



REPARATIVE JUSTICE FOR RAPE VICTIMS IN INDIA

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Abstract: *The Criminal Justice System in India, since its establishment under the colonial regime, has been concerned with the accused and his rights. The plight of victims and his position has not drawn any concern from either the policy makers or judiciary. It is only in recent years that the seeds of a victim-oriented system have witnessed its germination, especially in the realm of rape victims' rights and State/accused responsibility. The winds of reparation have started blowing and positive efforts from the legislative and judicial systems will help to reform the systems towards a more pragmatic and balanced approach.*

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1. INTRODUCTION

The adoption of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 was a milestone in the recognition of Victims in the Criminal Justice Process. It established four major components of the rights of victims of crime, namely, access to justice, fair treatment, restitution, compensation and assistance.

While the criminal justice system in India premised itself on the accused-state model of justice, the plight of victims and their neglect by the system drew attention. Rape victims figured above all others with their conditions of physical and psychological trauma, apathetic ill-treatment and societal desertion. Expressing concern, the Supreme Court of India lamented, "It is rather unfortunate that in recent times, there has been an increase in violence against women causing serious concern. Rape does indeed pose a series of problems for the criminal justice system. There are cries for harshest penalties, but often, at times, such cries eclipse the real plight of the victim. Rape is an experience which shakes the foundations of the lives of the victims."

In the hour of crisis, reparative justice for victims appears to be an alternative solution to the problem. A reparative theory of justice is a rights-based approach to criminal sanctions that views a crime as an offence by one individual against the rights of another calling for forced reparations by the criminal to the victim. It is based on three principles- one, that justice requires that we work to restore those who have been injured; two, those most directly involved and affected by crime should have the opportunity to participate fully in the response if they wish; and three, that Government's role is to preserve a just public order whereas the community's is to build and maintain a just peace.

The present paper is an attempt to emphasize the need of reparation for rape victims in India, alongside the legislative and judicial strides that have been taken in the direction. It attempts to enumerate the plight of rape victims in the present criminal justice set up and revisit the steps taken towards a humanistic and participatory model based on reparative justice.

2. OVERVIEW OF CRIMINAL JUSTICE IN INDIA: VICTIM PERSPECTIVE

The criminal justice system in India, based on the adversarial model, focuses heavily on the offender and his rights. The plea of innocence, of rights against arbitrary arrest, of fair trial and adequate legal aid services are, amongst others, various measures designed to ensure



the human rights of the accused. The development of this edifice has been a significant step in the Indian criminal law framework. However, a consequential grey area has been the neglect and apathy of the system towards the victims. As lamented by Krishna Iyer J.- “It is a weakness of our jurisprudence that victims of crime and the distress of the dependants of the victim do not attract the attention of law. In fact, the 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.”

What is the present role the victim is assigned under the existing criminal law? When a person who has been the victim of a cognizable offence gives information to the police regarding the same, the police is required to reduce the information into writing and read it over to the informant. The informant is required to sign it and get a copy of the First Information Report. If the police refuses to record the information, the victim – informant is allowed to send it in writing and by post to the Superintendent of Police concerned. If the police refuses to investigate the case for whatever reason, the police officer is required to notify the informant of that fact. Alternatively, victims are enabled by Section 190 of the Code of Criminal Procedure (Cr. P. C.) 1973 to avoid going to the Police Station for redress and directly approach the Magistrate with his complaint.

The investigation process is exclusively a police function and the victim has a role only if the police consider it necessary. There are administrative instructions given by police departments of certain States to give information on progress of investigation to the victim when asked for. Otherwise, till police report (charge sheet) is filed under Section 173 Cr. P. C. 1973, the victim is neglected.

The victim has a say in the grant of bail to an accused. S. 439 (2) Cr.P.C., as interpreted by the courts, recognizes the right of the complainant or any “aggrieved party” to move the High Court or the Court of Sessions for cancellation of a bail granted to the accused. A closure of report by the prosecution cannot be accepted by the court without hearing the informant. Also, compounding of an offence cannot possibly happen without the participation of the complainant. The victim of a crime may move the government to appoint a special prosecutor for a given case though S. 301(2) mandates that such lawyer of the private party “shall act under the directions of the Public prosecutor...and may, with the permission of the court, submit written arguments after the evidence is closed in the case.”



Further, though there is no legal provision in the code for providing legal aid to victims of crime, S.12(1) of the Legal Services Authorities Act, 1987 entitles every person “who has to file or defend a case:” to legal services subject to the fulfillment of the means test and the “prima facie” criteria.

The victim’s right of participation in the post trial stage of the proceedings is recognized. An appeal against an order of acquittal can be preferred, with the prior leave of the High Court by both the Government and the complainant.

Section 250 Cr.P.C. 1973 authorizes the Magistrate to direct complainants or informants to pay compensation to people accused by them without reasonable cause. Again, Section 358 empowers the court to order a person to pay compensation to a other person for causing a police officer to arrest such other person wrongfully. Section 357, Cr.P.C., 1973 empowers a Court imposing a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, in its discretion, *inter alia*, to order payment of compensation, out of the fine recovered, to a person for any loss or injury caused to him by the offence.

However Section 357 (1) is subject to some limitations as may be stated below:

1. Compensation to victims can be awarded only when substantive sentence is imposed and not in cases of acquittal.
2. Quantum of compensation is limited to the fine levied and not in addition to it or exceed the fine imposed.
3. Compensation can be ordered only out of fine realized and if no fine is realized, compensation to victim cannot be directed to be realized.
4. In very rare cases under the Penal Code, the maximum amount of fine is imposed. Moreover the maximum fine as prescribed in IPC amount 150 years back is now inadequate in terms of real losses to victims.
5. Compensation to victim under this section can be allowed by the court if it is of the opinion that the compensation is recoverable by such person in a Civil Court.

A recent amendment in 2009 has witnessed the introduction of Victim Compensation Scheme in Section 357A of the Code. The provision mandates the States to prepare a scheme for providing funds for the purpose of compensation to the victims who have suffered loss or injury as a result of a crime and require rehabilitation. Such disbursement of compensation are to be made on orders of the court, when it is of the opinion that the



compensation awarded under Section 357 is not adequate or, in cases of discharge or acquittal of the accused, where the victim has to be rehabilitated. A victim is also entitled under the provision to maintain an application in cases where the offender is not traceable or identifiable etc. The District and State Legal Services Authority shall thereupon award adequate compensation to the victim. The section has widened the scope of the authority to do further acts in order to alleviate the suffering of the victim which includes, proper medical services.

3. RAPE AND THE VICTIMS

While the above reflects the role assigned to victims in the criminal justice machinery system, reality reveals that the situation is worse. A victim of a crime in the Indian legal framework is the most discarded person. While the accused occupies the central place, the victim is reduced to merely being an informant and witness. He has little or no say in the investigation, prosecution and finally, sentencing of the accused. The situation is even worse in case of victims of sexual offences.

The offence of rape is one of the most heinous offences listed in the India Penal Code, 1860. It is an act of violence, which subjects the victim to physical and emotional humiliation, besides pain, fear and serious injury. The apex court has rightly observed that crime of rape is not only a crime against an individual but a crime which destroys the basic equilibrium of the social atmosphere.

Rape involves infliction of wounds on the body as well as the soul of the woman. Hence it requires years to recover from the traumatic experience. In fact, victims have opined that in most cases it is difficult to forget the nightmarish experience of rape. It overshadows the happiness of the entire life. Apart from the psychological part, in forced or violent rapes, the victim may suffer severe injuries over her body. Recovery from the deep-seated problem involves long-term treatment involving lacs of rupees. Unwanted pregnancies and sexually transmitted diseases such as HIV/AIDS are also not unknown of. Infact, in a tradition bound conservative society, as in India, the consequences of rape range much wider than mere physical and psychological trauma at the individual level. Rape is a taboo in Indian societal matrix. It attracts stigma, shame and ostracization, leaving the victim with no opportunities but to live a life of ignominy and isolation.



Unfortunately however, in spite of the gravity and barbarity of the act and its consequences, no concern has ever been shown for the hapless victims of the offence of rape. She has been sneered, mocked and tortured at the hands of the accused and administration for the plight which has befallen on her. The police express extreme apathy and disbelief towards the victim and her narration of events; more often than not, she is held responsible for her behavior; FIRs are not registered; investigations move on in a slow and sluggish manner; crucial evidences are overlooked; the prosecution exhibit extreme depravity and irresponsibility in their work; the trial court remains a silent spectator to the drama which unfolds in the courtroom with irrelevant and humiliating questions being put to the victim and every effort made to prove her complicity in the incident. Sadly enough, the victim is often made to relive the pain and feel guilty for her 'loose and immoral' behavior resulting in her victimization. Justice delivery ends with the acquittal or conviction of the accused and his punishment. Rarely, the court awards a sentence of fine. As opined by the Supreme Court while discussing the scope and object of Section 357 Cr.P.C., 1973 in *Hari Krishnan and State of Haryana v. Sukhbir Singh* (1988):

“It is an important provision but the courts have seldom invoked it, perhaps due to the ignorance of the object of it. It empowered the courts to award compensation to victims ...It may be noted that this power of the Court to award compensation is not ancillary to other sentences but is in addition thereto. This power was intended to do something to reassure the victim that he/she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is indeed a step forward in our criminal justice system.”

4. REPARATION FOR RAPE VICTIMS: JUDICIAL AND LEGISLATIVE STRIDES

Right to compensation has been recognized as an integral part of right to life and liberty under Art.21 of the Indian Constitution. As early as in 1983, the Supreme Court recognized the petitioner's right to claim compensation. “Art 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of relief from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Art 21 secured is to mullet its violators in the payment of monetary compensation. In several cases



thereafter, the apex court has repeated its order, making compensation an integral aspect of right to life.”

In 1995, a public interest litigation was filed to espouse the pathetic plight of four domestic servants who were raped in a moving train by some military personnel. The apex court highlighted the ordeals of the victims of rape and the defects in the criminal law system in vogue.

“It is rather unfortunate that in recent times, there has been an increase in violence against women causing serious concern. Rape does indeed pose a series of problems for the criminal justice system. There are cries for harshest penalties, but often times such cries eclipse the real plight of the victim. Rape is an experience, which shakes the foundations of the lives of the victims. For many, its effect is a long-term one, impairing their capacity for personal relationships, altering their behavior and values and generating endless fear. In addition to the trauma of the rape itself, victims have had to suffer further agony during legal proceedings.”

In this background, the court held that 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 should 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 should 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 of the rape.

In the case of *Gudalure M.J. Cherian v. Union of India* (1995), a compensation of two lakhs fifty thousand rupees was awarded to the victims of rape. In this case, some miscreants had entered a convent and committed rape on nuns. The case was investigated in a perfunctory manner and vital clues and evidence was lost. The Supreme Court, while ordering the government to suspend the police officers and initiate disciplinary action against them, also directed it to pay compensation to the victims.

In *Bodhisattwa Gautam v. Subhra Chakraborty* (1996), the accused established sexual relations with a woman on the pretext of marriage and even falsely married her before the family deity. The woman underwent abortions as a result of such relations but inspite of repeated requests, the accused refused to make their relation known to his family members



and finally, abandoned her. In its judgment, the Supreme Court equated the plight of the woman to that of a victim of rape and gave an eloquent exposition of the heinousness of the offence and the need to assist the victim to overcome the physical, psychological and financial loss suffered by her. In its opinion, rape is a crime against the entire society. It shatters the equilibrium of the social order. At the same time, it is a devastating experience for a woman and pushes her into deep emotional crisis. It is of paramount importance to rehabilitate the woman who has suffered such a trauma in rape. Accordingly, the accused was ordered to pay an interim compensation of Rs.1000 per month during the pendency of the case.

In yet another landmark decision, *Chairman Railway Board v. Chandrima Das (2000)* a Bangladeshi woman was raped by some railway officials in the railway yatri niwas. The apex court asked the railways to pay Rs. 1000000 as compensation for the infringement of her right to life under Art. 21 of the Constitution. In the opinion of the Court- "Smt. Hanuffa Khatoon, who was not the citizen of this country but came here as a citizen of Bangladesh was, nevertheless, entitled to all the constitutional rights available to a citizen so far as "Right to Life" was concerned. She was entitled to be treated with dignity and was also entitled to the protection of her person as guaranteed under Article 21 of the Constitution. As a national of another country, she could not be subjected to a treatment which was below dignity nor could she be subjected to physical violence at the hands of Govt. employees who outraged her modesty. The right available to her under Article 21 was thus violated. Consequently, the State was under the Constitutional liability to pay compensation to her."

Another path breaking judgment by the Rajasthan High Court deserves specific mention. It was a case of rape of a German Lady Tourist in the city of Jodhpur by two autorickshaw drivers. Under instructions of the Hon'ble High Court of Rajasthan, the fast track court decided the case within a period of two weeks of its occurrence. The accused were convicted and sentenced to imprisonment for life. From the victim's perspective what was remarkable was that she was provided boarding and lodging by the State Government and all expenses during the days of trial was borne by the State. Additionally, an amount of Rs. 3 lacs was awarded as compensation by the High Court of Rajasthan.



The Law Commission of India, expressing its concern for crime victims, has also suggested few proposals for reforms. The Fourteenth Law Commission in 1996 in its 154th Report on the Code of Criminal Procedure suggested a comprehensive victim compensation scheme to be administered, on recommendations of a trial Court, by the Legal Services Authorities constituted at the District and State levels under the Legal Services Authorities Act, 1987. The Law Commission desired the District and State Legal Services Authorities to have special considerations while compensating victims of custodial crimes, and of child abuse; rape victims, and physically and mentally disabled victims of crimes.

The National Women's Commission, in its report 'Revised Scheme for Relief and Rehabilitation of Victims of Rape, 2009-10', has recommended that after a rape victim lodges an FIR, she should be awarded compensation of Rs. two lakhs which may be increased to three lakhs in special cases. The first installment of Rs 20,000 has to be given to the victim when she registers the FIR, while the second installment of Rs 50,000 is recommended after the Board examines the case and determines the nature of rehabilitation measures required. The remaining amount has to be disbursed within one month of the victim's evidence in court or one year of the receipt of application. The Commission has also recommended the setting up of Criminal Injuries' Compensation Board at the District, State and National levels. Such boards have been entrusted with a wide range of activities, not only relating to financial assistance but also including medical, psychological and counseling services and affording holistic protection and support to the victim. The Scheme has received the approval of the Ministry of Women and Child Development but is awaiting a response from the Planning Commission on the modalities of disbursement of financial assistance to the States.

5. REPARATIVE JUSTICE FOR RAPE VICTIMS IN INDIA: AN APPRAISAL

Reparation commonly refers to the payment to victims of crime by an offender to cover losses incurred from the crime. Payment can take the form of money and/or services to the victim or the state. According to Black's Law Dictionary, restitution/reparation is an 'Act of restoring; restoring to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury; and indemnification'. The concept of reparative justice is based on the premise that a crime represents a debt owed not only to the state, but to the victim, the victim's family and to the community as a whole. It emphasizes on repairing the harm



caused by criminal behavior, accomplished through cooperative processes including all stakeholders of the criminal justice machinery wherein the victim is granted compensation for the violation of rights. This is in sharp demarcation to the traditional understanding of crime and criminal law where the whole enquiry is about the offender and his punishment. As has been put "Currently, when a crime is committed, two primary questions are asked: Who did it? and What should be done to the offender? The latter question is generally followed with another question about the most appropriate punishment and, when the crime is committed by a child or young person, about the most appropriate treatment or service." But the more significant questions of what has been the harm caused, what needs to be done to repair the harm and how, remain unaddressed by the system.

Reparative Justice is a response to crime which invites and enables victims, offenders and the community to repair some of the injuries resulting from crime. It involves a set of processes which can take place within or outside of the formal criminal justice system which aim to make the victim central to the process of resolving the crime committed against them. The victim may be an individual, group of individuals or a community since crime is perceived as having both individual and social dimensions of responsibility. The offenders are expected to accept accountability by assuming responsibility for their behaviour and taking subsequent action to repair harm done to the victim, directly or indirectly. The focus is on problem solving, on liabilities and obligation and on the future - planning what should be done to ameliorate some of the harm suffered.

Reparative Justice for rape victims in India has received a fragmented and sporadic response at legislative and judicial levels. Except in rarity, courts in India have not exhibited any "liberal" approach in granting of compensation to victims. "It is regrettable that our courts do not exercise their statutory powers under this section (S. 357 Cr.P.C.) as freely and liberally as could be desired." A survey of the available empirical studies, though scanty, has revealed a very rare use of the legal provisions in awarding compensation and inadequacy of the compensation awarded. However, the courts have been cautious to remind themselves not to award "unduly excessive compensation" and to calculate the amount to be awarded and then to impose a fine higher than the compensation.

The Malimath Committee in 2003 emphasized that the criminal justice administration will assume a new direction towards better and quicker justice once the rights of victims are



recognized by law and restitution for loss of life, limb and property are provided for in the system. It asserted that "Victim Compensation law will provide for the creation of a Victim Compensation Fund to be administered possibly by the Legal Services Authority. The law should provide for the scale of compensation in different offences for the guidance of the Court." Accordingly, the new inclusion in the Code in the form of Section 357A has come to open new frontiers in the domain of victim rights and right to compensation. In a Gauhati case (*Ganesh Karmakar v. State of Assam 2012*), where a fine of Rs. 1000 was imposed on the accused, a poor labourer, for the murder of a fellow man, the High Court called upon the District Legal Services Authority to award adequate compensation, alongwith an interim payment of Rs. 50000/- to the victims family for the loss and injury suffered as a result of the offence.

6. CONCLUDING NOTE

The traditional model of criminal justice premised on the accused-state interplay is under challenge in contemporary times. With low crime reporting and abysmally low conviction rates, the State today faces threat as the protector and provider of human rights security and welfare. Victims are at the receiving end of the entire system with no support mechanisms at their disposal and whatever, traditional mechanisms are in place, they are all designed to aid and assist the accused in his trial for justice.

The Victims Rights Movement all over the globe and the consequent International obligations has now set the winds blowing in the opposite direction. From the accused to the victim is the latest call for justice, where a crime is increasingly being recognized as not harm to the State but to the individual in particular and therefore, needs to be addressed both by the Offender and the State. The pertinent question thus is no longer, what should be the apt punishment, but rather, what ought to be the just mode of redressal of the injury perpetrated on the victim. The legislative and judicial initiatives in India in recent past appear laudable but they are still at a nascent state, and more pragmatic and prompt efforts are called for in recognition of Victims right to reparation.

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