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# The Relevance of the Victim Impact Statement at the Sentencing Stage: A Critical Analysis

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## ABSTRACT

*The victims of crime are often called the 'forgotten man' in the criminal justice system. The adversarial system, which is primarily an accused-centric system, ignores the needs of the victims after the crime. Moreover, there is no way for them to voice their needs, as they have no right to be heard at the sentencing stage. The emergence of victimology and the pro-human rights movement revived victims' participatory rights in a criminal process. It emphasizes that victim justice can only be achieved if an equivalent right to be heard is provided to the victim of a crime. The Victim Impact Statement (VIS) is an excellent tool to make the voice of the victim of crime reach out to the relevant authorities. It helps the court determine the sentence to be imposed and the compensation to be paid to the victim. It helps in the recovery of victims. It also encourages victim participation in the criminal process and makes them an essential part of the criminal justice system. There may be some challenges in its incorporation, but several countries have adopted it and have had good results. In India, its incorporation may pose some difficulty because of the accused-centric approach, but there is still a way to make it available as a right to the victims of crime.*

**Keywords:** *Victim impact statement, criminal justice system, victims of crime.*

## I. INTRODUCTION

The stepmotherly treatment of victims under the criminal justice system has resulted in the ignorance of the needs of victims of a crime. It is the result of the adversarial criminal system that has confined the role of victims of crime to a testimonial witness. Their only job is to inform the court about the crime, nothing else. This limited their right to voice the needs that arose after the crime. In ancient and medieval periods, the victim had the right to participate, and the legal battle was between the victim and the offender.<sup>2</sup> During the trial of their matter, they stated the harm caused to them, and the offender must compensate them for avoiding any retaliation from

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<sup>2</sup> CHANDRA SEN PRATAP SINGH, VICTIMS OF CRIME: THEIR RIGHTS AND HUMAN RIGHTS 18-26 (Deep and Deep Publications 2010)

the victim's side.<sup>3</sup> However, gradually, with the advent of the concept of a welfare state, there was a decline in the status of victim, and their right to participation was minimized. It was after the Second World War that the UDHR was introduced, and victims' rights got some recognition. Later, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recognized the four basic rights of victims of crime, and one of them is access to justice and fair treatment. It supports the active participation of victims of crime in criminal proceedings. It urges all the states to modify their laws to inoculate victim participation. Several countries such as the U.S, the UK, Australia, etc., have brought many changes in their criminal justice system to accommodate the participatory rights of the victims, for instance, Victim Impact Statement (hereafter called VIS), right to be heard at bail proceeding, withdrawal of prosecution, right to appoint private counsel.

In this research paper, the researcher analyzes the importance of the Victim Impact Statement (VIS) at the sentencing stage. The first part is a study of the VIS and its benefits. In the second, there is a study of the working of VIS in the U.S., U.K., and Australia. The third part deals with the challenges of incorporating VIS in the criminal justice system. The fourth part analyzes the scope of the VIS at the sentencing stage in India. The fifth and last part discusses the conclusion and recommendations regarding incorporating VIS in the Indian criminal justice system.

## **II. VICTIM IMPACT STATEMENT: A TOOL EMPOWERING VICTIM PARTICIPATION AT SENTENCING**

The right to be heard at the sentencing of an offender is not some nebulous idea. It existed in the ancient and medieval periods when the victims of crime held an active position in criminal proceedings. At that time, the victims had the right to punish the offender. In short, the victim played the role of the initiator, judge, and executioner in a criminal process. However, with the decline in the victim's position, the right to be heard at the sentencing stage was minimized to nothing. Later, the expansion of victimology and pro-human rights movements revived victim rights. Several adversarial criminal systems, such as the U.S.A, the U.K., and Australia, have adopted many victim rights encouraging participation in criminal proceedings. One of the significant rights is the Victim Impact Statement (VIS).

A Victim Impact Statement (VIS) is an oral or written statement made at the sentencing stage about the impact of the crime on the victim, whether emotional, physical, financial, etc. In other words, a VIS is a statement made by the victim concerning the emotional, psychological, and

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<sup>3</sup> Id.

physical harms suffered and financial loss or damage sustained because of a crime. It gives victims of crime a voice within the criminal proceedings. It provides a platform for the victim to explain the pain, trauma, and suffering they endured due to the crime committed against them. The significance of VIS lies in the fact that the judges must understand the impact of crime on the victim so they can consider those impacts to determine whether there is a continued risk to the community and whether a harsher or lighter penalty should be considered.<sup>4</sup> While punishing an offender, the judge considers several factors like the gravity of the offence (one of the ways to determine it is to see its impact on the victim), age, antecedents of the offender, any other mitigating factors, etc. So, it is necessary to know about the effects of the crime on the victim to impose proper punishment. However, there is a need to subject VIS to limited restrictions.

VIS provides many benefits: 1. It assists in healing the victims of crime. It was observed that the right to voice their plight and suffering before a relevant authority helps the victim to get psychological relief. It helps them to regain their lost confidence and hope, which eventually helps to empower them (especially in sexual abuse cases); 2. It aids the court in determining a proper and just punishment for the offender, such as community service, life imprisonment, imprisonment, and fine; 3. The financial loss statement provided in VIS helps the court to estimate the loss and grant fair compensation; 4. It is not subject to cross-examination due to the zero probability of secondary victimization<sup>5</sup>; 5. It assists the judges in understanding the crime victim's needs and includes reasonable and fair provisions to meet those needs in the judgment; 6. VIS enlightens the state to develop possible schemes, safeguards, rehabilitative schemes, etc., to ensure the future of the victims of the same crime.

### **III. SCOPE OF VICTIM IMPACT STATEMENT IN THE U.S.A, THE U.K., AND AUSTRALIA**

Several jurisdictions incorporated VIS in their criminal legal systems to provide participatory rights to the victims of crime. The ever-growing victim jurisprudence encouraged many adversarial systems to change their attitude toward the victims of crime. The U.S.A., the U.K., and Australia are some adversarial systems that incorporated VIS in their criminal process and have an established framework for its working.

- **U.S.A**

The victim impact statement (VIS) is trendy in the United States. It is implemented in most

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<sup>4</sup> Cynthia Bachour-Choucair, *Role Of Victim Impact Statements In Sentencing*, JAMESON LAW, (Oct 27, 2024, 5:45 PM), <https://jamesonlaw.com.au/criminal-law/role-of-victim-impact-statements-in-sentencing/>.

<sup>5</sup> Williams v. New York, 337 U.S. 241 (1949)

states of the U.S. These statements describe the emotional, physical, and financial impact of crime on victims and their families in their own words. It can be either written or oral statements. It was first used in 1976 in Fresno, California. Later, in 1991, the United States Supreme Court upheld the validity of a victim impact statement in the form of testimony during the sentencing phase of a trial.<sup>6</sup>

A victim impact statement allows victims to express their suffering due to the crime and mention their needs. It assists judges in passing a proper sentence. It also contains a financial loss statement used to verify and assess the financial impact of the crime on the victim.<sup>7</sup> The judge uses this information to determine any money the defendant may have to pay the victim.<sup>8</sup> The judge may order a 'restitution order' after considering other relevant factors along with this information.

The U.S. has a well-established legal framework for it. The victim has the right to be heard at the sentencing stage. The victim impact statement can be filed in written form, submitted to the United States Attorney's Office, and then forwarded to the U.S. Probation Office to be included in the Presentence Investigation Report.<sup>9</sup> This report is sent to the judge before sentencing.<sup>10</sup> The written submission can be in various forms, such as formal statements, personal narratives, written letters to the judge, etc.<sup>11</sup> The defendant and his lawyers can see such a statement, but any personal fact that discloses the victim's identity must be redacted.<sup>12</sup> Oral statements can also be made at the sentencing. Both written and oral arguments can be made together at the sentencing stage.<sup>13</sup>

- **U.K.**

The victim impact statement is known as the Victim Personal Statement (VPS) in the United Kingdom. It was introduced in England and Wales 1996 under the Victim's Charter. Like VIS in the U.S., the Victim Personal Statement (VPS) gives victims a platform to voice their needs and sufferings during the criminal process so that the relevant authorities understand their issues and make an appropriate decision. It allows victims to communicate verbally and/or in writing the effects the crime has had on them and their family members<sup>14</sup>. The VPS narrates the

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<sup>6</sup> Payne v. Tennessee 501 U.S. 808 (1991).

<sup>7</sup> *Victim Impact Statements*, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE (Oct 27, 2024, 3:30 PM), <https://www.justice.gov/criminal/criminal-vns/victim-impact-statements>

<sup>8</sup> Id.

<sup>9</sup> VICTIM IMPACT STATEMENTS, *supra* note at 6

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> *Joint Agency Guide to the Victim Personal Statement*, (Oct 27, 2024, 10:30 AM),

physical, emotional, psychological, financial, or any other suffering they endured. Victims of crime give the VPS to police or other authorized authorities or organizations.

The VPS may be used at appeal hearings, tariff review hearings, and Parole Board hearings, where the victim can include facts that show how the crime continues to affect them and their family and the impact that any outcome from one of those reviews may have on them.<sup>15</sup> The VPS also helps criminal justice agencies decide on the support and services victims and their families may need.<sup>16</sup> Sometimes, the judges can refer the victims to an exceptional support service based on VPS. The right of the victim to make a VPS is incorporated in the Code of Practice for Victims of Crime (Victims' Code). So, the UK also has a well-established legal framework that provides all the rules and regulations needed to run a smooth and effective VPS.

- **Australia**

Like its counterparts, Australia included VIS in its criminal justice system, favoring the participation of victims in the criminal process. The Australian National Committee on Violence has recommended that the VIS be introduced in all jurisdictions, subject to inclusions of safeguards against abuse by the Crown or the defence.<sup>17</sup> There were several negative remarks made against such inclusion; nevertheless, in 1985, the government of South Australia formulated and endorsed 17 principles on victims' rights, one of which states that the victim shall be entitled to have *“the full effects of the crime on him or her made known to the sentencing court either by the prosecutor or by information contained in a pre-sentence report; including any financial, social or physical harm, done to or suffered by the victim. Any other information that may aid the court in sentencing, including the restitution or compensation needs of the victim, should also be put before the court by the prosecution.”*<sup>18</sup> In 1988, South Australia legislated the Criminal Law (Sentencing) Act, which provides an elaborate framework for working on victim impact statements. It provides that prosecutors should submit VIS to the judges. It made it optional to use it at pre-sentence probation investigations. The law made it clear that the statement concerning the impact of crime on the victim is relevant, and any opinion regarding sentence and offender is irrelevant<sup>19</sup>.

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[https://www.cps.gov.uk/sites/default/files/documents/legal\\_guidance/joint-agency-guide-victim-personal-statement\\_0.pdf](https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/joint-agency-guide-victim-personal-statement_0.pdf).

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Edna Erez, *Victim Impact Statements*, AUSTRALIAN INSTITUTE OF CRIMINOLOGY (Oct 27, 2024, 12:00 PM), <https://www.aic.gov.au/sites/default/files/2020-05/tandi033.pdf>

<sup>18</sup> Id.

<sup>19</sup> EDNA, *supra* note at 16

#### IV. CHALLENGES TO THE INCLUSION OF VIS IN THE CRIMINAL JUSTICE SYSTEM

Like a coin, VIS has two sides. VIS significantly promotes victim participation, but there are some issues it poses to the smooth and fair functioning of the criminal justice system. In an adversarial system where VIS assists in determining the type of punishment or whether a light or severe punishment should be imposed, it raises the question of arbitrariness in sentencing. It is because of the disproportionate punishment due to the varying emotional and psychological state of the victims of crime.

It is argued that VIS may hamper the safeguards provided to the accused under the criminal justice system. It is also argued that VIS is not subject to cross-examination, and there is a high probability that the victim may exaggerate specific facts to enhance punishment.

Another argument against it is the time when it is to be submitted. Usually, it is submitted after the conviction of the accused. An example of such a case is the provision of 722(2) of the Criminal Code of Canada, which provides that a VIS can only be sought once an accused pleads guilty.<sup>20</sup> This means the accused will spend his time in custody while the prosecutor attempts to seek victim input, and such custody time can be more than the term of imprisonment imposed for the offence committed.<sup>21</sup>

A victim impact statement may increase the severity of sentences. According to general criminal law principles, the degree of punishment depends on the intent, knowledge, foreseeability, etc. Still, with the introduction of a victim impact statement, the enhancement of punishment depends on the emotional and mental suffering and on matters that are causally remote. It is against procedural fairness.<sup>22</sup>

It must be borne in mind that introducing a victim impact statement scheme will not ensure universal victim satisfaction with the criminal justice system and emotional recovery for all. It is because the social, cultural, and psychological conditions of every victim are different.

If the victim impact statement is used for information only, then the status quo position of the victim under the criminal justice system does not change. They remain as passive participants. As a result of such use, the victims become prone to secondary victimization.<sup>23</sup>

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<sup>20</sup> Adam Newman, *The Role of Victim Impact Statements in Sentencing*,

DERSTINE BARITEAU, (OCT 27, 2024, 12:30 PM) <https://www.derstinebariteau.com/blog/the-role-of-victim-impact-statements-in-sentencing>

<sup>21</sup> *Id.*

<sup>22</sup> Adrija Ghosh, *Unravelling the Question of Victim Impact Statements at Sentencing*, CRIMINAL LAW BLOG (Oct 2024, 1.00 PM), <https://p39ablog.com/2022/03/unravelling-the-question-of-victim-impact-statements-at-sentencing/>.

<sup>23</sup> GHOSH, *supra* note at 21

## V. SCOPE OF USAGE OF VIS AT THE SENTENCING STAGE IN INDIA

The adversarial system in India, a remnant of colonial rule, circumscribed the victims' participatory rights in the criminal justice system. This accused-centric system confined the involvement of a victim of a crime to a testimony. The legal contest is two-dimensional, i.e., between the offender and the state. It is due to the assumption that the offender, by committing a crime, violates a law made by the state. So, he is responsible to the state. Here, the victim is nowhere in the picture. The victim in the Indian criminal justice system is like a 'mute spectator.' However, the human rights movement and expansion of victimology and criminology have opened the way for victim participation in India. The victim jurisprudence, which was a 'vanishing point,' is now expanding, and many new rights have been introduced. Nevertheless, India's criminal justice system is still far from achieving victims' full participation in criminal proceedings.

The right to be heard in criminal proceedings is an indispensable right provided to the parties to a dispute. Article 21 of the Constitution states that the state cannot deprive a person of his right to life and personal liberty without any procedure established by law. It emphasizes fair treatment of every person under the law. The Apex Court has expanded Article 21 and includes many rights, including the right to be heard at a trial. In the *Maneka Gandhi case*<sup>24</sup>, the court recognized a person's right to be heard at a trial. The Malimath Committee also suggested that crime victims must be endowed with participatory rights at all stages of the criminal justice process.<sup>25</sup> It recommended a) active participation of the victim during the investigation would help discover the truth, b) participation of the victim will also assist the court in exercising its discretion concerning the grant or cancellation of bail, c) The victim should have the right to be represented by a lawyer, etc.<sup>26</sup> Furthermore, in a wealth of precedents, the country's Apex Court repeatedly recognized the significance of the right to participate of a victim of crime in a criminal proceeding. In *Rekha Murarka v. State of West Bengal*<sup>27</sup>, the right of a victim to appoint a private counsel was observed. The victim's right to voice necessary matters before the court was recognized. Similarly, in the *VLS Finance Ltd vs. State NCT of Delhi and Ors* and the *Jagjeet Singh v. Ashish Mishra*,<sup>28</sup> it was held that the victim has an indispensable right to be heard/consulted in a revision petition proceeding and bail proceedings.

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<sup>24</sup> *Maneka Gandhi v. UOI* 1978 AIR 597, 1978 SCR (2) 621

<sup>25</sup> DR. JUSTICE V.S. MALIMATH, COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM (2003)

<sup>26</sup> *Id.*

<sup>27</sup> 2019 (4) KLT OnLine 3046 (SC)

<sup>28</sup> 2022 (3) KLT 327 (SC)



### (A) Status of right to be heard at sentencing stage

In *Mallikarjun Kodagali vs. The State of Karnataka*, the Supreme Court observed that “a victim impact statement or a victim impact assessment must be given due recognition so that an appropriate punishment is awarded to the convict.<sup>29</sup>” The court stated the importance of victim participation in a criminal process and encouraged the use of VIS in a criminal process and its role in determining a proper sentence. The Delhi High Court in 2020, in the case of *Karan v. State of NCT of Delhi*, enunciated a tool to encourage the victim's right to be heard at the sentencing stage. It is called a Victim impact report. It is different from the VIS. The Court has instructed DLSA to submit the Victim Impact Report (VIR) in the format it formulated. It must be filed in every criminal case after conviction. A Victim Impact Report (VIR) shall disclose the impact of the crime on the victim of the crime. The court ordered the DLSA to conduct a summary inquiry and submit VIR to the court, which eventually considered it to determine the compensation.<sup>30</sup> While deciding the compensation, it shall hear all the parties to the dispute.<sup>31</sup> So, the Victim Impact Report is different from the VIS. DLSA submits it after a summary inquiry regarding the impact of the crime on the victim. It contains the effects of the crime on the victim, and such a report helps the court to determine the compensation. In comparison to the VIS, it has limited functions. There is no mention of its use in sentencing an offender to punishment. Nevertheless, since the judgment passed in 2020, it has not been in effect.

Furthermore, the Bharatiya Nagarik Suraksha Sanhita 2023 (previously the Criminal Procedure Code 1973) has several provisions that imply that sentencing an offender belongs to the prosecution and the court. It nowhere states expressly or impliedly that the victim has a say in sentencing matters. The revamped criminal procedure code says nothing about the right to be heard during sentencing. The Indian criminal system still favors the rights of the accused due to the traditional criminal justice it follows. Hence, it is hesitant to introduce VIS as it is feared it will affect the safeguards provided to the accused under the system. Another matter is that it will lead to disproportionate sentencing and infringe Articles 14 and 21 of the Constitution of India. Besides, the usage of VIS in the recovery of victims of crime is also questionable due to the social and cultural conditions of the country.

## VI. CONCLUSION AND RECOMMENDATIONS

Justice Benjamin Cardozo rightly observed in *Snyder Vs. Massachusetts*, while he held that the victim impact statement is constitutionally valid, “Justice, though due to the accused, is due to

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<sup>29</sup> 2019 (2) SCC 752

<sup>30</sup> *Karan v. State of NCT of Delhi*, 277 (2021) DLT 195 (FB)

<sup>31</sup> *Id.*

*the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.*<sup>32</sup>” Every party to the dispute has the right to be heard at every stage of the criminal process. It maintains fairness in the system. The reluctance to incorporate VIS is primarily because of the fear of its implications on the safeguards provided to the accused under the system. The Indian criminal justice system focuses on punishment, so many safeguards have been provided to the accused to maintain a fair trial. However, as a result, it ignores the rights of the victims of crime. This perspective is a major hindrance to the inclusion of VIS in India. In the contemporary era, several countries have adopted VIS to promote victim participation, an integral aspect of victim justice. India is also trying to encourage the participation of victims, and the Indian judiciary is making ways to help the victim to voice their needs after the crime. Some recommendations are provided to help to incorporate VIS in the system.

1. Firstly, changing the perspective concerning criminal justice is essential. Criminal justice is not about punishment but the healing of each party involved in the crime, primarily the victims. This concept is called restorative justice. It helps the parliament and the judiciary to focus on the needs of victims of crime, offenders, and the community rather than fixating on a particular stakeholder.
2. Secondly, incorporating VIS into the system requires a clear legal framework. For example, VIS should be made before the conviction of the accused, but it must be submitted to the judge after the conviction. Till then, it should be sealed and kept safely with the prosecution or the victim. After submitting the VIS, the other party should be given a copy. The defendant must be allowed to say his part concerning any mitigating factors.
3. Thirdly, the sentencing must be the decision of the court based on several factors, including the VIS. The judgment must clearly and unambiguously state all the reasons for the sentence.

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<sup>32</sup> 291 U.S. 97 (1934)

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