crime. These decisions have clearly acknowledged the need for compensating victims of violent crimes irrespective of the fact whether offenders are apprehended or punished. The principle invoked is the obligation of the state to protect basic rights and to deliver justice to victims of crimes fairly and quickly. It is time that the Criminal Justice System takes note of these principles of Indian Constitution and legislates on the subject suitably (Malimath Committee 2003).

Under the Penal Laws of India, in the process of trial for an offence, the focus always remains on the accused with insistence on all concerned to give him opportunity to defend himself against the charge. In the existing procedure of the court, hardly any attention is paid towards the plight and right of the victim and witnesses on whose evidence the efficacy of trial and the verdict of court depends. The apathy towards the rights of victim is apparent as no participation is allowed in the course of trial, coupled with frequent occurrence of witnesses turning hostile under compulsions, e.g. intimidation, coercion or allurements deflects the course of justice, invariably resulting in acquittals. The victims are thus left to suffer physically, mentally and financially (Justice D.M. Dharmadhikari 2014).

Actually, the victim requires greater help and support soon after commission of crime. At the initial stage the victim needs medical treatment, psychological supports and legal aid. It is the victims' rights to insist that he be provided proper medical care, safety of his life and property and protection against harassment by police and media. He has also

within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the aid next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme court by clause (2) of Article 32.

¹³ Medical justice for the Bhagalpur blinded victims, rehabilitative justice to the communal violence victims and compensatory justice to the Union Carbide victims are examples of this liberal package of reliefs and remedies forged by the apex Court. (MANU/SC/0307/1993: 1993 2 SCC 746)

a right to insist that eye witnesses of the incident are given adequate protection so that they are able to appear in court and adduce evidence fearlessly without intimidation, allurements or harassment. The victims' rights are required to be zealously guarded equally with the rights of defence of the accused. The needed protection to victim is required more in the period intervening the occurrence of crime and actual commencements of trial in court. In the present criminal justice delivery system there exists no forum or arrangement whereby a victim may seek financial and legal aid to secure punishment of the guilty and support for early restoration of his normal life. The main needs of victims of crime and society that must be taken into account are the right to access to mechanisms of justice, including the right to be informed at every stage about those rights, participation of the victim throughout the proceedings, respect for their dignity and privacy, and the right to obtain redress. We know that human rights means all those rights relating to lives, liberty, freedom, dignity, equality and security of man, women, youth and children. Therefore, enjoyments of basic human rights are the entitlement of every citizen and their protection, the obligations of every civilized state (Dr. Janardan Kumar Tiwari 2012).

According to the existing criminal justice system, Justice to the victims depends only on the punishment of the guilty. The victims have to wait to get justice till such time and so also due to handicaps in the system results in large scale acquittals of guilty. It can be a long and seemingly endless wait for justice. Sometimes, in spite of best efforts, the State fails in apprehending and punishing the guilty but that does not prevent the State from taking such steps as may reassure and protect the Victims' of crime. Justice to the victim has to be ensured irrespective of whether or not the criminal is punished (*Rohtash (Pappu) v. State of Haryana Crl.A. No. 250 of 1999 decided on 1.4.2008, a Division Bench of the Punjab & Haryana High Court.*).

There is always a presumption towards the application of compensatory jurisprudence by the Indian Apex Court judges in matters connected with, or incidentally involving issues of violation of fundamental rights brought before it in any petition under Article 32 irrespective of whether any legislation supports the move or not. The phrase "appropriate proceedings for the enforcement of fundamental rights give wide remedial as well as injunctive powers to the Apex Court for the purpose of doing complete justice as far as possible. The discretionary power to grant reasonable compensation is to be read in that Article. However, this power is not absolute and has to be used sparingly with proper care and caution. It is a settled principle of law, both on principles and precedents, that the power to grant compensation can only be exercised in cases of gross abuse of Part III rights either by the instrumentalities of State or any other private

person. The exercise of this power cannot in any circumstances be constitutionally permissible for deprivation of mere legal or constitutional rights of aggrieved persons. The proper forum for the determination of violation of legal rights sought through the invocation of writ powers is High Court under Article 226 where action can be brought for violation of fundamental rights and “for any other purpose”. This is due to the hierarchy of courts in the Indian justice system where the rule is that a party must approach subordinate courts first and higher courts must not be interfered with unnecessarily save permissible grounds of inordinate delay or lost/inadequate remedy for no fault of the petitioner (Ashish et al 2009: 17-30).

Any how the victims have right to get justice, to remedy the harm suffered as a result of crime. This right is different from and independent of the right to retribution, responsibility of which has been assumed by the State in a society governed by Rule of Law. But if the State fails in discharging this responsibility, the State must still provide a mechanism to ensure that the victim's right to be compensated for his injury is not ignored or defeated. Thus to say, by taking note of judicial activism and the new dimensions of Art.21 upon victim oriented Criminal justice administration, the victim orientation includes greater respect and consideration towards victims and their right in investigative and prosecution process, the provision for greater choice to victims in trial and the scheme of repatriation/ compensation particularly for victims of crimes. So it is high time to amend the Constitution for incorporating a provision in the directive principles of state policy that the union and state governments to legislate on the subject with an effective scheme of compensation for victims of crimes without further delay.

Compensation as a Justification for Injustice

During the past three decades, several justifications for initiating victim compensation programmes have been advanced in victimological literature. the particular rationale cited for the development of any given victim compensation programme is unimportant in itself, knowledge of the various and contradictory justifications for victim compensation may at least help explain the development of certain provisions in compensation statutes and particular procedures adopted by victim compensation administrators.¹⁴

¹⁴ Sometimes they are contradictory as, for instance, when victimologists argue that the victim of the offence of rape contributes to the aggravation of the offence when resists, for such resistance is likely to make the offender more violent, and that if she does not resist, she contributes to the offence by being a willing victim (as most of our lawyers argue), and she is an necessary to the crime. These rationales are generally reflected in the state's victim compensation statutes and may serve as justification for the adoption of specific programme procedures and daily operations.. See generally, V. N. Rajan (1995).

According to Hart, in *compensatory justice* the relation to the precept is less direct. Two different types of situations can engross injustice of this kind. Firstly, classes of people might be given privileges and immunities which are denied to others. For instance, nobles may be given the right to sue for slander but commoners not. This gives rise to a problem of distributive justice because one class is given benefits denied to another on the basis of what may be thought to be irrelevant differences. Secondly, compensation might not be permissible for certain types of harm and injuries. Hart claims that the vice here is ‘the refusal to all alike, of compensation for injuries which it was morally wrong to inflict upon others’ (Hart 1961).

Hart’s principle of treating like cases alike is not sufficient to account for compensatory justice. Firstly, if a particular wrong doer is made to compensate his victim, the circumstance can be hardly described as one treating like cases alike. None of them can reasonably say that they are treated alike when one is made to compensate. Resorting to a moral balance is one thing and treating like cases alike is another; they are not the same. Moreover, Hart requires one to say that a person who wrongfully causes injury to another has profited ‘even it is only by indulging his wish to injure him or not sacrifice his ease to the duty of taking adequate precautions (Hart, *loc cit.*). Thus a person at fault in an auto accident has profited at another’s expense even though he might have the loss of his automobile as well as limb while the other party only suffered a sprained ankle (Bayles *op cit.*).

Secondly, Hart requires slander, negligent automobile accidents, and injuries by unrestricted dangerous animals should be treated on parity. They are alike in as much as in each case one person has wrongfully harmed another. The law is unjust unless it treats the cases equally. The concept of wrongful is practically devoid of content when applied to strict liability; it can mean little more than caused injury for which the law holds one liable (Bayles *op cit.*).

One can also stay away from comparative considerations in developing a principle. One might hold a principle that persons should be compensated for personal injuries that occurred due to their no fault. At most, the principle is based on comparison of faultless and non-faultless victims. Further, comparative aspects can arise if, for example, a distinction is made between injuries caused by accidents and those owing to illness and diseases. How such a system of compensation should be paid for, will raise the issues of *distributive justice*, but it does not involve or at least necessarily involve, comparisons between wrongdoers and their victims (Bayles *op cit.*).

A libertarian theory of punishment would not adopt a particular justification such as retributive deserts or utilitarian deterrence, and it certainly would not empower the state to impose its own substantive rationale on those whose rights are implicated. Nor would it authorize officials to trade in these individuals' rights without their consent, as can occur under the practice of plea bargaining. Instead, a true libertarian state would permit these individuals, especially victims and offenders, to resolve criminal cases pursuant to their own personal justifications for punishment, possibly by facilitating party interactions through processes like restorative justice. From the outset, however, it should be acknowledged that a comprehensive statement of a libertarian theory of punishment is far beyond the scope of this victim compensation. Assuming that the resulting punishment conforms to its espoused justification of punishment - supposedly retribution, or maybe compensation - the values of libertarianism would seem to be served in full. For non-consequentialist libertarians¹⁵ like Robert Nozick, self-ownership is advocated not for its rule-utilitarian benefits but instead as a deontological principle, sometimes premised on the Kantian categorical imperative that individuals be treated as ends in themselves and never merely as a means. It might establish a fair process by which conflicting rights and punishment rationales - those of victims, offenders, and affected third parties - can be mediated toward a reasonable outcome (Erik Luna, 2007).

In India, Compensation to victims of crimes can be awarded by courts under Section 357 of Criminal Procedure Code, 1973 from the fine recovered as part of the sentence. Section 357 Cr.P.C. empowers the Court to award compensation to the victim(s) of the offence in respect of the loss/injury suffered. The object of the section is to meet the ends of justice in a better way. This section was enacted to reassure the victim that he is not forgotten in the criminal justice system. The amount of compensation to be awarded under Section 357 Cr.P.C. depends upon the nature of crime, extent of loss/damage suffered and the capacity of the accused to pay for which the Court has to conduct a summary inquiry. However, if the accused does not have the capacity to pay the compensation or the compensation awarded against the accused is not adequate for

¹⁵ Libertarians love free markets. An individual's right to exchange his property by mutual agreement with others is considered a first principle of libertarianism and the basis for the creation of wealth and the achievement of social prosperity. In fact, there are very few circumstances in which consensual deals among rights-holders would be impermissible. When problems arise in business dealings, libertarians find attractive the voluntary settlement of conflicts in lieu of legal action, possibly through mechanisms of alternative dispute resolution. Litigation is costly and unproductive, impeding free-market transactions and interposing the judgments of those who have no rightful claim over the dispute. Given the backlog in courts and a general distaste for centralized decision making, "it makes sense to try to work problems out without having a third party impose a solution." See also David Boaz (1997), and Charles Murray (1997).

rehabilitation of the victim, the Court can invoke Section 357A to recommend the case to the State/District Legal Services Authority for award of compensation from the State funded Victim Compensation Fund. Section 357 Cr.P.C. is mandatory and it is the duty of all Courts to consider it in every criminal case. Almost all states and Union territories in India have setup scheme to provide for payment of compensation and other reliefs to victims and /or dependents.

In the last century the science of compensation has emerged for the welfare of the victims of crime. Till the last decade to rehabilitate the convict is the essence of criminology. The life of the victim is worse than that of criminals. Compensatory jurisprudence is for victims. Separation of civil and penal function is a serious defect in the system of fines, which go only to the state, while the injured victim suffers all the hardships of the civil process. However, except for sporadic efforts, there is still a tendency to move the question of compensation or restitution more and more out of criminal procedure, probably in the desire to keep the victim from being involved in it. The argument clearly indicates that the victim is not accepted as an important role player in crime. History suggests that growing interest in the reformation of a criminal is matched by decreasing care for an interest in the victim.

And the victim is continuing to lose ground; if one examines the legal systems of different countries, one rarely finds an instance in which the victim of a crime can be certain to expect full restitution (Note 1984).

Similarly, hardly any legal system, takes fully into consideration the victim's contribution to a crime, in those rare cases where there is state compensation, the system either is not fully effective or does not work at all. Where there is no system of state compensation, civil procedure and civil execution generally offer the victim insufficient compensation. While the punishment of crime is regarded as the concern of the state, the injurious result of the crime—that is to say, the wrong or damage to the victim — is regarded almost as a private matter. It recalls the lonely man of the early days of social development, who by himself had to find compensation, and who by himself had to take revenge against those who harmed or otherwise wronged him. Today's victim cannot seek satisfaction on his own, since State forbids him to take the law into his own hands.

Adversarial model of criminal justice with punishing the offender as its only aim, has proved costly and counter-productive. Present criminal laws and procedure are deficient to give adequate compensation to the victims. Social justice, being goal of law in action,

has also been found under Indian Constitution like a golden thread. But justice itself is truth in action. Victims of crime being component of criminal justice administration are entitled to share the promises of social justice contained in the constitution. The concept of Victimology is a step towards fulfilling the avowed promises made by our constitution makers. The *corpus juris* of India is bereft of statutory awareness of Victimology of social justice, equitable and effective reparation of victims through compensation becomes imperative. So far the present law seemingly inadequate and fragmentary in nature, justice seems a distant possibility. The answer could lie in attributing a more active role to the State.

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