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## ASSESSING VICTIMOLOGICAL PARADIGM SHIFTS IN INDIA'S NEW CRIMINAL JURISPRUDENCE

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### ABSTRACT

The earlier criminal justice system was based on the principle “it is better to free ten guilty men than convicting one innocent man” and the guilt was to be proven “beyond the reasonable doubt “that sometimes could favor the accused. However, by the rulings of Hon’ble Supreme Court, we have seen that certain additional rights were incorporated in favor of victims in various judgements but with the introduction of new criminal laws these rights have been introduced and has kept the victim, accused, witnesses at par because the new criminal laws are based on the concept of Nyaya. As we follow adversarial system of justice so the participation of victims were restricted that lead to injustice to them as they could not narrate their part before the court in a proper way now the new criminal laws have affirmed their participation from the investigation till the final appeals so that “justice will not only be done but also seen to be done “so as to shift the criminal justice system from victimology to actual victim justice by encouraging their participation, access to every information, and other ancillary rights. This article will critically examine the brief evolution of Rights of victims from the past to present and simultaneously anticipate the future of the same.

**Keywords:** Victim, BNS, BNSS, BSA, Justice, Victim-centric, Compensation.

## **Introduction**

The crime is not done only against a person but also against society and maintaining the public order it is the most essential attribute of any criminal justice system. India traditionally followed the Retributive model as that primarily focused on punishing offender & at the same time ignored the rights of the victim. The victim has been considered merely an informant by the state authorities who in return pleaded his case in the court of law which relegated his role as passive informant despite Article 21 of the constitution they were not able to defend with dignity & fairness as their procedural & participatory rights were compromised. His presence was overshadowed by the battle between prosecution & accused they suffered through the whole process of seeking justice in the garb of procedures of court room.

Now the transition towards the victim oriented justice enshrined in the new criminal laws came as a relief to the victims of crime. All the three new criminal laws namely Bharatiya Nyaya Sanhita, 2023 (BNS), that replaced the Indian Penal Code, 1860 (IPC), the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), replacing the Code of Criminal Procedure, 1973, & the Bharatiya Sakshya Adhinyam, 2023 (BSA) in place of Indian Evidence Act, 1872 were overhauled to end the pre-colonial concept of justice & replaced it with the concept of 'Nyaya' which is based primarily on logic & epistemology also to end suffering caused by ignorance as it was evident in the old criminal laws that most of the rights of the victims, accused, and witnesses were ignored that led to grave injustice. The introduction of these new criminal laws recognized that the victims are not merely mute spectators rather the individuals who have been affected by the crime and they are having equal rights to participate in the justice seeking process. This was possible only by replacing the old laws and the new laws equipped the victim with empowerment and dignity. The criminal justice system is now victim centric and ensures inclusiveness and to support them throughout this process so as to built the justice system which is truly fair and inclusive in nature considering all parameters of justice delivery system.

The new criminal laws have operated in a dual way firstly, modernized the colonial period legislations and secondly, they included mechanism that safeguarded the rights of all the parties be it accused, victim or witness.

The reformations that were done in the criminal laws would not have been possible without considering the recommendations of the "VS Malimath Committee (2003)" and also the 288<sup>th</sup> Report of India's Law Commission (2012), highlighting the right of victim to participate in the proceedings of bail, also the Victim Impact Assessment that focused on social, mental and

physical impact and it is section 396 of BNSS that talks about the awarding of that compensation to the victims through Victim Compensation Boards.

### Global Perspective of the Victim Justice

Regarding the rights of the victims it was in the USA where the movement started famously known as the “Victims Rights Movement” 1970 that was primarily result of dissatisfaction within the justice system that “it ignored the Rights of Victims as they were merely used as evidence for prosecution with no legal standing to compel action.”<sup>1</sup> Also with the establishment that highlighted the issues that favored the victims was mainly done by Warren Court Revolution with later lead to formation of the President’s Task Force in 1982 under the presidentship of Ronald Reagan in USA which lead to 68 recommendations addressing the comprehensive plan ensuring that victims must be treated with fairness, dignity & respect.

With the passage of time the rights of victims evolved in every dimension. The Indian judiciary related to Rights of victims has played a significant role in recent years which exhibited the tilt towards the restorative justice ideals, most importantly in relation to victim compensation and offender rehabilitation. These decisions had laid emphasis on victims suffering & importance of restitution even if no express provisions were there.

As we know the Doctrine of ‘King can do no wrong’ gave immunity to the sovereign which later evolved and this doctrine became redundant and now under Article 300 of the constitution of India, state can sue and also can be sued that protected the rights to the victims. We have plethora of cases where state was held responsible while acting negligently these are some of the landmark cases: *Nilabati Behera v. State of Orissa*,<sup>2</sup> *Rudal Shah v. State of Bihar*<sup>3</sup> and victim jurisprudence were additionally cemented by *D. K. Basu v. State of West Bengal*<sup>4</sup> in all these rulings victims were given compensation for custodial violence, wrongful detention etc. thereby the rights of victims were expanded through judicial system.

While such evolution of victims rights one of the questions that raised in a case in United States citing *Does v. United States*<sup>5</sup> was whether before framing of charge victims have rights and the court gave a positive affirmation of the same and also stressed on the objective of the Crime Victim Rights Act, 2004 which ensured that victims are treated with dignity, present, informed,

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<sup>1</sup> *Linda R.S vs Richard* 1973 US SC.

<sup>2</sup> (1993) 2 SCC 746.

<sup>3</sup> AIR 1983 SC 1086.

<sup>4</sup> (1997) (1) SCC 416.

<sup>5</sup> *Does vs US*, 817 F. SUPP. 2011.

and heard during proceedings and also have different rights including protection, restitution and privacy that focuses on victim centric justice.

### **Three Dimensions of Victim Rights in the New Criminal laws:**

#### **Participatory Rights**

As earlier discussed, the Indian criminal justice system is based on adversarial form of justice in which the prosecution and accused play a vital role and the victim only is required as prosecution witness at trial stage. The new laws made is clear that sexually assaulted victims have right to give their statement only to female police officer also in the presence of parent or guardian, kin or social worker at the location of their choice. Section 360<sup>6</sup> also mentions that court shall not accept any withdrawal of prosecution unless victim is given notice and opportunity of being heard this is a significant change in victim jurisprudence also under section 176<sup>7</sup> of BNSS 2023 the recording of the statements should also be done in audio-video format such as mobile phone also to facilitate the participation of victim and section 265(3) allows the recording of statement during investigation that makes process more accessible to the victim.

#### **Right to Information**

This dimension has also been broadened under new laws as under section 173<sup>8</sup> of BNSS, 2023 victim gets a copy of FIR that is free of cost, the expedient investigation has been encouraged under section 193<sup>9</sup> and within 90 days an investigation has to be completed to avoid the delays from the end of police & additionally the whole process is monitored by victim as the FIR is the corroborative piece of evidence which sets the criminal investigation into motion.

#### **Right to Compensation**

Section 396<sup>10</sup> of the Bharatiya Nagarik Suraksha Sanhita,2023 (BNSS) provides for the compensation of the victims of crime for their financial assistance & also mentions the formulations of various schemes for victims through Legal service Authorities. Section 397<sup>11</sup> allows court to impose fine on offenders and using it for treatment of victims who are sexually assaulted under provisions of section 64,65,66,67,68,70, and 71 of the Bharatiya Nyaya Sanhita

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<sup>6</sup>S.360, BNSS,2023.

<sup>7</sup>S.176, BNSS,2023.

<sup>8</sup> S.173, BNSS,2023.

<sup>9</sup> S.193, BNSS,2023.

<sup>10</sup> S.396, BNSS,2023.

<sup>11</sup> S.397, BNSS,2023.

2023 or under section 4,6,8,10 of Protection of Children from Sexual Offences Act, 2012. However, the implementation has been challenging due to bureaucratic delays, lack of awareness or due to insufficient funds in the state combating this section 65<sup>12</sup> of Bharatiya Nyaya Sanhita,2023 (BNS) has been incorporated which provides that victim must be paid medical expenses from the fine recovered from the accused & also to meet rehabilitation expenses of victim in sexual assault cases. The Hon'ble Supreme Court of India has held that "courts shall award compensation even when there is no such plea made by victim and affirming the pivotal role played by victim in reparation of sentencing."<sup>13</sup>

### **Other Rights Added:**

#### **Provision of Zero FIR**

Earlier only through the precedents of the Hon'ble Supreme Court the controversy of filing an FIR where the jurisdiction was under question but now under section 173<sup>14</sup> of the BNSS, 2023 an FIR can be filed at any police station irrespective of its jurisdiction & this provision has made the sufferings of the victims easy; as they have had to go from pillar to post for registering an FIR. Also, to conduct seamless investigation the Bureau of Police Research and Development (BPR&D) has issued standard operation procedures that police officials have to follow. The SHO while recording the FIR of any cognizable offence same has to be recorded as 'Zero FIR' that is suffixing the FIR number with Zero so that it can be distinguished from normal FIRs, also under 173(1)(ii) the concept of registering FIR through electronic medium has also been allowed this is quite helpful for the victims who don't want themselves to be indulged in the cumbersome process of law enforcement agencies like visiting police station, and also due to other coercive factors from society and family of not letting him or her to file complaint. After filing of E-FIR a sign has to be taken from victim or informant so as to register it, it is then forwarded to in charge of police station and he seeks the permission from officer not below the rank of Deputy Superintendent of Police for conducting preliminary inquiry if it carries the punishment of three to seven years.

Another provision that also reflects about the protection of victim right is Section 338<sup>15</sup> of the Bharatiya Nagarik Suraksha Sanhita,2023 (BNSS) allowing victim of engaging Advocate

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<sup>12</sup>S.65, BNS,2023.

<sup>13</sup> Ankush Shivaji Gaikwad v. State of Maharashtra, 2013 6 SCC 770.

<sup>14</sup> S. 173, BNSS,2023.

<sup>15</sup> S. 338(2), BNSS,2023.

independent of Public Prosecutor that assists the public prosecutor during the process of trial or appeal.

### **Paradigm Shift toward Justice Oriented Approach:**

The criminal justice system prior to new one in India mainly focused on victim-oriented approach but over the coming years as that approach couldn't serve the purpose & was replaced by the approach that primarily focused on justice rather than victim and his interaction with the accused. Justice oriented approach was only reflected in section 2(wa) in Code of Criminal Procedure, (CrPC), 1973 that was amended in 2009 which defined victim as someone who suffers loss or injury from an offence and includes their guardian or legal heir now under 2(1)(y) of the BNSS, (2023) the 2009 amendment expanded the rights of victims granting them right to appeal without requiring court leave under section 372 of CrPC (1973) as these rights were limited through sections 301 and 302 of the CrPC 1973, that curtailed the participatory rights of victim which were later provided in the amendment which mainly included right to choose a private Advocate, Right of compensation under 357A<sup>16</sup> (now Section 396, BNSS, 2023) and rights related appeal against any judgment or inadequate compensation and also if in any case victim is known and accused is not known still compensation can be given in that case. Trial in Absentia under section 356<sup>17</sup> of BNSS 2023 also has been of paramount importance in protecting the rights of victim as now trial can be conducted in the absence of proclaimed offender so that victim can not wait for the unreasonable time and the process of trial could be done expeditiously for serving ends of justice.

### **Role of Judiciary in safeguarding Rights of victims**

The role of judiciary in preventing rights of victims majorly started when a more liberal interpretation of Article 21<sup>18</sup> of the Indian constitution was done that subsequently changed the concept of mere Right to life & liberty with the word dignified life that includes all the Rights that we discussed earlier. Regarding the victims some landmark decisions of Hon'ble Supreme Court will explain this more vividly after the *Maneka Gandhi v. Union of India*<sup>19</sup> case it was also reflected thereafter in plethora of judgments like in *Maru Ram v. Union of India*<sup>20</sup> case the court stressed upon the rehabilitation of a victim so that he can again go back to society without

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<sup>16</sup> S.357A, CrPC, 1973.

<sup>17</sup> S. 356, BNSS, 2023.

<sup>18</sup> Article 21. Constitution of India.

<sup>19</sup> AIR 1978 SC 597.

<sup>20</sup> (1981)1 SCC 107.

any stigmatization & the new opportunities are also provided to him so that victim can start a new life again. In another landmark case of *Zahira Habibullah Sheikh v. State of Gujarat*.<sup>21</sup> it was held that there must be balance maintained between the fair trial of accused and justice provided to victim the same was reiterated in the case of *Mallikarjun Kodagali v. State of Karnataka*<sup>22</sup> that for smooth and fair running of criminal trials balance of rights of accused & victim must be considered no rights of any party should be compromised.

In another landmark case of *Rattan Singh v. State of Punjab*<sup>23</sup>, Justice V. R. Krishna Iyer and P.N Singhal in para 6 mentioned about ‘Victimology’, and opined that victim of a crime do not attract the attention of law. Victim’s reparation is still the vanishing point of law. In the case of *Mofil khan vs state of Jharkhand* <sup>24</sup> Supreme Court held “on the consideration of Rights of victims and incidental victims like family and co- sufferers, the judiciary has a paramount duty to safeguard the right of victims as diligently as those of perpetrators and society too is incidental victim of crime. In the case of *Mallikarjun Kodagali v. State of Karnataka*<sup>25</sup> ,the Apex Court went into the scope of Articles 14 & 21 of the Constitution and held that the Victim’s rights to safety and crime, cybercrimes, police protection, bodily integrity. Steps like victim impact statement, Victim impact assessment, must be given due recognition so that appropriate punishment is awarded to the convict.

“There is victimization of victim of crime both prior to trial and during trial. There is a need to balance rights of victim with rights of Accused. Both Legislature and Judiciary have addressed Rights of Victim. But a lot still remains to be done. What follows in a trial is often Secondary victimization through repeated appearances in Court in a hostile or semi-hostile environment in the Courtroom. Today, the rights of an accused far outweigh the rights of the Victim of an Offence in many respects. The Court have provided solace to the victim with monetary compensation. But that is not enough. It emphasizes that the victim is the “forgotten party” in the criminal justice system and requires statutory empowerment—not just judicial sympathy—to achieve true equity.(Para 3,4, 5 & 8).”<sup>26</sup>

## Conclusion

One of the significant breakthroughs in the new criminal laws have been the its victim centric

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<sup>21</sup> AIR 2004 SC 3114.

<sup>22</sup> (2019) 2 SCC 752.

<sup>23</sup> AIR 1981 SC 1223.

<sup>24</sup> (2021) 20 SCC 162.

<sup>25</sup> (2019) 2 SCC 752.

<sup>26</sup> *ibid.*

approach that not only strengthened the criminal justice system of India but also made it justice oriented the reflections of all the important precedents by Hon'ble Supreme Court were seen in the new criminal laws making it more specific in determining the rights of victims & their welfare has been considered of utmost importance. But mere introducing of these provisions could not help us to meet the ends of victim centric laws for its effective impact we have to make people aware about these new laws and the rights available under these laws. Also educating the other stakeholders regarding the same like police officials, NGOs, other social welfare institutions, and mass media in particular about not disclosing the identity of the victims. Through all possible medium making every person aware of provisions like Zero FIR, E- FIRs, video recording of the statements of the sexually assaulted victims also the role of judiciary has to strike a balance between adversarial and inquisitorial systems of judicial process. These new laws have significantly uplifted the rights of victims in every direction yet their implementation is a challenge for the all stakeholders and also its continuous evolution in coming time as we are aware how swiftly the society is changing and the jurisprudence of victim rights also needs to be kept balanced.