



Restorative Justice and Victims: Right to Compensation

Haveripeth. Prakash D.

Dept of Criminology and Forensic Science, Karnataka Science College Dharwad, INDIA

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Abstract

The proponents of the justice argue that punishment is society's customary response to crime; it neither meets the need of victim nor prevents re-offending. Restorative justice aims at encouraging offenders to take responsibility for the consequences of their actions, express repentance and repair the harm they have done. Restorative justice also emphasizes the reintegration of offenders into communities rather than their control through strategies of punishment and exclusion. Restorative justice is an evolving response to crimes that respect the dignity and equality of each person, builds understanding, and promotes social harmony. This process Provides an opportunity for victims to obtain reparation, feel safer and seek closure, allow offenders to gain insight into the cause and effects of their behavior and take responsibility in a meaningful way, and enable communities to understand the underlying causes of crime. What required is a paradigm-shift from punitive justice, to restorative justice, which will meet to the need for restitution or reparation of harm to the victims and prevail over demand for punishment. In the light of above, an attempt will be taken to analyse the position of the victim under criminal justice system and the existing law on the victim's right and compensation in India.

Keywords: Victims, offender, crimes, compensation, laws, Judgments, remedies.

Introduction

Restorative justice revolves around the ideas that crime is, in essence, a violation of a person by another person (rather than a violation of legal rules); that in responding to a crime our primary concerns should be to make offenders aware of the harm they have caused, to get them to understand and meet their liability to repair such harm, and to ensure that further offences are prevented; that the form and amount of reparation from the offender to the victim and the measures to be taken to prevent remembers of their communities through constructive dialogue in an informal and consensual process; and that efforts should be made to improve the relationship between the offender and victim and to reintegrate the offender into the law-abiding community¹.

The proponents of the restorative justice argue that punishment society's customary response to crime; neither meets the need of victim nor prevents reoffending. Restorative justice aims at encouraging offenders to take responsibility for the consequences-of their actions; express repentance and repair the harm they have done. Restorative justice. Also emphasizes the reintegration of offenders into communities rather than their control through strategies of punishment and exclusion. Restorative justice is an evolving response to crimes that respect the dignity and equality of each person, builds understanding, and promotes social harmony. It is now believed that many times the Victim induces or facilitates the commission of crime. There are certain offences in which the victim plays a very important role and the works towards the success of crime, e.g., abortion, prostitution. The study of victim-offender relationship

is, therefore, considered necessary today for determining the question of guilt of the offender and for fixing up the nature and amount of penalty for the offender.

This process provides an opportunity for victims to obtain reparation, feel safer and seek closure, allow offenders to gain insight into the cause and effects of their behavior and to take responsibility in a meaningful way, and enable communities to understand the underlying causes of crime².

The priority of the criminal justice system should be resolving conflict between the offender and the victim therefore the aim should be to meet to i. Victims needs, ii. to convince the offender his responsibility of the crime and the loss/injury/harm caused by the crime and iii. his liability to repair the offender this process move stress is given to reconciling the offender with the victim and the community by voluntarily paying compensation for the harm caused. What required is a paradigm-shift from punitive justice to restorative justice, which will meet to the need for restitution or reparation of harm to the victims and prevail over demand for punishment. Only recently, society has woken up to the realization of victim's plight and related unfairness of the whole system³.

The idea of relief and compensation to victims is not a new one. Earlier too, our laws provided for compensation to the victims of accidents. In some cases, the law combined punishment of the offender with monetary satisfactions for the injured party as a means of foretelling enmity through counter-violence by the victim's kin. In the 1950s, an English reformer initiated a modern movement to bring the victim back into the justice

equation. "Victim compensation" refers to payments made from state funds to victims of crime. Advocates of victim compensation have argued that since the state is responsible for protecting its citizens from crime, the failure to do so obligates the state to indemnify those who are victimized. The state is believed to be responsible to the victims because imprisonment prevents offenders from paying damages. The general welfare policy also is cited as justification for governmental assistance to the unfortunate victims of crime.

The Indian Law, as compensatory measures victims of crimes, is not in enough and this aspect needs to be reviewed by the legislature to frame or enact necessary law, so as to sufficiently compensate to victims of crimes and to provide safeguards to victims of crimes, besides compensating him in monetary terms.

Stephen Schafer studied existing compensation schemes in 29 countries in 1958-59 and gave the following suggestions

i. Compensation to victims of crime could be brought within the purview of criminal procedure and dealt with in the same criminal court which deals with the offence. ii. Compensation may be claimed by the victim but if he doesn't, the court should deal with it as part of its fundamental duties. iii. If the question of compensation leads to delay in the pronouncement of sentence, the court should pass a part sentence and may postpone its decision in relation to compensation. iv. Compensation should be fixed with reference to offender's economic and social position. v. Where the offender is not in a position to compensate, the state must undertake its responsibilities. vi. The state should set up a compensation Fund with the aid of fine and other sources of revenue⁴.

The U.N. Congress on Prevention of Crime and Treatment of Offender took up the cause and contributed substantially in drafting a declaration of victim's right. It was placed on the agenda of the 7 U.N. Congress in Milan, August-September 1985. The U.N. General Assembly adopted the Basic Principles of Justice for Victims of Crime and Abuse of Power; this declaration is specifically concerned with societal response to the needs of the victim. The declaration deals with two focal areas: (a) victims of crime and (b) victims of abuse of power". The first category relates to conventional definition of crime and the declaration lays down norms for providing for i. standards for access to justice and fair treatment, ii. restitution from the 'offender, iii. compensation from the State and. iv legal assistance.

The Declaration recognized the following rights of victim of crime

i. Access to justice and fair treatment - This right includes access to the mechanisms of justice and to prompt redress, right to be informed of victim's rights, right to proper assistance throughout the legal process and right to protection of privacy and safety. ii. Restitution - including return of property of payment for the harm or loss suffered; where public officials or

other agents have violated criminal laws, the victims should receive restitution from the State. iii. Compensation - when compensation is not fully available from the offender or other sources, State should provide financial compensation at least in violent crimes, resulting in bodily injury for which national funds should be established. iv. Assistance - victims should receive the necessary material, medical, psychological, and social assistance through governmental, voluntary and community' - based means. Police, justice, health, and social service personnel should receive training in this regard⁵.

The main objectives of this article are

i. To know the problems of victims, ii. To understand the offences against the victims, iii. To know the laws related to victims, iv. To understand the compensation of victims, v. To know the Rights of victims, vi. To know the remedies of victims

Laws relating to Compensation

The provision relating to compensation to the victims of crime by the offender are contained in Section 357 of the Criminal Procedure Code, 1973 and Section 5 of the Probation of Offenders Act, 1959 and some other statues Section 5 of the Probation of Offenders Act empowers a trial court, in its discretion, to order for 'reasonable compensation' to any person for his loss or injury caused to him by the offender who is released under Section 3 or Section 4 of the Act.

The power to compensate the victims of crime under Section 357 of the Criminal Procedure Code is not a new remedy provided under Criminal Procedure Code of 1973. Even Sections 545 and 546 of the Criminal Procedure Code, 1998 provided for compensating victims of crime. The Law Commission of India noted in its Forty First Report (1969) our courts did not exercise their statutory powers under this section as freely and liberally as they could be desired. The Commission favored payment of compensation out of fine imposed on the offender. Accordingly, With a view to give a substantive power to the trial court to this effect, it recommended insertion of a substantive provision for payment of compensation to the victim of crime.

Under Section 357(1) of the Criminal Procedure Code the court has been empowered to order the payment of compensation to the victim of an offence out of the fine imposed on the accused person while passing an order of sentence of which fine forms a part. Clause (b) of sub-section (1) provides that for compensating the person who has himself suffered injury or loss when compensation is recoverable by a person in a civil court. Clause (c) contains a provision for compensating the heirs and dependents of the person who is victim of a homicide.

Sub-section (3) of Section 357 of the Code, which was introduced for the first time in 1973, provides that when a court imposes a sentence of which fine does not form a part, it may direct the accused to pay compensation. Clauses (a) to (d) sub-

section (1) of Section 357 reproduce word for word clauses (a)(b), (bb), and (c) respectively of the old sub-section (1) of Section '545 with the only change that definite article 'The' has been inserted in clause (a) before the word 'expenses'. Section 357(3) runs: "When a Court imposes a sentence of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced".

It is indeed a step forward in our criminal justice system and reflects the concerns of the legislature for the victims of crime who suffer loss or injury due to the act, neglect or default of the accused. The object of sub-section (3) of Section 357 is to empower the court to award compensation to the heirs and dependents for the loss resulted from the death of the victim of the crime. The compensation should be payable for any loss or injury, whether physical or pecuniary and the court shall give due regard to the nature of the injury, the manner of inflicting the same, the capacity of the accused to pay and other relevant factors. Thus, by the new Section, the jurisdiction of the criminal court has been extended to liberally order for compensating a victim of crime for his loss or injury even in those cases where fine does not form a part of the sentence, which ordinarily lies in the domain of the civil court⁶.

The restorative and reparative theories that have developed in response to the plight of the victims of crime also underline the necessity of compensate the victims of crime. -Their Argument is that sentence should move away from punishment of offender towards restitution and reparation, aimed at restoring the harm done and calculated accordingly. Restorative theory encompasses the notion of reparation for the effects of the crime. It envisages less resort to custody, with onerous community based sanctions requiring offenders to work in order to compensate victims and also contemplating support and counseling offenders to reintegrate them into community. Such theories therefore tend to act on a behavioral premise similar to rehabilitation, but their political premise is that compensation for victims should be recognized as more important than notice of just punishment on behalf of the state⁷.

The Supreme Court of India observed plight of the rape victims in India and expressed serious concern and suggested that the defects in criminal laws be removed soon. The Court observed as follows in Delhi Domestic Working Women's Forum v. Union of India.

"The defects in the present system are firstly, complainants are handled roughly and are not giving such attention as is warranted. The police, more often than not. Humiliate the victims. The victims have invariably found rape trials an experience. The experience of giving evidence in Court has been negative and destructive. The victims often say, they considered the ordeal to be even worse than the rape itself. Undoubtedly the Court

proceedings added to and prolonged the psychological stress they had to suffer as a result of the rape itself."

In view of this, the Court laid down the following guidelines for trial of rape cases: i. The complainants of sexual assaults cases should be provided with legal representation. Such a person must be well acquainted with criminal justice. The victims advocate's role should not be only to explain to her the nature of 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 consulting 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 represents her until the end of the case. ii. Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state at the police station the guidance and support of a lawyer at this stage would be of great help to her. iii. The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and the police report should state that the victims was so informed. iv. A list of advocates willing to act in these cases should be kept at the police station for victims who did not have any particular lawyer in mind, or whose own lawyer was unavailable. v. The advocate shall be appointed by the Court on application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay advocates would be authorized to act at the police station before leave of the Court was sought or obtained. vi. In all rape trials anonymity, (name not to be disclosed), of the victim must be maintained, as far as necessary. vii. It is necessary, having regard to the directive principles contained under Art.38 (1) of the Constitution, to set Criminal Injuries Compensation Board. Rape victims frequently incur substantial loss. Some, for example, are too terrorized to continue in employment. viii. 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 the loss of earnings due to pregnancy and childbirth if this accrued as result of rape⁸.

The National Commission for Women should be asked to frame schemes for compensation and rehabilitation to ensure justice to victims of such crimes. The Union of India shall then examine and take necessary steps to implement them at the earliest. The Committee feels that the system must focus on justice to victims and has, thus, made the following recommendations, which include the rights of the victim to participate in cases involving serious crimes and to adequate compensation.

The victim, and if he is dead, his legal representative shall have the right to be impleaded as a party in every criminal proceeding where the offence is punishable with 7 years imprisonment or more.

In select cases notified by the appropriate government, with the Permission of the court an approved voluntary organization shall also have the right to impaled in court proceedings.

The victim has a right to be represented by an advocate of his choice; provided that an advocate shall be provided at the cost of the State if the victim is not in a position to afford a lawyer. The victim's right to participate in criminal trial shall, inter alia, include: i. To produce evidence, oral or documentary, with leave of the Court and/or to seek directions for production of such evidence. ii. To ask questions to the witnesses or to suggest to the court questions, which may be put to witnesses? Iii. To know the status of investigation and to move the court to issue directions for further investigation on certain matter or to a supervisory officer to ensure effective and proper investigation to assist in the search for truth. iv. To be heard in respect of the grant or cancellation of bail. v. To be heard whenever Prosecution seeks to withdraw and to offer to continue the prosecution. vi. To advance arguments after the Prosecution has submitted arguments. vii. To participate in negotiations leading to settlement of compoundable offences.

The victim shall have a right to prefer an appeal against any adverse order passed by the court acquitting the accused, convicting for a lesser offence, imposing inadequate sentence, or granting, inadequate compensation. Such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court.

Legal services to victims in select crimes may be extended to include psychiatric and medical help, interim compensation, and protection against secondary victimization.

Victim compensation is a State obligation in all-serious crimes, whether the offender is apprehended or not, convicted or acquitted. This is to be organized in a separate legislation by Parliament. The draft bill on the subject submitted to Government in 1995 by the Indian Society of Victim logy provides a tentative framework for consideration.

The 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. It may specify offences in which compensation may not be granted and conditions under which it may be awarded or withdrawn. It is the considered view of the Committee that 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. The cost for providing it is not exorbitant as sometimes made out to be. With increase in quantum of fine recovered⁹.

Conclusion

The expanding universe of compassionate criminology must so respond realistically to the new challenge of human rights and

social justice as to salvage, solace and resituate victims of crime and abuse of power by resorting to new methodologies of reparative, compensatory, preventive and other judicial remedies. The victims of crime must claim our attention. Injustice to him/her can be fully undone only by recitative justice, beyond punishment of the offender. The most important interest of the victims of crime is restitution, from the victim's point of view; restitution is beneficial because it helps to make whole the victim's crime related loss. The present laws in the absence of legal mandate to pass an order of restitution to the victim of crime in appropriate case only do lip service to them. Making a mandatory provision for compensating the victim of crime by offender *may* not solve all the problems of the victim of crime, because this provision also will suffer from the same disadvantage that the offender in most of the cases would be discharged or acquitted due to lack of evidenc or other technicality in the procedure. As the provision merely emphasizes that the victim of crime be compensated only on conviction, it is not likely to be of real help. There is therefore an urgent need to establish a victim assistance and compensation board to provide assistance and compensation to the victim of crime. Therefore, it is high time that the government of India should come forward with a scheme/program to provide compensation and assistance to the victims of crime for their loss or injury. As we know the victims as well as the accused/offenders in most cases are necessarily poor, restitution alone cannot solve the problems of the victim of crime. Therefore, a consolidated victim welfare fund may be created on a statutory basis, the fund will be created from the total amount collected by the State as fine from the offenders/accused and also a suitable and matching grant should be provided by the State. A Board named, as victim Welfare Board, which will be *of* non-political composition, will administer the fund. The payment of compensation shall be left *to* the discretion of the Board and it may refuse payment where there has been undue delay in reporting *to* police about the occurrence and also where the victim contributed to the commission of the crime¹⁰.

For too long the victim of crime have been forgotten and forsaken lots of the criminal justice system. If the victims come to regard their treatment as unfair, distorting of reality or little concerned with their own rights, feeling and interest or if the decisions are made which are felt to be unsatisfactory, it is possible that this Secondary Victimization" by the system may lead *to* disinterest and future non cooperation by the victim. When the victim chooses not to cooperate with the system, it will collapse. Therefore, there is a need for renewal of emphasis and enhanced sensitivity to the rights of the victim. Victim's right *to* assistance is *now* more acceptable in the developed countries. In India, though there are very limited legal provisions for compensation *to* the victims of crime by the offender, it received a very cold reception at the hands of judiciary. Hence, there is an urgent need for streamlining the system by legitimately including victim's rights and interests in

the system. So also, the victim should be made "whole" with monetary recovery and support service¹¹.

In this context, it is pertinent to note that the Supreme Court in *State of Gujarat v. Honorable High Court of Gujarat*¹⁰ directed the state governments to frame law to pay compensation to the victims of crime from the earning during their sentence period. Such compensation should either be paid directly to the victims or through common fund to be created for this purpose or any other feasible mode. Enacting a law on these lines will be in the fulfillment of the constitutional obligation of the State under Articles 39 (1) and 41 of the Constitution of India, which vouchsafe justice and equal protection of law. The new enactment will also be in accordance with U.N. Declaration of Basic Principles of Justice for Victims of Crime and U.N. Declaration of Basic Principles and Guidelines on the "Right to Reparation for victims of violation of Human Rights"¹².

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