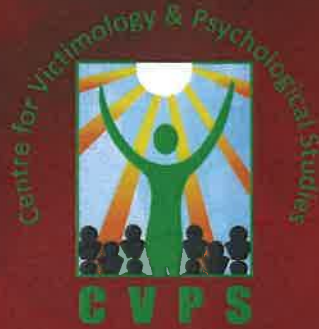




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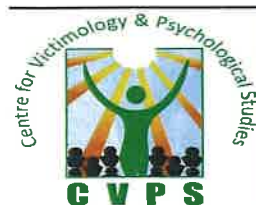
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The Emergent Paradigm of Victim Justice

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Recently, the Supreme Court of India in the case of *Jagjeet Singh v. Ashish Mishra*¹, recognised the “unbridled right” of the victim to participate in a criminal trial at all stages from investigation to appeal. The pronouncement of the Court is emancipatory for the struggle for victim rights. In observing that the victims with legitimate grievances cannot be expected to sit on the fence and watch the proceedings from afar, the Court has recognised the fact that victims too deserve equal rights in the criminal process. While the Court’s judgment and observation may seem obvious and warranted to us in the context of the day, the same was not always the case. The discipline of victimology has travelled far in order to culminate into such an understanding of victim justice.

1. From Victimology to Victim Justice

Over the last four decades, victimology has emerged as a discipline in its own right. It has witnessed drastic shifts in its focus, approach and contents owing to a variety of factors including socio-political contexts of concerned societies. In its first wave, the focus was upon the individual offender and individual victim; their interaction and relationships and hardships experienced by the victims. The wave studied victimology in its

‘positive’ sense. This era is characterised by the typologies of Von Hentig, Mendelsohn, Garofalo etc. and concepts such as victim precipitation, victim provocation, victim facilitation, victimisation processes etc.

In the second wave, the focus shifted from the positive to the normative. From understanding the causes of victimisation and conceptualising victimhood, an activist stance of victimology became prominent which stressed upon legal recognition, access to justice, access to victim services, assistance and compensation. Understood comprehensively, the shift was from victimology to victim justice. The works of Nils Christie (1977) deserve particular mention in this regard. At a time when victimology was still affirming its theoretical foundations, (Christie, 1986) proffered radically that our legal systems were flawed in two pertinent senses – firstly, that our criminal justice system stole the conflict from its rightful owner and that in practise, our criminal justice system refused to recognise unideal victims.

It is quite telling that even as Herbert Packer (1964) studied the Criminal Processes from the point of view of ‘Due Process’ and ‘Crime Control’, the issue of role of victims in such processes was left unaddressed. Several scholars attempted to fill this important gap by suggesting and forwarding models of victim participation. These normative models both addressed and raised several important questions regarding both the willingness and

¹S.L.P. (Crl.) No. 2640 of 2022 (vide order dated 18.04.2022)

capacity of our criminal justice to provide for an enabling framework of rights for victims of crime. Douglas Beloof's (1999) model took into consideration key concepts such as fairness, respect, dignity to the victim of crime². Kent Roach's (1999) models cut across punitive and non-punitive measures to increase victim participation within the criminal process. Leslie Sebba's (1982) models provided for the varying degrees to which such participation could be feasibly incorporated in our criminal justice system.

Such a shift was accompanied by a call for reforming the traditional criminal justice system which had erected significant barriers to victim justice. Feminist scholarship had an extremely important role to play in this regard. The works of Susan Estrich (1988) help us identify how the society tends to stereotype rape victims and how such stereotypes actually deter successful crime report, investigations and prosecutions. In this regard, the key phrase is 'burden of performance' wherein the victim must constantly compete with the hyper-simulated image of the ideal victim in order to prove her victimisation (Rayburn, 2006).

2. Victim Justice Indian Content

Victims of crime in India received legislative recognition only in 2009 with the insertion of s. 2(wa) in the Code of Criminal Procedure, 1973 vide the Amendment Act of 2009. Through the same Act, the victims were granted three other substantive rights. First was to hire a private counsel, albeit with limited participatory rights². The second was the right to be compensated under section 357A. The third right was the right to file an appeal against a judgment of acquittal, conviction for lesser offence and inadequacy of compensation. Other than these legislative provisions which grant some rights to all victims of crime, a few special and local legislations provide for more nuanced rights to victims of specific offences³. It becomes clear upon examination that the legislative growth of victim justice in India is marked by a compartmentalized thought process on part of the law makers resulting in a lack of a comprehensive legal framework which addresses several important aspects of victim justice.

On the judicial side, the growth of victim justice has seen the realization of some substantive rights, but such progresses have been marred by regressive observations. For example, in the case of *Maru Ram v. Union of India*, the Supreme Court observed as follows:

"While reformation of the criminal is only one side of the picture, rehabilitation of the victims and granting relief from the tortures and suffering which are caused to them as a result of the offences committed by the criminals is a factor which seems to have been completely overlooked while defending the cause of the criminals for abolishing deterrent sentences".

While the observations may, prima facie, seem progressive to the cause of Victim Justice, the Court effectively assumes that securing rights for victims of crime must come at the cost of securing rights of the accused. This assumption has for long acted as a barrier to securing right for victims of crime because due process safeguards have traditionally been understood solely from the perspective of the accused. Anything which our criminal justice system assumes is antithetical to such due process is immediately rejected without much thought or analyses. Such rejection, often receives the assent and support of the society and non-governmental actors as well. Therefore, in assuming that balancing victim rights against the rights of the accused is a zero-sum game, the Supreme Court may have made the realization of substantive rights for victims of crime just that much tougher. Such a balancing oriented understanding can also be observed from other rulings of the Supreme Court such as the case of *Mallikarjun Kodagali v. State of Karnataka*,⁴ where the Court stated that:

"Today, the rights of an accused far outweigh the rights of the victim of an offence in many respects. There needs to be some balancing of the concerns and equalising their rights so that the criminal proceedings are fair to both".

The need for victims to participate in the criminal justice system through a legal representative has been recognized by the Supreme Court in 1994 through the case of *Delhi Domestic Working Women's Forum v. Union*

²Limited through section 301 and 302 of the Code of Criminal Procedure, 1973

³The POCSO Act and the SC/ST (Prevention of Atrocities) Act both provide for special procedures and rights for victims.

of India,⁵ wherein the Supreme Court held that the role of the victim's advocate would - *"would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counseling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represent her till the end of the case"*. Nevertheless, the role of the prosecution vis-à-vis victims as well as the right of the victim's advocate to participate substantively in the trial still awaits legislative recognition.

Even as witnesses to a trial, the victims still find trials to be a traumatic experience. Such trauma occurs first as victims are subjected to repetitive adjournments. It is as the Supreme Court observed in the case of *State of U.P. v. Shambhu Nath Singh*⁶ - *"it is a sad plight in the trial courts that witnesses who are called through summons or other processes stand at the doorstep from morning till evening only to be told at the end of the day that the case is adjourned to another day"*. If this wasn't enough, victims are also subjected to intense cross examinations which tantamount to character assassination in the name of impeachment of character. In the case of *Nipun Saxena v. Union of India*,⁷ the Supreme Court observed that:

"In Court the victim is subjected to a harsh cross-examination wherein a lot of questions are raised about the victim's morals and character. The Presiding Judges sometimes sit like mute spectators and normally do not prevent the defence from asking such defamatory and unnecessary questions".

If the same wasn't enough, the victim is often threatened and manipulated in many ways to deter them from testifying and pursuing the trial. Little has been achieved in way of witness protection in such regard.

In the case of *Mahendra Chawla v. Union of India*,⁸ the Supreme Court observed that:

"It hardly needs to be emphasised that one of the main reasons for witnesses to turn hostile is that they are not accorded appropriate protection by the State. It is a harsh reality, particularly, in those cases where the accused persons/criminals are tried for heinous offences, or where the accused persons are influential persons or in a dominating position that they make attempts to terrorise or intimidate the witnesses because of which these witnesses either avoid coming to courts or refrain from deposing truthfully. This unfortunate situation prevails because of the reason that the State has not undertaken any protective measure to ensure the safety of these witnesses, commonly known as "witness protection"."

3. The Way Forward

Highlighting the problems with respect to the realization of victim justice in India is just one step in a long process. In the true legacy of "Critical Victimology," the ultimate aim of developing an understanding crime victims, victimization and victimhood must be to ensure that the same translate into a concrete statutory and policy framework for victims of crime in India. There is an urgent need in this regard, to develop and further the concept of "victimological jurisprudence". The legal principles that predominantly consider the victim in the centre to decide the applicability of laws and deciding the fate of cases with a focus on victim must form the core of such victimological jurisprudence.

Aside from legal principles, such victimological jurisprudence must also draw from a more interdisciplinary understanding of victim justice. For example, it is imperative for us to consider the gendered notions of crimes and criminal law before we make any attempts to amend the law from the perspective of victims. Crimes impact each category of victims, differently. The

⁴(2019) 2 SCC 752

⁵(1995) 1 SCC 14

⁶(2001) 4 SCC 667

⁷(2019) 13 SCC 715

⁸(2019) 14 SCC 615

categorisation of these gendered crimes must naturally based upon the places where the crimes occurred, the motive behind the crimes, and culture specificity of the crimes. Another perspective that requires much interdisciplinary introspection is that of victimization of the vulnerable/marginalized and the extent of their access to justice. It is trite to say that marginalized sections of the society are more prone to victimization and have lesser access to justice. Studying the inter-relationship of these key concepts is crucial if we want to secure victim justice for a large section of our society.

Finally, there is a requirement for a greater victim centric activism pushing for comprehensive reforms to secure victim justice. The push must be to ensure that rights, which have so far been granted only to a few select categories of victims, must also be made legislatively available to all victims of crime. Such a push must also extend to developing an understanding of the victim as a complete participant to the criminal process with rights which are distinct and separate from that of the State's. It is as the Supreme Court observed in the *Jagjeet Singh* case (supra):

The victim's right, therefore, cannot be termed or construed restrictively like a brutum fulmen. We reiterate

that these rights are totally independent, incomparable, and are not accessory or auxiliary to those of the State under the Cr. P.C. The presence of 'State' in the proceedings, therefore, does not tantamount to according a hearing to a 'victim' of the crime.

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