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Justice Denied:

Examining the Legal Inadequacies of Restorative Justice for Victims in India

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ABSTRACT

The entire Criminal Justice system in India is accused-oriented and completely overlooks the victim who bears the brunt of the entire offence. This offender-oriented nature of our criminal justice system completely refutes the idea of restorative justice for the victims. There is a clear lack of legal provisions for ensuring restorative justice in India. This results in a deprivation for the victims of any tragic crime, a proper restoration for the loss he/she has suffered. It must be kept in our mind that the victim is the centre of the offence, and ignoring the reparation of the victims can result in an incomplete delivery of the justice system. Thus, there is a need for a comprehensive scheme for the victim to ensure proper rehabilitation for the victims of a crime.

Keywords: Restorative Justice, Victim Compensation, Rehabilitation, Criminal Justice System.

I. INTRODUCTION

In India, the administration of the Criminal Justice takes into consideration the accused and the state and grossly overlooks the victim. The Indian Penal Jurisprudence is based on a constructive conglomeration of deterrent and reformatory theories.³ The Indian criminal justice system uses punishment as an instrument imposed to deter the offenders; it also believes that the offenders should be given an opportunity for reformation. Thus, this entire system completely overlooks the victim. In the Indian history of murder cases, it has been observed that the judgements were made considering the act of the accused and in rare cases victim's perspective was given a significant place in the process of decision making. The criminal justice system is concerned with the offender and reduces the victim merely to the position of an informant and a witness for the sake of evidence.⁴

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³ Kaur, Harleen, and Ayushka Sharma. "The Principle of Restorative Justice Towards the Strengthening of Crime Prevention as Viewed from the Pragmatic Gandhian Lens." *Relevance of Duties in the Contemporary World: With Special Emphasis on Gandhian Thought*. Singapore: Springer Nature Singapore, 2023. 273-284.

⁴ Khan, Sarfaraz Ahmed. "Restorative Justice under the Criminal Justice System in India: With Special Reference to Plea Bargaining and Compounding Measures." *RESTORATIVE JUSTICE IN INDIA*-M. PHIL.

II. ROLE OF THE VICTIM DURING THE TRIAL

The administration of criminal justice is a fundamental obligation of the state. Thus, Function is a basic trait of the sovereign powers of a state. In our criminal justice system, the state is the prosecution and represents the victim. In this process, the victim starts from being the mere complainant of the offence and ends up being a witness for evidence. The elimination of the victim from the prosecution is justified as it is believed that a crime is directed against society as a whole. Crime is an act against the society. The State is the sovereign entity and is the sole body for the protection the life and property of the citizens of the state. The state is the only entity to ensure law and order, enforce the rule of law and punish the offenders. The state machinery is only apparatus that represents the collective will and protect the people. As the state is the only authority capable of discharging the sovereign function of maintaining law and order, hence the state is bound to restrain any individuals from violating law and order and also preventing the citizens from taking law in their hands as this may cause chaos in the society.⁵

Another crucial reason for excluding the intervention by the victims is to ensure that the process is not rendered retributive and the justice system does not become vengeful and thereby vitiate the fairness of the entire trial process. Hence, the entire duty of the prosecution is conferred upon the state and its machinery.⁶

However, as it is the victim who is the sole sufferer of the offence and it is also the same victim who bears the brunt of the same. Thus, it is very important to give space to the victim. The victim thus must be heard by the Ld. Judges before the framing of the charges against the accused. There is a need to provide the victims counsel an opportunity to place supplementary questions.⁷ The victims must be allowed to question any order passed. These steps can give the victims a much-needed satisfaction about the entire trial that is taking place. Also, this would assist the court in its quest for truth in an adversarial system like ours.

III. RESTORATIVE JUSTICE AND THE LEGAL PROVISIONS

However, the idea of restorative justice refutes this existing situation and seeks to institute a process of restoration or repair to the harm done to the victim.⁸ Although there is no well codified system/ scheme of ensuring restoration of the true harm suffered by the victim, but

DISSERTATION, WBNUJS (2011).

⁵ 'P.V. Reddi, "Role of Victim in Criminal Justice Process" STUDENT BAR REVIEW, 2006, Vol. 18, No. 1 (2006), pp. 1-24'

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Walgrave, L. "Restorative justice and the law" Ed. Lode Walgrave. Cullompton: Willan, 2002.

the section 357 of the CrPC which includes provision for compensation which can be ordered by the court while sentencing. However, it was grossly inadequate as the compensation can only be ordered when the court passes the judgement, i.e. after the trial has ended. Also, the compensation amount shall be only paid after the entire period of appeal has elapsed⁹. Hence section 357(A) was added which provided for: “Establishing a victim compensation scheme by the every state government in coordination with the central government scheme for providing funds to the victims of various offences and their dependents who have suffered a loss as a result of crime”.¹⁰ This compensation is awarded out of a fund created by the government on recommendation by the District/State Legal Services Authority; section 357(B) provides for compensations in addition to fine for certain cases¹¹ and section 357(C) which provides for immediately imparting free treatments by private or public hospitals, or by any other person towards the victims¹² were later added. Also, the section 5 of the Probation of Offenders Act 1958 provides the court the power while directing the release of the offender to order him to compensate the victims reasonably for loss or injury caused to any person by the commission of the offence; and such costs of the proceedings as the court thinks reasonable¹³.

IV. INADEQUACIES IN ENSURING RESTORATIVE JUSTICE

However, these provisions don't provide for compulsory compensation which results in the deprivation of the victim's right to restoration. Also, in most cases the quantum of compensation is not adequate as the consideration granted often fails to take into consideration the real harm suffered by the victim. The present compensation system provides for one-time pecuniary compensation to the victim; which in reality acts as a token compensation without really facilitating the process of reparation or restoration.¹⁴

The victim's psychological trauma is a crucial sphere of restoration which is beyond the purview of the present legal framework for compensation in the country. Chronic psychological damage requires long-term counselling and support to help the victim come out of their traumatic psychological condition.¹⁵

⁹ 'Section 357 of the Code of Criminal Procedure, 1973'.

¹⁰ 'Section 357 A of the Code of Criminal Procedure, 1973'.

¹¹ 'Section 357 B of the Code of Criminal Procedure, 1973'.

¹² 'Section 357 C of the Code of Criminal Procedure, 1973'.

¹³ 'Section 5 of the Probation of Offenders Act, 1958'.

¹⁴ Johnstone, Gerry. *"Restorative justice for victims: inherent limits?"* Restorative Justice 5.3 (2017): 382-395.

¹⁵ Gavrielides, Theo. *"Restorative justice theory and practice: Addressing the discrepancy."* RJ4All Publications, 2020.

The infamous Muri Express rape case, where six women from Bihar were raped in train brought into light the necessity for a victim compensation scheme. In light of this tragic incident the Honourable Supreme Court in *Delhi Domestic Working Women's Forum Respondent vs Union of India and others* while indicating the broad parameters for assisting the rape victims held that the complainants of sexual assault cases should be provided with legal representation. 'It was held by the Supreme Court that it is very important to have someone who is well-acquainted with the criminal justice system. The role of the victim's advocate is not only to explain to the victim the nature of the proceedings but also to prepare her for the case and to assist her in the police station and in the court. They also have the responsibility to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counselling or medical assistance. The Honourable Supreme Court also held that the National Commission for Women was to prepare a scheme for the rehabilitation of the rape victims. The Supreme Court also recommended the creation of a Criminal Injuries Compensation Board which will award compensation to the victims whether or not the conviction of the accused has taken place by taking 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 of the rape.¹⁶ The apex court also directed the Central Government to take the necessary steps to implement the scheme at the earliest. The Court also held that the victim must be informed of her right to legal representations prior to the phase of questioning her, the victim must be provided with mind counselling or medical assistance, along with protecting the anonymity of the victim during trial.'¹⁷

V. IMPLEMENTATION OF RESTORATIVE JUSTICE IN INDIA

Despite the Judicial precedent, the practical implementation of this idea remains a distant dream. A verbatim implementation of the said judgement by the Honourable Supreme Court is not possible practically in India thus the more acceptable and practicable solution would be to provide immediate assistance to the victims through recognized N.G.O.s at the very police station where they filed the complaint.¹⁸ Such organizations can help the victims aware of

¹⁶ George, Ajay. "Applicability of Restorative Justice in India: An Overview." Part 1 Indian J. Integrated Rsch. L. 2 (2022): 1.

¹⁷ '1995 (1) SCC 14'.

¹⁸ S., Darshan. "Victim Rights under Criminal Justice System in India-An Analysis." Part 1 Indian J. Integrated Rsch. L. 2 (2022): 1.

his/her right in seeking the advice of an advocate nominated by the District/State Legal Services Authority for the said purpose.¹⁹

Along with this an equal importance should be given towards providing genuine and immediate medical assistance to the victims of violent and brutal offences. As pecuniary compensation may not be an adequate remedy in some specific situations, and the process of getting compensation may not be quick.²⁰ Thus, a special focus on the medical care of such victims is of utmost importance. Also, in cases of offences such as rape, sexual assault on children, kidnapping of minor, trafficking, etc in which the victims are sensitive, the need for effective counselling by professional psychologist and providing prolonged psychiatric services, is of highest importance which must be recognised and duly actualised. The rehabilitation of victims, especially those who belong to the financially weaker section of the society, children who have been rendered orphan as a result of an offence, and the children and women who are victims of sexual offences, calls for urgent attention, and must be treated as part of the public policy of the State.²¹ Also for providing reparation the civil society and different non-governmental organisations can supplant the role of the government and its functionaries. The government should also take the initiative to provide facilities for free medical care for the victims to render the best possible assistance for curing the physical harm they have suffered. Apart from this the government must provide adequate counselling and psychiatric treatment, at the local level, and encourage active participation by NGOs, while coordinating their efforts in this social cause. The local health authorities in connivance with the District Legal Services Authority can have a significant role in implementing the same. Also the civil society instead of launching agitations for higher penalties and asking for stringent punishment, must engage itself in working with the victims, this also includes the crucial function of ensuring the acceptance of the victim in the society, preventing social out casting of victims of sexual offences like rape.²²

Also measures aimed at providing monetary compensation to ensure restoration towards the pecuniary loss suffered by the victims should be formulated through legislative policies and its effective implementation. Another sensitive area which is often overlooked in which the Government must give its immediate focus is the treatment meted out towards these helpless

¹⁹ Thilagaraj, R., and Jianhong Liu, eds. *Restorative justice in India: Traditional practice and contemporary applications*. Springer, 2017.

²⁰ Jaamdar, Shiva M. "Restorative justice in India: old and new." *Restorative Justice in India: Traditional Practice and Contemporary Applications*. Cham: Springer International Publishing, 2017. 41-75.

²¹ Latha, S., and R. Thilagaraj. "Restorative justice in India." *Asian Journal of Criminology* 8 (2013): 309-319.

²² ' P.V. Reddi, "Role of Victim in Criminal Justice Process" STUDENT BAR REVIEW, 2006, Vol. 18, No. 1 (2006), pp. 1-24'

victims by the investigating authorities at police stations and hospitals. It is observed in many cases that the victims in the criminal justice system are virtually treated in a very inhumane manner. The investigating authorities lack the basic empathetic attitude towards these helpless victims of these offences.²³ The investigating authorities fail to have a basic empathy towards them. These acts not only aggravate the emotional damage of the victim but also deeply dismantle the moral courage in their hearts. Thus, a victim who has suffered at the hands of the offender must at least find solace under the hands of the investigating agency and must not be treated as a mere complainant.²⁴ Hence an intricate and efficacious guideline, along with a proper and effective training of the investigating authorities in this sensitive area, is the need of the hour, if we need to rectify the shortcomings of the present system and improve the experience of these helpless victims and bring a change in the ground realities

Apart from all these, the inability of the present system to differentiate between a primary and secondary victim aggravates the problem and hampers restoration of the harm suffered by the victim. The indifferent attitude of the state towards the secondary victim (family members/dependents of the victims) shows the inadequateness of the present system of compensation and on the lack of attempt by the state for true restoration of the harm caused to the victim.²⁵

Justice not only involves punishing the offender but also requires that the person who has suffered must be adequately compensated so that the wrongs can be repaired. The entire essence of restoration justice is stands on the concept that a criminal act constitutes an obligation that is owned by the offender not only to the state but also towards the victim and his family and everyone else who is affected by a particular offence. The Restorative Theory of Justice is completely different from the deterrent/ retributive/ reformatory theory as it takes into consideration the victim's side and works to reinstate the victim to his original position that he had prior to the harm suffered by him as a result of the offence.²⁶

As our current criminal justice system is primarily offender oriented. The state mainly represents the society and its' interest. This results in the system of trial and sentencing completely oriented towards the offender and ignoring the victim. The criminal justice system gives the accused a statutory right to be heard during the trial and even during the sentencing

²³ *Ibid.*

²⁴ Asadullah, Muhammad, et al. "Community and restorative justice practices in India, Nepal, and Bangladesh: A comparative overview." *Comparative restorative justice* (2021): 223-244.

²⁵ Gupta, Gauree, and Manisha Sharma. "Justice Redefined: Addressing the Scope and Challenges of Restorative Justice in India and Victim's Role in Criminal Justice System." *Jus Corpus LJ 4* (2023): 676.

²⁶ Gulzar, Unanza. "Democratic Model of Restorative Justice: Sheath to the Criminal Justice System in India." *Restorative Justice and Practices in the 21st Century*. IGI Global, 2023. 225-249.

process, but the victim of crime is not heard. In India the Public Prosecutor or ("P.P.") who is an officer of the court carries out the entire criminal prosecution. The Public Prosecutor is assigned the duty and responsibility to assist the courts in arriving at the true appraisal of the facts of the case. The P.P. shouldn't act in any manner so as to identify himself with the victim or the investigating authorities. According to section 225 of the Code of Criminal Procedure²⁷ the prosecution shall be conducted by the Public Prosecutor. Thus, during the entire trial process the Ld. Counsel for the prosecution acts as an officer of the court and not as a sole representative of the victim.²⁸

Although the victim can appoint a "victim counsel" in the trial but his contention may or may not be heard depending upon the attitude of the public prosecutor as per section 301(2) of the CrPC²⁹. Section 301(2), qualifies the general rule regarding the appearance by the Public Prosecutor. Thus, 'the counsel appointed by the Victim can only act as per the directions of the Public Prosecutor, but with the leave of the court he can submit written arguments after evidence is closed'. However, the recent Supreme Court judgement in *Rekha Murarka v. State of W.B.*³⁰ case held that 'a private counsel appointed by the victim does not have a right to cross-examine the witness or make oral arguments. The court held that the meaning of the word 'assist' under section 24(8) of the CrPC cannot be said to include the act of carrying out the prosecution by a private counsel. The court held that the work of the prosecution was to be carried out by the public prosecutor.'

This has severely curtailed the effective participation of the victim in the trial process. Similarly, in the case of bail, the accused has a right to bail, but the victim does not have the right to oppose the bail granted to the accused. He relies on the state on this issue. However, under section 439³¹ the victim can oppose a regular bail application and not an interim bail application. It is only under section 320 of the CrPC which mandates that no compounding can be done without the consent and the wilful participation of the victim. And lately, the right to appeal against the acquittal of an accused has been granted to the victim, also the right to file a Special Leave Petition under Article 136 of the Constitution was granted to near

²⁷ 'Section 225 of the Code of Criminal Procedure, 1973'.

²⁸ 'P.V. Reddi, "Role of Victim in Criminal Justice Process" STUDENT BAR REVIEW, 2006, Vol. 18, No. 1 (2006), pp. 1-24'

²⁹ 'Section 301(2) of the Code of Criminal Procedure, 1973'.

³⁰ '2020 (2) SCC 474'.

³¹ 'Section 439 of Code of Criminal Procedure, 1973'.

relatives of the victim.³² Thus when the victim cannot be represented in a trial, how will he be cared for reparation?

Thus, in this situation, the victim/ sufferer is left out of the entire system and is never cared for. The inability to provide solace and adequate reparation to the victim results in an incomplete administration of justice. This serious lacuna of our criminal justice system can be dealt with if we have a compulsory mode of compensation. A specific section 357 of the Code of Criminal Procedure, which is left at the discretion of the judge, has resulted in the inherent inadequacy of the process of ensuring restoration. Also, it is the solemn responsibility of the state to protect its citizens and in case of failure to fulfil this duty renders the state liable to provide adequate compensation which shall ensure a genuine restoration of the harm suffered by the victim.³³

VI. VICTIM COMPENSATION SCHEMES

The Victim Compensation Scheme³⁴ designed in various states have been ineffective in ensuring proper restoration. Compensation is a part of restoration but compensation itself does not amount to a complete restoration. A holistic all-inclusive approach needs to be taken for the proper restoration of victims. Also, in many cases the victim compensation from the victim compensation scheme is delayed because of inadequacy of funds and in many cases the honourable high courts have to step in such matters and issue directions relating to the non-payment of the victim compensation scheme (*Maleka Khatun v. State of West Bengal*)³⁵. Also, there are many offences which result in severe loss to the victim and can be only redressed by compensating the victim rather than punishing the offender but are un addressed in the present victim compensation scheme.³⁶

As the entire Indian Criminal Justice System is based on the deterrent and the retributive school of thought given the colonial origin of our criminal justice system.³⁷ The wholehearted implementation of restorative justice is very essential for the true redressal of the victim who is the main sufferer of the offence. Thus, for those offences, which are not covered under the

³² 'P.V. Reddi, "Role of Victim in Criminal Justice Process" STUDENT BAR REVIEW, 2006, Vol. 18, No. 1 (2006), pp. 1-24'

³³ *Ibid.*

³⁴ 'Dipa Dube, "Victim Compensation Scheme in India: An Analysis" INTERNATIONAL JOURNAL OF CRIMINAL JUSTICE SCIENCES, Vol 13 Issue 2 July – December 2018'

³⁵ '2022 SCC OnLine Cal 1755'.

³⁶ *Ibid.*

³⁷ 'A. Lakshminath, "Criminal Justice in India: Primitive to Post-Modernism" JOURNAL OF THE INDIAN LAW INSTITUTE, January-March 2006, Vol. 48, No. 1 (January-March 2006), pp. 26-56'

victim compensation scheme, the judiciary must use its power conferred under the section 357 of CrPC and section 5 of the Probation of Offenders Act, 1958 and make victim compensation an inseparable part of the criminal justice system and provide just and reasonable compensation to the victims for ensuring restorative justice in India.

VII. CONCLUSION

Thus, it can be concluded that creating a scheme for ensuring restoration and rendering reparative justice will be greatly beneficial for the victims. This scheme must receive adequate funds from the government, to compensate the victims of crime, provide livelihood to the secondary victims to prevent destitution amongst them and also implementing social security measures like pensions, alternative employment for those who have suffered permanent disability will be highly beneficial. Further inculcating Mediclaim within the compensation scheme will be helpful in the process of restoration. All these shall immensely facilitate in helping the victim come out of the degraded, ignored and helpless situation and help the victim of a criminal offence live his life with respect and dignity in society.

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8. 'Section 357, 357 (A), 357 (B) and 357 (C) of the Code of Criminal Procedure 1973'
9. 'Section 301(2) and proviso to section 24(8) of Code of Criminal Procedure 1973'
10. 'Section 5 of the Probation of Offenders Act 1958'
