

3. Victim Participation to Ensure Criminal Justice

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i. Abstract

Since time immemorial, whenever a crime is committed it is considered to be committed against the society as a whole. Hence, the state took it upon themselves to run the criminal proceedings essentially putting the actual victim at a backseat in the entire criminal justice system reducing the to a mere witness. However, it is high time for making a paradigm shift from this to a more victim-centric approach and the important advantages and drawbacks of this approach are discussed below. An analysis is made to the amendments that have been brought to the Rome Statute in order to incorporate victim participation in criminal proceedings at the International Criminal Court. Next, a comparison is made with the legal framework in India and identify the scope of improvement.

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1. Introduction

To administer the criminal law efficiently, effectively and even-handedly a fundamental obligation of any law-abiding body is to be governed by the rule of law. This function is an attribute of the State or nations as well as international tribunals. The quality of governance democratic country is judged inter alia, by how the justice system is administered, and its effectiveness and the fairness of an international tribunal instilling faith in an international order. Society is a local or international reasonably expects that the criminal justice system will promote the common good and free atmosphere, the failures or inadequacies in the criminal justice system apparatus are bound to have an adverse effect on the life and conduct people. One such neglected aspect is that of victim participation.

2. Concept of Criminal Justice

Proponents of victims' rights argue that the criminal justice system should reflect and strike a balance between the rights of the victim and the rights of the accused. They further contend that prosecutorial discretion should be modified to allow the interests of the victim to come to the fore at the trial, as the rights of the defendant currently take center stage.⁵⁰

Secondly, those in favor of providing the victim with a greater voice in the criminal justice process contend that auxiliary prosecution, through a specific victim lawyer ought to be available for the victim. The predominant fear, however, pertaining to the introduction of a victim prosecutor, in addition to the public prosecutor, is that this practice would violate the due process rights of the defendant.⁵¹

⁵⁰ Rupert Holden, Victim Participation within the International Criminal Court, 3 King's Inns Student L. Rev. 51 (2013).

⁵¹ *Ibid.*

2.1. The Rational behind the Concept

Following the crimes that were prosecuted in the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), there was a need for the ICC to design an incorporative system for victims that was mindful of the immense suffering they had experienced. The Nuremburg and Tokyo International Military Tribunal (IMTs) were groundbreaking for prosecuting serious crimes. Despite the enormity of victim suffering during World War II, some claim that the IMTs had 'betrayed victims' by failing to adequately consider their interests. Hence incorporation of the same was important in the existing criminal structure.

2.2. Advantages of Such Participation

Victim participation has several advantages. It is considered to be indispensable for shedding light on international crimes. Victims bring in light high atrocities faced by them by the hands of the most power centric people or group of people and in hence, in view of this, should be able to speak in their capacity.

Victim participation can also be considered a form of (moral) reparation, as the person who has been wronged get a sense of being part of the justice delivery system. Telling of their stories can help victims to heal their pain and restore their dignity.

Furthermore, victim participation can contribute to reconciliation by helping both victims and torturers to reintegrate with their communities. It allows both victims and torturers to identify themselves with the participants in the proceedings. While participation in practice is only accessible to certain persons, those that remain at home can feel involved in the process thanks to modern channels of communication like video conferencing, social media etc. Hence, it is a natural understanding that victim participation can be an effective tool to ensure criminal justice.

2.3. International Instrument that Envisages on Victims Rights of Participation

In particular, the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (the Basic Principles) anticipated that international law's future would be increasingly victim- orientated. The ethos behind the Basic Principles has been substantially incorporated into the Rome Statute, considering the language in Principle 6(b) is directly mirrored in Article 68(3).

3. Recognition of Victim Participation Mechanism by the International Criminal Court

3.1. The Legal Framework

Victim participation in proceedings is a part of the Rome Statute of the International Criminal Court (ICC). It is specially outlined in Article 68(3) of the Statute, which provides that '[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.' The Chambers were given the task of arranging victim participation within this framework.⁵²

The framework provided for it by the drafters of the Rome Statute is vague, hence creating troubles in its interpretation over the years. The modalities for the participation of victims are further outlined in the Rules of Procedure and Evidence

Article 68(3) is one of its kind provision which is applicable throughout the entire procedure before the ICC, which consists of three phases: pre-trial, trial, and appeal.

⁵² Article 68 (3), Rome Statute of the International Criminal Court, 1998.

Further, when under Article 15(3) the Prosecutor opens an investigation *proprio motu* or when under Article 19(3) of the statute, the jurisdiction of the Court or the admissibility of a case is challenged, and when reparations are awarded to victims under Article 75 all of these can be done by legal representatives of the person approaching the tribunal.

Generally, Article 68(3) has permitted victims to:⁵³

- a. propose evidence, including calling witnesses;
- b. discuss evidence proposed by prosecution and defense, which includes examining the witness and making submissions on the evidence's admissibility or probative value;
- c. access the Registry's record of case;
- d. attend public and closed sessions; and
- e. participate in oral and written motions.

Allowing victims to exercise these rights throughout all stages of proceedings has equipped victims with the necessities to contribute to the ICC's mandate of ending impunity for international criminals and further the main aim of such participation.

3.2. Who can be Classified as a Victim under the Rome Statute

The Rome Statute's drafters recognized that participation from indeterminate numbers of victims could be costly and time-consuming, and would risk bringing unbearable prejudice to the accused if victims adopted quasi-prosecutorial roles. Hence, the rules are quite stringent on the same.

The Rules of Procedure and Evidence the term “victim”. According to Rule 85(A), victims are 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'. This covers both direct and indirect victims, the latter being most of the time family members. Victims are 'natural persons' if they supply the ICC with proof of

⁵³ Gauthier de Beco, *Victim Participation in Proceedings before the International Criminal Court: Resolving Contentious Issues*, 3 Hum. Rts. & Int'l Legal Discourse 95 (2009).

identity. This requirement has been problematic, as victims in war-stricken regions are often unable to obtain the necessary documentation."

3.3. Definition of Harm to Qualify as a Victim

The major problem in determining harm is that neither the Rome Statute nor its accompanying rules define 'harm'. However, the Pre-Trial Chamber in one of the cases has held that harm should be assessed case by case in light of Article 21(3),⁶⁶ which requires interpretation of the Rome Statute to be 'consistent with internationally recognized human rights'. Accordingly, 'harm' includes physical suffering," emotional suffering⁶⁹ and economic loss, based upon Principle 1 of the Basic Principles.

Victims may suffer harm both directly and indirectly. Direct victims suffer harm as a result of the commission of a crime within the ICC's jurisdiction, whilst indirect victims suffer harm as a result of harm that has been suffered by the direct victim.

3.4. Conditions imposed on the Victims who wish to Participate

There are various conditions provided in the Article itself. First, Article 68(3) of the Rome Statute provides that victims may only participate when their personal interests are affected. This leaves a certain margin of discretion to the judges.

Second, Article 68(3) of the Rome Statute provides that victims may share 'their views and concerns at stages of the proceedings determined to be appropriate by the Court'.

Third, Article 68(3) of the Rome Statute provides that victim participation must be 'not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Furthermore, victims may be allowed only to make opening and closing statements. In addition, they might have to choose legal representatives to participate in the proceedings, as is foreseen by Article 68(3) second sentence. According to the Rules of Procedure and Evidence, victims

may choose their legal representatives by themselves, although the Chamber may order them to choose common representatives.

To balance the interest for the defense as well, the Defence must be made aware of victims' requests to intervene and have the opportunity to react. During the proceedings, it has the right to reply to any observation made by their legal representatives. These conditions appear to be quite stringent to create hurdles in fluent participation.

To participate in proceedings before the ICC victims must fulfill three conditions: their interests must be affected; their participation must be appropriate, and they must respect the rights of the accused by any means possible even if it's unfair to bring such proof to people who are already suffering to showcase their worthiness to appear as a victim.

3.5. Specific Benefits of Victim Participation under ICC

First, victim participation has facilitated accountability and punishment for perpetrators of crimes within the ICC's jurisdiction. Crucial investigative and trial matters are often resolved through victims' testimonies.

Second, victim participation is necessary to create a credible historical narrative of the conduct that occurred. Verification of truth is a core victim interest. The ICC has acknowledged victims have much to contribute to establishing truth given their intimate experience of the crimes.

Third, victim participation is fundamental to the development of the ICC's mandate of using justice to foster sustainable peace and prevent conflict. The promotion of peace is the ultimate aspiration for any notion of justice. The ICC's mandate does not extend to overseeing the peaceful transition of societies in conflict, but it certainly requires the ICC to use its power to create conditions that conduce reconciliation in conflict-stricken regions.

For victims, the process of truth-telling contributes to healing grief-stricken communities that benefit from understanding how and why they were victimized.

Fourth, victim participation has been crucial in determining appropriate reparations. The ICC has been mandated to create a restorative reparations model.

3.6. Problems Pertaining to Victim Participation under ICC

However, the road is not all rosy as it might appear on the outset. The principal problem relating to victim participation in proceedings before the ICC is that it conflicts with other interests.

Throughout the ICC's history, there has been concern that victim participation shall amount to double prosecution, which affects the accused's rights to receive just and impartial judgment. However, the ICC has categorically rejected this argument, as victims merely 'give a different color to the facts presented in court but the clouds of doubts are always hovering.

Victim participation, however, might violate the rights of the accused in two ways. First, victim participation could affect his or her right to a fair trial. This right is protected by Article 67(1) and builds on both Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the European Convention on Human Rights (ECHR). The right to a fair trial implies the equality of arms. This means that parties to the proceedings must be on an equal footing, a critical issue for accusatorial systems.

Second, victim participation could affect the right of the accused to an expeditious trial. Article 67(1)(c) of the Rome Statute stipulates, as do both Article 14(3)(c) of the ICCPR and Article 6(1) of the ECHR, that the accused should 'be tried without due delay'. This means that he or she has the right to be found guilty or not as soon as possible

It is obvious that if the victim's participation is allowed in international criminal trials, it may take more time because they concern about the most serious crimes and because they raise complex issues, but this is not a reason to prolong them further. Thus, victim participation, however, *de facto* extends the proceedings.⁵⁴

⁵⁴ Sarah Moynihan, The Voiceless Victim, A Critical Analysis of the Impact of Enhanced Victim Participation in the Criminal Justice Process, 3 ISLRev 25 (2015).

4. Reflection on Participation of Victims in India Criminal Justice System

It is well understood that in criminal cases in India, the contest is between the accused and the State, represented by the Public Prosecutor. In effect, we all can agree that role assigned to a victim for a crime committed against him/her is marginal. The dual is fought between the State and the accused and in this, the interest of the victim is usually forgotten.

If the victims are allowed effective participation, not only will this provide much-needed relief and succour to the victims, but will also help in the proper implementation of criminal justice in India instilling the faith back in India criminal system.

4.1. Current Notions

Till date, the exclusion of the victim from the prosecution scene is sought to be justified by the concept that, by and large, crimes are directed against the society as a whole. Crimes foment unrest in the society and trigger off repercussions on societal life. The State which takes upon itself the duty to protect the life, liberty, and property of the people, and to enforce the rule of law, exercises its police power to check crimes and bring offenders to just punishments.

At present sadly it can be observed that the role played by a victim of crime in our criminal justice delivery system is not that pivotal. After the F.I.R. (first information report) is filled there is not much that the victim can do to ensure justice. He/she waits till the stage at which when he/she is called upon to give evidence in the court by the prosecution hence taking virtually a backseat in the criminal justice without much to be engaged in. They are neither a participant in the criminal proceedings launched against the offender, nor even involved in the ultimate decision-making as their views and opinions are only equal to any other witness in court. There are a plethora of instances in which the victim has been subjected to secondary victimization by the acts of the accused or their associates.⁵⁵ The law does not give much relief

⁵⁵ P. V. Reddi, Role of the Victim in the Criminal Justice Process, Student Bar Review, Vol. 18, No. 1 1-24, (2006).

in the long proceedings of the court. In some exceptional cases, an ad hoc ex gratia amount may be extended towards the victims on the discretion but usually the victim has to look for themselves. One such instance where the court took a proactive measure to ensure the interest of victims was of *Bhopal Gas Tragedy*.⁵⁶ However, their role in the process has been marginal.

4.2. Legal Provisions

The major legislation that governs the legal criminal proceedings in India is The Code of Criminal Procedure, 1973 in short referred to as CrPC. Section 301 of CrPC prosecutors of the case. It deals with the Public Prosecutor or Assistant Public Prosecutor and lays down its authority in the case. It enjoins a lawyer to prosecute any person, the Public Prosecutor conducts the prosecution, and the lawyer directions of the Public Prosecutor or the Assistant Public Prosecutor, if by the permission of the Court, submit written arguments. This inherently means that the counsel for the victim or by a private first informant can assist the Prosecutor with submit written arguments after the evidence in such an event, as pointed out by the Supreme Court in *Hukum Chand* case⁵⁷ is more or less that of a junior cannot act independently of Public Prosecutor. Hence, in short, every trial before a court be conducted by a Public Prosecutor who is a representation of the state and has nothing to do with the victims per se.

Next is Section 302 bearing the caption "Permission to conduct prosecution ", which is with reference to the inquiries and trials in a Magistrate's court. Section 301(2) applies to the prosecutions conducted in all courts whereas section 302 is confined to trial in a Magistrate's court. The distinction between sections 301(2) and 302, as highlighted by the Supreme Court in the decision of *J.K. International v. State*,⁵⁸ seems to suggest that a counsel engaged by a victim or a third party may be allowed to intervene, nay, play a primary role in the conduct of prosecution before a Magistrate's court, whereas in the sessions court, he is only permitted to have a limited or subordinate role. These provisions, namely, sections 301 and 302, give some

⁵⁶ M.C. Mehta and Ors. vs Union of India and Ors., (1986) 2 S.C.C. 176.

⁵⁷ Shiv Kumar vs Hukam Chand and Ano., (1999) 7 S.C.C. 467.

⁵⁸ M/s J.K. International vs State (NCT of Delhi), (2001) 3 S.C.C. 462.

scope for the intervention of the victim or the person aggrieved by the offense, in the trial proceedings.

In some specific cases like the cases of sexual assault or rape or any such similar offenses, at the stage of investigation, the statement of the victim is recorded and she is sent for medical examination, if necessary. In accordance with this, on a predetermined date, the victim is called upon to the court to give evidence or any other testimony. Additionally, the court has the *suo moto* power or the inherent power to summon the victim as a witness, at their discretion when they deem fit. The prosecution agency in India, the police, or the CBI is usually the in charge of conducting a criminal proceeding and the victim himself/herself who filed the complaint to initiate criminal is not made a party to the proceeding itself. However, there can be an except in a case where the proceedings are initiated based on a complaint made directly to a Magistrate and a cognizance has been taken.

However, one unique feature must not be missed. It arises when if on the consideration by the Magistrate is taken of the police report or charge sheet, and he concludes that he is not inclined to take cognizance and is in favor to drop the proceedings altogether, then, in that case, an opportunity is to be given to the victim to put their side of the story before such proceedings are completely dropped. The procedure was established in lieu of the *Bhagwant Singh v. Commissioner of Police*⁵⁹ case by the Supreme Court and is allowed to play at stage of an investigation.

One more important element found in CrPC relates to *Plea Bargain* incorporate by an amendment called the Criminal Law (Amendment) Act, 2006. It introduced the section 265A to 265C. However, the same is has nothing to do with the participation in the trials itself.

The *154th Law Commission Report* dealt with the topic of Victimology, but confined itself to a discussion on victim compensation. It did not address the issue of participation of victims in investigation and prosecution.

⁵⁹ *Bhagwant Singh v. Commissioner of Police*, (1985) 2 S.C.C. 537.

5. Conclusion

Victim's rights groups, largely responsible for the changes, welcomed the modifications made to the Rome Statute and its attached Rules to allow victims a central role throughout the criminal trial process. However, it is still uncertain whether the structural transformations presented by active participation will benefit the victims, infringe upon the rights of the accused, jeopardize prosecutorial discretion, or hamper the functioning of the ICC.

The Courts must continue to respect the rights of victims to freely express their views and provide worthy information along with opinions at various stages of the proceedings and in a way that does not infringe upon the fair trial rights of the parties.

Now analyzing the case close at home, our very own criminal law system might have some provisions but there is a lot to be incorporated. Our criminal system must aim at ensuring safety instilling a sense of security in the victims. This not only that the victim be allowed to participate in a meaningful way in the proceedings. Drawing a road map to give a better deal to the victims is the way to look forward.