

# AN ANALYSIS OF THE VANISHING POINT OF INDIAN VICTIM COMPENSATION LAW

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*Reforms toward a restorative criminal justice system hinged on the amendment made to the Indian Criminal Procedure Code of 1973 in 2008. These amendments were undertaken by the government in order to reform India's archaic criminal laws. The major thrust of the victim related amendments were on defining 'victim' and recasting existing defunct laws related to the provision of compensation to victims. Unfortunately the major fallacy of the recent law is that it once again seems to leave the provision of compensation to the sole discretion of the judge. The prime focus of this paper would be an analysis of the above-mentioned amended law and the shortcomings of the same.*

## I. INTRODUCTION

The criminal justice system in India would ensure efficacious and expeditious justice once the law recognizes the rights of victims and adequately provides for the compensation of victims. In 2008, the Government undertook major amendments to the Criminal Procedure Code of 1973 (*hereinafter* "CrPC"), in order to strengthen India's criminal system.<sup>1</sup> The amendment focusing on victim-justice, for the first time sought to define the term "*victim*" and refurbish the defunct laws related to provision of compensation to victims. Unfortunately it once again leaves the provision of

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<sup>1</sup> The amendments were notified in Dec. 2009.

compensation to the sole discretion of the judge; something that has been rarely exercised of their own accord in the past—the vanishing point of Indian victim compensation law.<sup>2</sup>

The prime focus of the article would be victim compensation law and its interface with criminal justice. The authors will outline the recently amended law that deals with victim compensation and the shortcomings of the same.<sup>3</sup> We place the blame for such needless suffering squarely on the criminal justice system especially the non-exercise of discretion by the Indian judiciary.

## II. EVOLUTION OF THE CONCEPT OF COMPENSATION IN CIVIL AND CRIMINAL LAW

Historically, the principle of compensation to the victims of crime or wrong has been a part of most legal systems. In the 12th and 13th centuries a distinction was made between various kinds of wrongs, i.e., civil wrong and public wrongs.<sup>4</sup> In the case of civil wrongs the injury was specific to the individual, hence the perpetrator was necessitated to pay compensation. However, given that in public wrongs the offence affected the public at large, the State took

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<sup>2</sup> K.I. VIBHUTE, *Justice to Victims of Crime: Emerging Trends and Legislative Models in India*, in CRIMINAL JUSTICE: A HUMAN RIGHTS PERSPECTIVE OF THE CRIMINAL JUSTICE PROCESS IN INDIA 370, 392-93 (2004).

<sup>3</sup> Compensation is also awarded in the form of a constitutional remedy for human rights violations. It is interesting to note that compensation available under a constitutional remedy is far more readily invoked and of a greater quantum than that which is generally granted under § 357(3) of the CrPC. See *A.K. Singh v. Uttarakhand Jan Morcha*, (1999) 4 S.C.C. 476; *D.K. Basu v. State of West Bengal*, (1997) 1 S.C.C. 416; *Chairman, Railway Board v. Chandrima Das*, (2000) 1 S.C.C. 465; *Saheli, a Woman's Resource Centre v. Commissioner of Police*, (1990) 1 S.C.C. 420; *Nilabati Behera v. State of Orissa*, (1993) 2 S.C.C. 746; *Rudal Shah v. State of Bihar*, (1983) 4 S.C.C. 141; *State of Punjab v. Ajaib Singh*, (1995) 2 S.C.C. 486.

<sup>4</sup> K.D. Gaur, *Justice to Victims of Crime: A Human Rights Approach*, in CRIMINAL JUSTICE: A HUMAN RIGHTS PERSPECTIVE OF THE CRIMINAL JUSTICE PROCESS IN INDIA 350, 351 (2004).

responsibility upon itself to punish the accused.

Various justifications for compensation have been used, such as: benefit to the victims, symbolic social recognition for the victims suffering, deterrent effects on the offender as also the reformatory effects on the offender as the paying of compensation has an “intrinsic moral value of its own”.<sup>5</sup>

The Hammurabi code of ancient Babylonian makes the earliest reference to state compensation for victims of crime.<sup>6</sup> It specified that:

*“If a man has committed robbery and is caught, that man shall be put to death. If the robber is not caught, the man who has been robbed shall formally declare what he has lost . . . and the city . . . shall replace whatever he has lost for him. If it is the life of the owner that is lost, the city or the mayor shall pay one maneh of silver to his kinsfolk.”<sup>7</sup>*

This principle was well accepted in England in the Anglo-Saxon period of the seventh century. The Kentish laws of Ethelbest contained specified amounts of compensation for a large number of crimes ranging from murder to adultery.<sup>8</sup> In the early Common Law of Middle England, if a man was

<sup>5</sup> LAW COMMISSION OF INDIA, ONE HUNDRED AND FIFTY FOURTH REPORT ON THE CODE OF CRIMINAL PROCEDURE, 1973 (1996), at 57.

<sup>6</sup> See Morris Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment*, 28(1) OXFORD JOURNAL OF LEGAL STUDIES 57, 58-61(2008).

<sup>7</sup> Marlene A. Young, *Meeting Victim Needs: What is the Role of Victim Compensation in Recovery?* (Discussion Paper), THE NATIONAL CENTRE FOR VICTIMS OF CRIME (May, 2003), at 1, available at <http://www.ncvc.org/ncvc/AGP.Net/Components/documentviewer/Download.aspx?DocumentID=32597>. See generally Gerhard O. W. Mueller, *Compensation for Victims of Crime: Thought before Action*, 50 MINN. L. REV. 213 (1965).

<sup>8</sup> Dr. Kaushal Kishor Bajpai, *The History of Compensation of the Victims of Crime*, AIR WEB WORLD, <http://airwebworld.com/articles/index.php?article=1058> (last visited Jan 30, 2012).

murdered, the victim's family was entitled to a wergild of four pounds.<sup>9</sup> Over time the criminal justice system was separated from the civil system due to the simultaneous growth of Royal and Ecclesiastical power.<sup>10</sup> Offences like murder, robbery and rape did not remain within the category of tort to be settled by compensation but were regarded as crimes against society and were punishable as such.<sup>11</sup> Hence, state compensation disappeared and the state played a punitive role, imposing punishment for not only the harm done to individual victims but also harm done to the king or feudal lord.<sup>12</sup>

This saw a change with the stirrings of the prison reform movement in Europe during the nineteenth century.<sup>13</sup> Jeremy Bentham believed that due to the presence of the social contract between the state and the citizen, victims of crime should be compensated when their property or person was violated. It is the role of the state to prevent crime and protect people and property. If the state is unable to prevent a crime it falls upon the state to support the victim. State compensation is further justified because it is the political, economic and social institutions of the state that generate crime by poverty, discriminations, unemployment and insecurity.<sup>14</sup> This justification has not been completely accepted, as it would entail the compensation of all victims of crime to the full extent of damages suffered by them. Nonetheless it is the foundation for providing compensation as part of the state's response to the suffering of victims.<sup>15</sup>

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<sup>9</sup> Young, *supra* note 7, at 2.

<sup>10</sup> Bajpai, *supra* note 8.

<sup>11</sup> Bajpai, *supra* note 8.

<sup>12</sup> *Supra* note 5.

<sup>13</sup> *Supra* note 5.

<sup>14</sup> *Id.* See generally Frank Carrington & George Nicholson, *The Victims Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV. 1 (1983).

<sup>15</sup> Young, *supra* note 7, at 3.

This concept of state compensation was discussed at fifth International Prison Congress in the latter half of the century.<sup>16</sup> Despite the activism of Penologists like Jeremy Bentham the acceptance of the principles of compensation to the victims remained unfulfilled.<sup>17</sup> During the 1950's Margery Fry, an English penal reformer called refocusing on the plight of victims and the bestowing of effective remedies on victims such as state compensation.<sup>18</sup> This heralded the establishment of state compensation programs in the American and European jurisdictions.<sup>19</sup> Britain set up a non-statutory program in 1964, which was administered by the Criminal Injuries Compensation Board and the funds being sanctioned by the Parliament annually.<sup>20</sup> This compensation was provided in the form of a lump-sum payment to the victim and was computed in the same manner as damages in a civil award.<sup>21</sup> This program was given statutory form in the Criminal Injuries Compensation Act, 1995 which computed compensation based on a tariff scheme, which took into account the need for special care and dependency.<sup>22</sup>

The move towards state compensation was mirrored in the United States, with California being the first state to do so in 1965.<sup>23</sup> In 1984 the Victims of Crime Act 1984 was enacted by the Congress, which established a Crime Victims Fund within the US Treasury.<sup>24</sup> This compensation is

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<sup>16</sup> Bajpai, *supra* note 8.

<sup>17</sup> *Id.*

<sup>18</sup> Abner J. Mikva, *Victimless Justice*, 71 J. CRIM. L. & CRIMINOLOGY 189, 191 (1980). *See generally* Margery Fry, *Penal Reform in the Colonies*, 8(2) THE HOWARD JOURNAL OF CRIMINAL JUSTICE 90 (1951).

<sup>19</sup> *Supra* note 5, at 57-58. *See generally* Terence Morris, *British Criminology: 1935-48*, 28(2) BRIT. J. CRIMINOLOGY 20, (1988).

<sup>20</sup> *Supra* note 5.

<sup>21</sup> *Supra* note 5.

<sup>22</sup> *Supra* note 5, at 58.

<sup>23</sup> *Supra* note 5, at 58.

<sup>24</sup> *Supra* note 5, at 58.

provided only to innocent victims and those who are involved in serious crimes.<sup>25</sup>

This necessity for compensating victims of crime was emphasized by the United Nations in its Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the 2006 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. The former deals with the victims of domestic crimes, while the latter with victims of international crimes.

The need for a victim compensation framework has been recognised by the international community. Though the Universal Declaration of Human Rights, 1948<sup>26</sup> does not specifically speak of compensation, Article 9 states that no one “shall be subject to arbitrary arrest, detention...”. By reading the procedural guarantees provided under Articles 6, 7 and 8 one could infer that for the violation of such rights the victim is entitled to an “effective remedy”. Given the facts of the case, compensation could be one such effective remedy.

Furthermore, the International Covenant on Civil and Political Rights<sup>27</sup> states that a victim of unlawful arrest or detention shall have an enforceable right to compensation.<sup>28</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>29</sup> has an identical

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<sup>25</sup> *Supra* note 5, at 58. See also David L. Roland, *Progress in the Victim Reform Movement: No Longer the Forgotten Victim*, 17 PEPP. L. REV. 35, 36 (1989).

<sup>26</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc.A/RES/217(III) (Dec. 10, 1948).

<sup>27</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200(XXI) A, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966).

<sup>28</sup> *Id.*, Art. 9(5).

<sup>29</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

provision.<sup>30</sup> American Convention on Human Rights<sup>31</sup> entitles a person to compensation in case of miscarriage of justice due to wrong sentencing.<sup>32</sup>

The right of compensation to the victim was finally crystallised in the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>33</sup> of 1985, which recognises four types of rights and entitlements of victims of crime: (a) Access to justice and fair treatment, (b) Right to restitution, (c) Personal assistance and support services, and (d) Compensation.<sup>34</sup>

In the pre-independence period the criminal justice system remained largely preoccupied with the *crime-control oriented* policy that viewed criminal justice in terms of a state monopoly with a narrow focus of justice, confined to the State and the accused.<sup>35</sup> However, in the post-independence period it expanded beyond the reformation and rehabilitation of the offender to acknowledge the plight and concerns of the victims.<sup>36</sup>

In spite of this emerging trend the aspect of compensation remains subordinate to the punitive role of the State. Justice V.N. Krishna Iyer, highlighted the continued apathy of the criminal justice system:

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<sup>30</sup> *Id.*, Art. 5(5).

<sup>31</sup> American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

<sup>32</sup> *Id.*, Art. 10.

<sup>33</sup> United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. Doc.A/RES/40/34 (Dec. 11, 1985).

<sup>34</sup> It states that when compensation is not fully available from the offender or other sources, the State should provide it at least in violent crimes that result in serious bodily injury, for which a national fund should be established.

<sup>35</sup> VIBHUTE, *supra* note 2, at 374-75.

<sup>36</sup> *Id.*

*“It is the weakness of our jurisprudence that victims of crime and the distress of the dependents of the victim do not attract the attention of law. In fact, 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”.<sup>37</sup>*

### III. INDIAN POSITION

The present criminal justice system is based on the assumption that the claims of a victim of crime are sufficiently satisfied by the conviction of the perpetrator.<sup>38</sup> The Committee on Reforms of Criminal Justice System, chaired by Justice Dr. V.S. Malimath, by the Ministry of Home Affairs, in its Report submitted to the Government of India in March 2003, perceived that *“justice to victims”* is one of the fundamental imperatives of criminal law in India.<sup>39</sup> It suggests a holistic justice system for the victims by allowing, among other things, participation in criminal proceedings as also compensation for any loss or injury.<sup>40</sup>

In India, there are five possible statutory provisions under which compensation may be awarded to victims of crime, namely:

- Fatal Accidents Act, 1855
- Motor Vehicles Act, 1988
- Criminal Procedure Code, 1973
- Probation of Offenders Act, 1958; and

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<sup>37</sup> Rattan Singh v. State of Punjab, (1979) 4 S.C.C. 719, 721, ¶ 6.

<sup>38</sup> Gaur, *supra* note 4, at 351.

<sup>39</sup> N.R. Madhava Menon, *Victim's Rights and Criminal Justice Reforms*, THE HINDU, Mar. 27, 2006, at 7, available at <http://www.hindu.com/2006/03/27/stories/2006032703131000.htm>.

<sup>40</sup> 1 Report of Committee on Reforms of Criminal Justice System, Ministry of Home Affairs, Government of India (2003) at 80-81, ¶ 6.8.



- Constitutional remedies for human rights' violations

Until 2009, there was no comprehensive legislation or a well-designed statutory scheme in India that allowed a victim to seek compensation from either the perpetrator or the State. The recent amendment to the CrPC notified in 2009, addressed the victim's right to compensation. It is a step forward; however, some inherent flaws remain.

### **A. Position Prior To The Amendment**

A careful glance at the CrPC, 1973, reveals a highly fragmented legislative scheme for compensating victims.<sup>41</sup> In pursuance of the recommendation of the Law Commission in its Forty-first Report (1969), a provision was made for the victims of crime that has been provided in Section 357 of the CrPC. This provision states "*Court may award compensation<sup>42</sup> to victims of crime at the time of passing of the judgment, if it considers it appropriate in a particular case, in the interest of justice*".

Unfortunately, under Section 357(1), compensation is obtainable only when the court imposes a fine and the amount of compensation is limited to the amount of the fine. It lays down four grounds for imposing a fine: (1) defraying pecuniary losses incurred by the person in prosecution, or (2) by a bona-fide purchaser of stolen goods, or (3) for loss

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<sup>41</sup> Sections 357, 421 & 431 empower a criminal court, at its discretion, to award compensation to a victim of crime as well as to recover it and pay it to him.

<sup>42</sup> Section 357(1) empowers the court to award compensation out of the fine in the following cases: for meeting proper expenses of prosecution; compensation to a person or dependants for the loss or injury caused by the offence when he can recover compensation in a civil court; compensation to persons entitled in damages under the Fatal Accidents Act, 1855; and compensation to a bona fide purchaser of property which being the subject of theft, criminal misappropriation, cheating, etc. is ordered to be restored to the person entitled to it.

caused by injury or death, or (4) if the victim has suffered loss or injury caused by the offence.

However, Section 357(3)<sup>43</sup> empowers the Court to award compensation for loss or injury suffered by a person, even in cases where fine does not form a part of the sentence. It is left to the discretion of the court to decide the amount of compensation, depending on the facts and circumstances of each case. This sub-section was introduced after the repeal of the CrPC of 1898. Since, this provision is not conditioned on a sentence of fine; some argue that it assumes the role of an additional punishment.<sup>44</sup>

Although the principle underlying Section 357 is similar to that envisaged in the UN Basic Principles of Justice for Victims of Crime, its application is limited to where (1) the accused is convicted and (2) either the compensation is recovered in the form of a fine, when it forms a part of the sentence or a Magistrate may order any amount to be paid to compensate for any loss or injury by reason of the act for which the accused has been sentenced and (3) in awarding the compensation the capacity of the accused has to be taken into account by the Magistrate.<sup>45</sup> Practically, given the low rates of conviction in criminal cases<sup>46</sup>, the long drawn out proceedings and the relatively low capacity of the average accused to pay, one needs to question whether an effective

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<sup>43</sup> § 357(3): “When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused 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”.

<sup>44</sup> VIBHUTE, *supra* note 2.

<sup>45</sup> N.R. Madhava Menon, *Victim Compensation Law and Criminal Justice: A Plea for A Victim Orientation in Criminal Justice*, in CRIMINAL JUSTICE: A HUMAN RIGHTS PERSPECTIVE OF THE CRIMINAL JUSTICE PROCESS IN INDIA 362, 363-364 (2004).

<sup>46</sup> *Id.* at 364. It is less than 10%.

victim compensation scheme exists.

The dismal provision of compensation to victims of crime was due to the infrequency with which the judges invoked this section—the vanishing point of Indian victim compensation law. This has been dealt with in detail at a later point in this note.

### **B. Position Post Amendment**

To address the absence of a definition of a victim, subsection (w) has been inserted in Section 2 of the amended CrPC as below:

*“(wa) ‘victim’ means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression ‘victim’ includes his or her guardian or legal heir”.*

Let us compare this definition with the comprehensive one in the United Nations Declaration of the Basic Principle of Justice for the Victims of Crime and Abuse of Power<sup>47</sup>:

*“Victim includes, any person who, individually or collectively, has suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of his fundamental rights, through acts or omissions that are in violation of criminal laws operating within the member States including those laws prescribing criminal abuse of power. A person would be considered a victim, irrespective of whether the perpetrator is identified,*

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<sup>47</sup> *Supra* note 33. These U.N. Basic Principles were premised on the recommendations of the Sixth U.N. Congress on the Prevention of Crime and Treatment of Offenders was passed by the U.N. General Assembly in 1985.

*apprehended, prosecuted or convicted and irrespective of familiar relationship between the perpetrator and the victim. The term victim includes, where appropriate, the immediate family of the dependents of the direct victim and the persons who have suffered harm in intervening to assist victim in distress or to prevent victimization. The provisions are applicable to everyone irrespective of race, age, cultural belief or practices, property, birth or family status, ethnic or social origin disability and nationality."*

Given the propensity of a narrow interpretation of "loss or injury" suffered by the victim we believe that an expansive delineation of what constitutes loss or injury should be added by the legislature. This will also check the varied interpretations made and ensure uniformity in the dispensation of compensation. Explicit inclusion of compensation to victims of criminal abuse of power should also have been made.

Additionally, there is a need to include persons who have suffered harm while *intervening* to assist victims in distress or to prevent victimization. For instance, in the United States, specifically California, Massachusetts and New York, have laws that provide for the compensation to those who suffer injuries while preventing a crime or apprehending a criminal, etc.<sup>48</sup> It is important that along with victims the police are also entitled to compensation. Thus, these provisions encourage both the police and populace at large, to curb crime.

### **C. Analysis Of Section 357A**

Under the amended Indian law, sub-section (1) of Section 357A of the CrPC discusses the preparation of a scheme to provide funds for the compensation of victims or his dependents who have suffered loss or injury as a result of a

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<sup>48</sup> Gaur, *supra* note 4, at 360-61.

crime and who require rehabilitation.

Sub-section (2) states that whenever the Court makes a recommendation for compensation the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the above-mentioned scheme. It is significant that the Legal Services Authority, comprising of technical experts, has been entrusted the task of deciding the quantum of compensation, since they are better equipped to calculate/quantify the loss suffered by a victim. However, the provision loses its teeth because the discretion remains with the judge to refer the case to the Legal Services Authority- a situation that has previously been the vanishing point of Indian victim compensation law. The problem is compounded by the fact that traditionally Indian judges have been hesitant to invoke this provision. A more effective solution could be to make compensation a statutory right, with a provision mandating that the judges have to record reasons for not awarding compensation.

It is a positive development that in sub-section (3) the trial court has been empowered to make recommendations for compensation in cases where-

- Either the quantum of compensation fixed by the Legal Services Authority is found to be inadequate; or,
- Where the case ends in acquittal or discharge of the accused and the victim has to be rehabilitated.

However, there is scope to further extend compensation to victims in these cases that end in acquittal or discharge beyond rehabilitation to compensation for loss.

Sub-section (4) of Section 357A states that even where no trial takes place and the offender is not traced or identified; but the victim is known, the victim or his dependents can apply to the State or the District Legal Services Authority for award

of compensation. We see a shift towards state funded victim compensation as has been established in the United Kingdom and the United States. This is an extremely progressive development that takes into account practical reality of an overburdened criminal justice system, which is unable to identify all offenders and prosecute them.

Sub-section (5) says that on receipt of the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months. It is pertinent that a time frame has been provided within which the Legal Services Authority should conduct its enquiry and award compensation. A period of two months, as specified in the proposed amendment, would ensure speedy delivery of justice to the victim and specification of a time period would create accountability and prevent dilatory measures. Moreover, it should be noted that the section speaks of 'adequate compensation'; thus ensuring the quantum of compensation awarded should be just and fair.

Further, sub-section (6), states that, in order to alleviate the suffering of the victim, the State or District Legal Services Authority may order immediate first-aid facility or medical benefits to be made available free of cost or any other interim relief as the appropriate authority deems fit. It is a positive that the section speaks of "*alleviating the suffering*" of the victim and seeks to help the victim recover in the after-math of the crime and ensure that the victim does not have to wait till the end of the trial to recover these costs. The statutory recognition of the right to interim relief is an important step and an urgent need of the hour.

Furthermore, Section 372 of the CrPC has been amended, containing the following proviso:

*"Provided that the victim shall have a right to prefer an appeal against any order passed by the Court*

*acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.”*

The section provides a victim a specific right of appeal in the following circumstances:

- Acquittal of the accused,
- Conviction for a lesser offence, and;
- Inadequate compensation.

Earlier, the section mentioned a general right to appeal and restricted the right to only those situations as provided for in the CrPC or any other applicable law.

Apart from the above-mentioned provisions, the victim can claim compensation by approaching a higher court under Section 482 of the CrPC, which empowers the court to exercise its inherent powers in the interest of justice. However, the Supreme Court has discouraged this practice, in view of the availability of compensation under Section 357.<sup>49</sup>

Nevertheless, trial courts seldom exercise the powers conferred on them under Section 357- the vanishing point of victim compensation law in India. Reprimanding this attitude, the Supreme Court in the *Hari Krishna & State of Haryana v. Sukhbir Singh (hereinafter “Hari Krishna”)*<sup>50</sup>, directed all

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<sup>49</sup> *Palaniappa Gounder v. State of Tamil Nadu*, ¶ 3, (1977) 2 S.C.C. 634, 636. (In this case, the son and two daughters of the deceased files an application before the High Court under S. 482 of the CrPC, praying that the accused be directed to pay them, the dependants of the deceased, compensation to the tune of Rs. 40,000 for the death of their father. Finally, in the Supreme Court it was held that since S. 357 expressly confers powers on the court to compensate the heirs, there is no need for invoking or exercising the inherent powers of the court).

<sup>50</sup> *Hari Krishna & State of Haryana v. Sukhbir Singh*, (1988) 4 S.C.C. 551.

courts to exercise Section 357 liberally and award adequate compensation, particularly in cases where the accused is released on admonition, probation or when the parties enter into a compromise. At the same time, the court cautioned that the compensation must be reasonable, fair and just; taking into account the facts and circumstances of each case—nature of the crime, veracity of the claim and ability of the accused to pay.<sup>51</sup> The following paragraph from the court's judgment sums up the importance of Section 357(3) succinctly:

*"Section 357 of the CrPC is an important provision but Courts have seldom invoked it. This section of law empowers the Court to award compensation while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of the accused. This power to award compensation is not ancillary to other sentences but is in addition thereto. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We therefore recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way."*<sup>52</sup>

The court further observed that the *payment by way of compensation must, however, be reasonable*. What is reasonable may depend upon the facts and circumstances of each case.<sup>53</sup> The quantum of compensation may be determined by taking into account the nature of the crime and the ability of the accused to pay. If perhaps, there are more than one accused

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<sup>51</sup> *Id.*, ¶ 11.

<sup>52</sup> *Id.*, ¶ 10.

<sup>53</sup> *Id.*, ¶ 11.



they may be asked to pay in equal terms, unless their capacity to pay varies considerably.<sup>54</sup> A reasonable period for payment of compensation, if necessary by instalment, may also be given.<sup>55</sup> The court may enforce the order by imposing sentence in default.<sup>56</sup>

Thus, the court must be satisfied that the victim has suffered loss or injury due to the act, neglect or default of the accused to be entitled to recover compensation. This loss or injury may be physical, mental or pecuniary. In *Hari Krishna*, the Supreme Court interpreted the scope of Section 357(3) to mean that a reasonable amount has to be awarded as compensation taking into consideration not merely the gravity of the injury or misconduct of the accused but also the capacity of the accused to pay.<sup>57</sup> This practice of taking into account the accused's capacity to pay is problematic as in most cases this either deters the judges from exercising their discretion of awarding compensation or it prompts them to award compensation which is nominal in nature. However, since the State will be establishing a compensation fund for the purpose of compensating victims, this aspect will not play such a vital role in deterring the exercise of this discretion as it has in the past. The court stated that the High Courts must orient the Judicial Officers in this new aspect of compensatory criminal jurisprudence.

The progressive judgment of the Supreme Court in the *Hari Krishna* to compensate victim of crime under Section 357(3) of the CrPC was not allowed by the Court in its later judgments in *Brij Lal v. Prem Chand*<sup>58</sup>, *State of U.P. v. Jodh Singh*<sup>59</sup>,

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<sup>54</sup> K.A. Abbas H.S.A. v. Sabu Joseph & Anr., (2010) 6 S.C.C. 23, ¶ 22.

<sup>55</sup> *Id.*, ¶ 20.

<sup>56</sup> *Id.*

<sup>57</sup> *Supra* note 50, ¶ 11.

<sup>58</sup> BrijLal v. Prem Chand, (1989) Supp (2) S.C.C. 680.

<sup>59</sup> State of U.P. v. Jodh Singh, A.I.R. 1989 S.C. 1822.

*State of Mysore v. Tyhappa*<sup>60</sup>, *N.B. Panth v. State*<sup>61</sup> and *Gur Swami v. State*<sup>62</sup>. In these cases the Court awarded compensation to the victims of crime out of the fine amount i.e. under Section 357(1) CrPC and was far more sympathetic toward the accused rather than the victim.

*Baldev Singh v. State of Punjab*<sup>63</sup> is another important case in the victimological approach of judicial law making. The Supreme Court ordered a grant of compensation by invoking Section 357(3) of the CrPC. The Supreme Court held that in the circumstances of the case an order of compensation would be more appropriate instead of sentence of imprisonment. Here, the Court used its judicial discretion to the benefit of the victims and opted for the compensation theory instead of extending the sentences of imprisonment.

While looking at Indian compensation laws it is imperative to note that under sub-section (1), the compensation to the victim of crime has to be paid out of the fine and the court should determine the necessity and the consequent amount of the fine. In *Adamji Umar v. State of Bombay*<sup>64</sup>, Supreme Court observed that while passing a sentence the court has always to bear in mind the proportionality between an offence and the penalty. In imposing a fine it is necessary to have as much regard to the

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<sup>60</sup> *State of Mysore v. Tyhappa*, A.I.R. 1962 Mys. 51.

<sup>61</sup> *N.B. Panth v. State*, A.I.R. 1977 S.C. 892.

<sup>62</sup> *Gur Swami v. State*, A.I.R. 1979 S.C. 892.

<sup>63</sup> *Baldev Singh v. State of Punjab*, (1995) 6 S.C.C. 593, ¶ 14.

<sup>64</sup> *Adamji Umar v. State of Bombay*, A.I.R. 1952 S.C. 14. This was also held in *Palaniappa Gounder v. State of Tamil Nadu*, A.I.R. 1978 S.C. 1525. The court reduced the fine of Rs. 20,000 imposed by the High Court on the accused, who has been sentenced to life imprisonment for committing murder, to a meagre sum of Rs. 3,000. This was once again reiterated by the Supreme Court in *Swaran Singh & Anr. v. State of Punjab*, (2000) 5 S.C.C. 668.

pecuniary circumstances of the accused person and to the character and magnitude of the sentence, where a substantial term of imprisonment is imposed, an excessive fine could not accompany it except in exceptional cases.<sup>65</sup> The criminal court's power to award compensation is limited by the considerations which govern the imposition of fine as compensation.

This section should be implemented liberally towards compensation of the victim for his/her loss or injury; even in cases where the claim of compensation ordinarily lies in the domain of the civil court. Victim should be spared the time and expense of bringing civil suits, claiming compensation; as well as the emotional strain of enduring a second trial.

Though, justice has been meted out to the victims through judicial creativity at the appellate level; these instances are few and far between.<sup>66</sup> The provisions in the CrPC after the recent amendment are more holistic in their approach of addressing the plight of victims. However, the infrequency with which these provisions are invoked by judges in a bid to achieve victim justice and to alleviate the suffering of the victim would render these provisions redundant and be the vanishing point of Indian victim compensation.

To effectuate any progressive victim compensation reforms, there is a need for a sensitized judiciary that recognizes the importance of victim compensation. Consequently, the High Courts must orient and train the Judicial Officers towards compensatory criminal jurisprudence. Some positive steps have been initiated with the establishment of judicial academies in each state, where newly recruited judicial officers are sent for training and senior officers are offered refresher courses.

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<sup>65</sup> *Id.*

<sup>66</sup> C. Raj Kumar, *Emergence and Evolution of Victim Justice Perspectives in India*, 25 (2) INDIAN JOURNAL OF CRIMINOLOGY 71, 74-77.

### **D. Evolution Of The Constitutional Remedy Of Victim Compensation**

The principles of victimology has foundations in the Indian Constitution particularly in the fundamental rights and directive principles of state policy, which form the bulwark for a new social order in which social and economic justice would be ensured. Article 51A is a fundamental duty of every citizen to have compassion for living creatures and to develop humanism. This mandate expressly provided for in the Constitution, broadly forms the constitutional underpinnings for victimology.<sup>67</sup>

A significant phase in the evolution of victimology in India was witnessed in the 1980s, through the creative judicial decisions delivered by the appellate courts. There were a series of decisions handed down in the 1980's and 1990's by the Supreme Court that seemed to recognise the special right of the victim to compensation for harm suffered either at the hands of a private criminal or in the course of criminal justice administration.

The *Mathura rape case*<sup>68</sup> was perhaps the lowest point of the Indian judiciary, highlighting the blatant insensitivity of the judiciary coupled with weak and ineffective laws relating to rape.

A new era in the Indian victimological thinking began with the initiative taken by the Indian judiciary in the nature of evolving a new kind of compensatory constitutional remedy through articles 32 or 226/227. The starting point would be the case of *Rudul Shah v. State of Bihar*<sup>69</sup>. In this case, Chief Justice Chandrachud, invoked the extraordinary power vested in the Supreme Court under article 32 to award

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<sup>67</sup> *Supra* note 5, ¶ 9.1.

<sup>68</sup> *Tukaram & Anr. v State of Maharashtra*, (1978) Crim.L.J. (S.C.) 1864.

<sup>69</sup> *Rudul Shah v. State of Bihar*, (1983) 4 S.C.C. 141, ¶ 9.

compensation, for the first time, for the deprivation of fundamental rights. Interestingly, in the case of the *State of Punjab v. Ajaib Singh*<sup>70</sup> the Supreme Court went a step further and granted a compensation of Rs. 5 lakhs even after acquitting the accused.

Following this, in the landmark case of *Bodhisattwa Gautam v. Subhra Chakraborty*<sup>71</sup> the Supreme Court of India evolved creative principles of victimology and victim justice. Firstly, it held that the award of compensation, as an interim relief is necessary so that undue delay in the delivering of justice to a victim of crime is not caused. Secondly, it held that the court had jurisdiction to award such compensation to the victim even when the accused is not convicted, due to the slow progress of the criminal proceedings. These principles evolved by the court were futuristic, perhaps a form of judicial activism; and have been subsequently incorporated into the 2009 amendment to the CrPC<sup>72</sup>.

In the *Uttarakhand Stir (Rallyist)* case<sup>73</sup>, the Allahabad High Court delivered a path-breaking judgment in a group of six cases arising out of the incidents in Khatima, Mussoorie and Muzaffarnagar. The brief facts of the case are that twenty four persons were killed, seven women were raped, seventeen were sexually molested while many others were injured and illegally detained as a result of police firing and atrocities committed on a peaceful demonstration for a separate State of Uttaranchal in 1994.

The court in a historic decree awarded Rs. 10 lakh each to deceased victims' families and Rs. 10 lakh for rape victims judging the crime equivalent to death; Rs. 5 lakh to the victims

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<sup>70</sup> *State of Punjab v. Ajaib Singh*, 1995 2 S.C.C. 486, ¶ 9.

<sup>71</sup> *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 S.C.C. 490.

<sup>72</sup> *Id.*, ¶ 17.

<sup>73</sup> *Uttarakhand Sangharsh Samitee v. State of U.P.*, (1996) 1 U.P.L.B.E.C. 461.

of sexual molestation; and Rs. 2.5 lakh to Rs. 50,000 for less serious injuries. Thus, the court while advancing the cause of human rights and giving more teeth to the constitutional guarantee for a right to live with dignity vide Article 21, declared that the court itself could award compensation in a case of human rights violation.

In the instant case, the State was held vicariously responsible for the crimes committed by its officers and was directed to compensate the victims and was not protected under the doctrine of sovereign immunity wherein the State can avoid criminal liability in the name of 'acts of State'.<sup>74</sup>

In the case of *D.K. Basu v. State of West Bengal*<sup>75</sup> the Supreme Court held that monetary compensation for redressal by the court is useful. It is perhaps the only effective remedy to 'apply balm to the wounds' of the family members of the deceased victim, who may have been the breadwinner of the family.<sup>76</sup>

However diverging from this trend, in the *A.K. Singh* case<sup>77</sup>, the Supreme Court set aside the High Court's order directing the convicts to furnish compensation to the victims, holding that Rs. 10 lakh was in excess of the required compensation for the crime<sup>78</sup>. This decision was made despite the fact that state functionaries perpetrated this crime against innocent members of a peaceful demonstration.<sup>79</sup>

On the other hand in the recent case of Chairman,

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<sup>74</sup> Gaur, *supra* note 4, at 357-58.

<sup>75</sup> *D.K. Basu v. State of West Bengal*, (1997) 1 S.C.C. 416, ¶ 44.

<sup>76</sup> *Id.*

<sup>77</sup> *A.K. Singh v. Uttarakhand Jan Morcha*, (1999) 4 S.C.C. 476.

<sup>78</sup> *Id.*, ¶ 11.

<sup>79</sup> Gaur, *supra* note 4, at 358.

<sup>80</sup> *Chairman, Railway Board v. Chandrima Das*, (2000) 2 S.C.C. 465. Other cases where the accused was directed to pay compensation as a constitutional remedy: *Saheli, A Woman's Resource Centre v. Commissioner of Police*,

Railway Board v. Chandrima Das<sup>80</sup>, the Supreme Court ordered the payment of Rs. 10 lakhs as compensation to a Bangladeshi national who was repeatedly raped by Railway employees. The Court upheld the Calcutta High Court's decision that even as a foreign national she was entitled to the fundamental right to life in India, and thus there was a constitutional liability to pay compensation to her<sup>81</sup>.

Thus, as observable by the judicial trends, compensation available under a constitutional remedy has been far more readily invoked and amounts of a greater quantum have been granted than under Section 357(3) of the CrPC. The judiciary has to be urged to be liberal in invoking Section 357A and ensure that it is not the non-exercise of discretion by them that become the vanishing point of victim compensation in India.

### ***E. Current Trends***

The policy of our criminal justice system is victim-oriented and we have to a certain extent incorporated the idea of compensatory criminal jurisprudence. The problem arises in implementation of this policy. The attitude of the judiciary needs change. The provisions being discretionary, it neither imposes a legal obligation on the judge to order compensation in all suitable cases to the victim of crime, nor does it require reasons to be recorded for not doing so. Similarly, these provisions do not vest in the victims a legal right to be compensated either by the accused or the state for loss or injury caused by the commission of the offence. The victim remains at the mercy of the discretion of the judge for the award of compensation because of the word 'may' in Sections 357(1) and (3) of

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(1990) 1 S.C.C. 420; Nilabati Behera v. State of Orissa, (1993) 2 S.C.C. 746; Rudal Shah v. State of Bihar, (1983) 4 S.C.C. 141.

<sup>81</sup> Chairman, Railway Board v. Chandrima Das, (2000) 1 S.C.C. 465, ¶ 19.

CrPC; this being the vanishing point of victim compensation in India. Mere punishment to the accused though it may exhaust the primary function of criminal law, is not fulfilment of the *Rule of Law*. Hence, the court should be liberal in utilising the discretion vested in them in granting compensation to the injured in a criminal case.

It is imperative to convert the discretionary power of the court into a legal mandate requiring it to in all suitable cases, pass compensation orders and when it decides not to do so, make it obligatory to record reasons for not doing so.

From the aforesaid cases we may conclude that the Apex Court in India has set a trend of compensatory criminal justice jurisprudence, which in effect is developing the ground towards restorative justice in our criminal justice system.

#### IV. CONCLUSION

Unlike in the Western countries, the victims of crime in India do not have a statutory right to be compensated. There is no compulsion on the court to record reasons for not invoking its powers to provide compensation. Moreover, there is no effective institutional mechanism for recovering the ordered compensation from the recalcitrant accused and paying it to the victim.<sup>82</sup> In light of the above, various efforts have been made towards the establishment of a state funded victim compensation fund as envisaged in the amended law.

Without this it would not only be unjust from the point of view of victims of crimes but it would also result in the negation of the *Rule of Law*. D.P. Wadhwa, J., of the Supreme Court of India reminded us that in our efforts to look after

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<sup>82</sup> See The Criminal Injuries Compensation Act, 1995 (U.K.). Chapter XXXII of the CrPC contains a few provisions dealing with recovery of 'fine' and 'money' payable by virtue of any order made under the CrPC. However, they are insufficient.



and protect human rights of a convict we should not forget a crime victim—a ‘forgotten man’ in the criminal justice system—and his reparation and rights. “*Criminal justice*,” his Lordship stressed, “*would look hollow if justice is not done to the victim of the crime*”.<sup>83</sup> They believe that compensation will at least provide some solace to the victim, even if his lost honour cannot be fully recompensed.

The 14th Law Commission in its Report recommended State compensation, which is justified on the grounds that it is the political, economic and social institutions of the state system that generates crime by poverty, discrimination, unemployment and insecurity.<sup>84</sup> In its 154th Report on the CrPC influenced by the Tamil Nadu system of “*Victim Assistance Fund*”, the Commission suggested the setting up of a similar Fund. Even the Malimath Committee was in favour of the establishment of a State funded compensation fund modelled on the Victim Compensation Bill, 1995 prepared by the Indian Society of Victimology and submitted to the Government of India.<sup>85</sup>

Without a substantial fund that has a steady flow of resources, a meaningful state funded victim compensation program will be hard to establish. Given the alarming crime rates, particularly against the vulnerable sections of society, the Fund must have a corpus of atleast Rs. 500 crores, which must steadily grow at 100% every year to ensure continued availability of funds.<sup>86</sup>

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<sup>83</sup> VIBHUTE, *supra* note 2. See also K.I. Vibhute, *Compensating Victims of Crime in India: An Appraisal*, 32 JILI 68, 80-81 (1990).

<sup>84</sup> Article 41 of the Constitution mandates that the State shall ‘secure the right to public assistance in cases of disablement and other cases of undeserved want’.

<sup>85</sup> VIBHUTE, *supra* note 2, at 389-390. Strangely, the Committee did not outline or attach the Bill to the Report, nor did it discuss the NLSIU compensation model. Did it not think it worthwhile to refer to other suggestions or was the Committee blissfully unaware of the existence of such suggestions?

<sup>86</sup> Menon, *supra* note 45, at 364.

There are certain primary impediments in the establishment and functioning of victim compensation. Firstly, only a small number of accused are actually apprehended and convicted.<sup>87</sup> Secondly, the accused are generally not capable of providing compensation to the victim as they are usually from the lowest socio-economic strata of society and thereafter earnings by the offender as a prisoner would not be sufficient to pay the compensation.

Since victims as well as the offenders in most cases are usually poor<sup>88</sup>, compensation cannot alone solve the problems of the victim of crime. Hence, it is imperative that a consolidated state funded victim welfare fund should be created on a statutory basis, which will be designed to meet both the immediate financial assistance that some victims in distress will need, inclusive of medical and hospitalisation expenses, along with compensation.

Consequently, there arises an urgent need to establish a victim assistance compensation board to the victim of the crime. Therefore, it is noteworthy and progressive that the Government of India has come forward with a scheme/ programme to provide compensation and assistance to the victims of crime for their loss or injury.

The 2008 amendment to the CrPC dealing with the compensation of victims is yet to be notified. This is a reflection of the apathy of our society towards the suffering of victims of crime. However, it is heartening to see that the Maharashtra government is in the process of drafting a victim rehabilitation scheme as envisaged by Section 357A.<sup>89</sup>

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<sup>87</sup> *Id.* at 362.

<sup>88</sup> Gaur, *supra* note 4, at 351.

<sup>89</sup> Prafulla Marpakwar, *Prithviraj Chavan Plans to Draft Package for Terror, Riot Victims*, TIMES OF INDIA, Sept. 14, 2011, at 3, available at [http://articles.timesofindia.indiatimes.com/2011-09-14/mumbai/30153912\\_1\\_rehabilitation-package-terror-victims-riot-victims](http://articles.timesofindia.indiatimes.com/2011-09-14/mumbai/30153912_1_rehabilitation-package-terror-victims-riot-victims).

According to the state government, annually 5,000-6,000 cases of severe injuries are registered in the state.<sup>90</sup>

In July 2011, the Maharashtra government announced that it would provide compensation to the victims of sexual assault and other forms of violence, who suffer severe injuries, or their kin in case of fatalities.<sup>91</sup> This is not only for physical but also mental trauma suffered by an individual. The compensation amounts and criteria for entitlement are being outlined. Such a policy has already been implemented in Punjab, with a compensation of Rs. 1 lakh being provided for the loss of life, Rs. 40,000 for over 40% damage to a body organ, Rs. 30,000 in case of rape and Rs. 20,000 for an injury that causes mental trauma.<sup>92</sup>

However, it must be remembered that in spite of the State's obligation to promote general welfare, as enshrined in the Directive Principles of State Policy<sup>93</sup>, the quantum of compensation payable is for the State to decide, on the basis of its economic resources and the legitimate interests of the victims. Thus, this right is a qualified one, with the State prioritizing who receives compensation and in what measure.

Ultimately, the efficacy of the law and its social utility depends largely on the manner and the extent of its application by the courts. A good law badly administered may fail in its social purpose and if overlooked in practise, will fail in purpose and utility. Section 357A has a social purpose to serve and has to be applied in appropriate cases. The Law

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Article 38 of the Constitution: "*The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life*".

Commission of India has not only admitted the fact that they are “not particularly liberal” in utilising these provisions but also observed: “it is regrettable that our courts do not exercise their statutory powers under this section as freely and liberally as they could be desired”.<sup>94</sup>

The victim compensation law as it stands after the 2009 amendment to the CrPC is holistic, however, if the judges continue to not exercise their discretion and invoke these provisions, these provisions will remain disused. The judges’ discretion should not become the vanishing point of victim compensation laws.

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<sup>94</sup> LAW COMMISSION OF INDIA, FORTY FIRST REPORT ON THE CODE OF CRIMINAL PROCEDURE, 1898 (1969), at 356.