

## REVISITING VICTIM COMPENSATION IN INDIA

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### INTRODUCTION

*“Law should not sit limply, while those who defy it go free and those who seek its protection lose hope”.*<sup>1</sup>

The carriage of justice is often misconceived to halt at the signature on a judgment; however, the true destination lies at the lap of the victim. While it is the courts that preserve the sanctity of justice, it is the prerogative of the State to support the pillars of justice. Victimology related jurisprudence has debated extensively on where to place the ball of responsibility - whether the responsibility of the State ends merely by registering a case, conducting investigation, initiating prosecution and sentencing an accused or whether apart from pursuing these steps, the State has a further responsibility to the victim. Similarly, there is a dilemma whether the court bears a legal duty to award compensation irrespective of conviction. However, it remains that victims of a crime, including her/his kith and kin carry a legitimate expectation that the State will ‘catch and punish’ the guilty and compensate the aggrieved. Even in the event when the machinery of justice fails to identify the accused or falls short in collecting and presenting requisite evidence to ensure appropriate sentencing of the guilty, the duty of compensation remains.

The framework of justice in India has been largely oblivious to what would constitute true vindication to the victim. The ambit of justice has fixated to merely mean the conviction of the accused. This has excused systemic failures in terms of blotchy investigation, poor efforts of the prosecution, and questionable integrity of those who are involved in the process. Further, there is a lack of infrastructure to support or accommodate development in the process. This in turn affects the quality of justice offered to the victim.

Justice must be reformative for the purpose of the perpetrator and rehabilitative for the survivor. Therefore, it is a legitimate expectation that the victim must be given rehabilitative support including monetary compensation. Such compensation has been directed to be paid in

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<sup>1</sup>Jennison v Baker, (1972) 1 All ER 997; Justice V.S. Malimath, Report of the Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs,(2003), [https://mha.gov.in/sites/default/files/criminal\\_justice\\_system\\_2.pdf](https://mha.gov.in/sites/default/files/criminal_justice_system_2.pdf). [hereinafter “Malimath Committee Report”].

public law remedy with reference to Article 21.<sup>2</sup> The Hon'ble Supreme Court has in numerous cases, to do justice to the victims, directed payment of monetary compensation as well as rehabilitative settlement where State or other authorities failed to protect the life, dignity and liberty of victims.<sup>3</sup>

The jurisprudence under Article 21 has gained momentum since the turn of the century and now extends to rehabilitating the victim or her/his family. However, the scope for remedy to the victim in terms of compensation was earlier limited under public law by way of writ jurisdiction. Therefore, there was a need to introduce a specific provision for providing compensation to the victim irrespective of the result of criminal prosecution. Accordingly, Section 357-A was introduced in the Code of Criminal Procedure, 1973<sup>4</sup> [hereinafter: **CrPC**].

### **History and Development of Compensation as a criminal remedy**

Restitution has been employed as a punitive measure throughout history. Ancient societies never conceptually separated the realm of civil and criminal law, but mechanically required the offender to reimburse the victim and/or the family for any loss caused by the commission of the offence. However, the primary purpose of such restitution was misplaced since it was meant to protect the offender from violent retaliation by the victim or the community as opposed to compensating the victim.<sup>5</sup> It was a bargain afforded to the offender to 'buy back' the peace he had broken.

With the passage of time, principles of law gradually demarcated the allocation of punishment in the case of civil tort and criminal offences. Compensation was then incorporated as a victim's right in civil law as opposed to a remedy in the case of a crime. Thus, criminal law was rid of the burden of compensation to rehabilitate victims since the position of law was that criminal justice was either reformative or retributive for the purpose of the offender, as opposed to being rehabilitative with regard to the victim. This conventional position has in recent times undergone a notable change, as societies world over

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<sup>2</sup> The Constitution of India, 1950, <https://www.india.gov.in/my-government/constitution-india/constitution-india-full-text>. [hereinafter "Constitution"].

<sup>3</sup> KewalPati v State of U.P (1995) 3 SCC 600; Supreme Court Legal Aid Committee v State of Bihar (1991) 3 SCC 482; Railway Board v Chandrima Das (2000) 2 SCC 465; Nilabati Behera v State of Orissa (1993) 2 SCC 746; Khatri (1) v State of Bihar (1981) 1 SCC 623.

<sup>4</sup> Code of Criminal Procedure Act, 1973 [hereinafter "CrPC"].

<sup>5</sup> Dilip S. Dahanukar v Kotak Mahindra Co. Ltd. and Anr. (2007) 6 SCC 528; Victim Restitution in Criminal Law Process: A Procedural Analysis, (1984) 97 Harvard Law Review, p. 931 – 946.

have increasingly felt that the legislatures and the courts alike were neglecting victims of the crimes.

However, a scheme based on restitution by the offender to the victim is particularly problematic because it is imperative for the offender to be apprehended and convicted, and it is also necessary for the victim to be able to afford the resources for the same. Such a scheme also gives rise to a probability where the victim is denied compensation since the offender is a debtor and cannot raise money in prison.<sup>6</sup>

Thus, the best method seems to be to have a State Fund from which the victims are immediately compensated after the crime. If and when the offender is convicted, he may be ordered by the court to retribute a certain amount to the State.<sup>7</sup> This is to ensure that the victim is not affected either by the offender's inability to pay, the long delays in the criminal process, or an acquittal because of lack of evidence.

Therefore, legislations have been introduced by several States including Canada, Australia, England, New Zealand, Northern Ireland and the USA providing for restitution by courts administering criminal justice.

### **History and Development of Victim Compensation in India**

The history of penal law in India can be traced to the times of colonisation and the era of British rule. The very first trace of restitution in Indian law can be found in sub-clause (1)(b) of Section 545 in the Code of Criminal Procedure of 1898, which provided that courts may direct:

*“payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the court, recoverable by such person in a civil court”.*

### **The Law Commission Report and Section 357 of the CrPC**

The 41<sup>st</sup> Report of the Law Commission of India was submitted in 1969. This discussed Section 545 of the Code of Criminal Procedure of 1898 extensively. The report stated that the significance of the recoverability of compensation should be enforceable in a civil court akin

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<sup>6</sup> M. Novak, Crime Victim Compensation – The New York Solution, (1971), 35 Alb L. Rev., p.717.

<sup>7</sup> *Fresneda v State* (1977) 347 So.2d 102; *People v Becker* (1957) 349 Mich. 476; *State v Elits* (1980) 94 Wash.2d 489.

to the public remedy available to tort. The gravity of compensability was earlier demarcated by the use of the word “*substantial*” which excluded cases where nominal charges are recoverable. However, the Law Commission debated against the demarcation since the discretion to apply the provision in cases was used scarcely by the courts in directing compensation for victims.

On the basis of the recommendations made by the Law Commission in the above report, the Government of India introduced the Code of Criminal Procedure Bill, 1970, which aimed at revising Section 545 and re-introducing it in the form of Section 357 as it reads today. The Statement of Objects and Reasons underlying the Bill was as follows:

*“Clause 365 (now Section 357) which corresponds to Section 545 makes provision for payment of compensation to victims of crimes. At present such compensation can be ordered only when the court imposes a fine; the amount is limited to the amount of fine. Under the new provision, compensation can be awarded irrespective of whether the offence is punishable with fine or fine is actually imposed, but such compensation can be ordered only if the accused is convicted. The compensation should be payable for any loss or injury whether physical or pecuniary and the court shall have due regard to the nature of injury, the manner of inflicting the same, the capacity of the accused to pay and other relevant factors.”*

The CrPC consequently incorporated the changes proposed in the said Bill of 1970. In the Statement of Object and Reasons it stated that Section 357 was “*intended to provide relief to the poorer sections of the community*” whereas, the amended CrPC empowered the court to order payment of compensation by the accused to the victims of crimes “*to a larger extent*” than was previously permissible under the Code.

Section 357 brought about significant changes in the framework. The approach to demarcation was shifted with the exclusion of the word “*substantial*”. Further, two new subsections were inserted. Subsection (3) provides for payment of compensation even in cases where the sentence does not impose a fine, while subsection (4) outlined the jurisdiction and powers of courts with respect to the section. It states that an order awarding compensation may be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

## Other Provisions in the CrPC

While discussing the law of victim compensation, it is necessary to also address other aspects of what would be construed as compensation to the aggrieved. This requires a perusal of other provisions in the CrPC such as Section 358.

Section 358 addresses an *unconventional interpretation* of who is a 'victim' and what would constitute 'compensation' for that purpose. In the context of strictly defining a victim, the Supreme Court has observed that -

*"The term 'Victimization' is defined neither by the Central Act nor by the Bombay Act. Therefore, the term 'Victimization' has to be given general dictionary meaning. In Concise Oxford Dictionary, 7th Edn., the term 'Victimization' is defined at Page 1197 as follows :*

*make a victim; cheat; make suffer by dismissal or other exceptional treatment."*<sup>8</sup>

Section 358 provides for compensation to anyone who would be a victim of an arrest that is without reason. It states that in such a case, the Magistrate may award compensation to the extent of ₹1,000/- to the person who is a victim of such an arrest. However, according to this section, it is necessary for a direct connection to exist between the arrest and the complainant. In order to attract this provision, the arrest must have been caused by the informant without any sufficient grounds.

Similarly, Section 359 deals with instances where a complaint for a non-cognizable offence is made to a court, and the accused is convicted by the court. It provides that a Court of Session, an Appellate Court, or the High Court while exercising their revisional jurisdiction can order payment of costs in such situations. In addition to the penalty imposed, the court may also order the accused to pay to the complainant, either in whole or in part, the cost which is incurred by the complainant in the prosecution. Further, the court is also empowered to sentence the accused to a simple imprisonment for a period not more than thirty days in the event he fails to make the payment.

The CrPC also takes into account instances where the accused may be victim to false allegations. In light of the same, Sections 237 deals with compensation to such peculiar

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<sup>8</sup>Colour-Chem Ltd. v A.L.Alaspurkar&Ors. (1998) 3 SCC 192.

victims. Section 237 empowers the Court of Session to take cognizance of an offence in accordance with section 199 (2) of the CrPC. Further, according to subsection (3) of the same provision

*“If, in any such case, the court discharges or acquits all or any of the accused and is of opinion that there was no reasonable cause for making the accusation against them or any of them, it may, by its order of discharge or acquittal, direct the person against whom the offence was alleged to have been committed (other than the President, Vice-President or the Governor of a State or the Administrator of a Union Territory) to show cause why he should not pay compensation to such accused or to each or any of such accused, when there are more than one”.*

If the court should consider that there is a lack of reasonable ground for the allegation, it is empowered to order the complainant to pay compensation of an amount not exceeding ₹1,000/- to the victim of false accusation, after recording reasons for the same. Similar powers are vested under Section 250 of the CrPC which empowers the Magistrate to order the complainant to provide compensation to the person against whom baseless allegations were made.

### **Analysis of Section 357**

The parent of Section 357 of the CrPC was Section 545 of the 1898 Criminal Procedure Code. The scope and application of this Section however extends to any order for compensation passed either by the trial court, Appellate Court, or by the High Court, or Court of Session while exercising their revisional jurisdiction. The Hon'ble Supreme Court is also empowered to order compensation under this provision.

The applicability of this Section is limited in application to four defined instances. Such compensation may be afforded to the complainant for meeting the expenses incurred during prosecution. It can also be recovered in the aforementioned competent courts by any person who has suffered loss or injury by the offence. The courts so empowered, can award such compensation to a person entitled to recover damages under the Fatal Accidents Act, when there is a conviction for causing death or abatement thereof. The scope of Section 357 extends to instances of injury to property since courts can order compensation to a *bona fide* purchaser of property, which has become the subject of theft, criminal misappropriation, criminal breach of trust, cheating, or receiving or retaining or disposing of stolen property,

and which is ordered to be restored to its rightful owner. Subsection (3) of Section 357 further enables the court to order the payment of compensation even in cases where the punishment prescribed does not include payment of fine.

### **Criticism of Section 357**

The biggest flaw in the jurisprudence of Section 357 is that it is triggered only upon successful conviction. It functions on the assumption that the accused must be identified, prosecuted and convicted. It does not accommodate cases where the person is not pronounced guilty, or in those cases where Closure Reports or Summary Reports are filed by the Police, disclosing the commission of the offence, but that such an offence has not been committed by the accused who is sought to be prosecuted, or that the accused has not yet been identified. In such instances, the courts cannot rely on Section 357 to order compensation to the victim.

Further, this provision places the entire onus of disbursement of compensation on the convicted person in which case, the quantum of compensation awarded to victim depends on the financial position of the convict, as opposed to dividing the liability between the State and the offender where the victim will enjoy the security of compensation. The provision does not provide for apportionment of liability towards the State, and to what extent the State would pay compensation. Moreover, subsection (2) of Section 357 further states that no disbursement of compensation shall be made, if the order imposing fine is subject to an appeal, until either on the expiry of period of limitation or when the appeal is finally disposed of. This results in financial inconvenience to the victim who may incur immediate expenditure for recovery from the offence. The provision does not contemplate a contingency where under emergency situations; interim compensation might be required by the victim. Further, the provision does not outline the timeline for payment of compensation.

Contrary to the limitation of Section 357, Section 357A provides a fresh perspective addressing the lacuna in allocating responsibility to the State. It obligates state governments to draw up victim compensation schemes. It defines the role of the District Legal Services Authority [hereinafter: **DLSA**] to decide the quantum to be awarded every time either a recommendation is made by the court for compensation or an application is made under the state scheme by the victim. It also provides for compensation and measures of rehabilitation where the order of compensation passed by the courts is inadequate. An application for

compensation under Section 357A can be made even when the offender has not been traced or identified or in the absence of a trial.

In terms of interim assistance, the DLSA is obligated under Section 357A to make provisions for immediate medical assistance, and such other relief, as the appropriate authority deems fit.

However, the only drawback of Section 357A is that it is imperative for states to notify a scheme, and allocate budget so that applications may be processed effectively and victims are given compensation expeditiously.

### **Victim Compensation and Interplay with Fundamental Rights**

The 154th Law Commission Report on the Code of Criminal Procedure<sup>9</sup> devoted an entire chapter to “Victimology” in which the growing emphasis on victim's rights in criminal trials was discussed extensively.

It noted that the interest of criminologists, penologists and reformers of the criminal justice system had gradually been directed to victimology, the control over victimization, and the protection of the various victims of crimes. It highlighted that crimes often entailed substantive harm to people, and this harm was graver than just the symbolism of its apparent effects in the social order. Consequently the report also addressed the needs and rights of victims and that they should be prioritized in the hierarchy of the process of justice in dissecting a crime. Compensation was proposed as a recognized method of protection that offered immediate support to the victim. Such compensation could also be extended to the family of the victim in certain instances.

The report traced the foundation of the principles of victimology to Indian constitutional jurisprudence. Part III of the Constitution which consists of fundamental rights and Part IV which deals with Directive Principles of State Policy, form the bulwark for “*a new social order in which social and economic justice would blossom in the national life of the country*”<sup>10</sup>. Further it also mandates inter alia that the State shall make effective provisions for “*securing the right to public assistance in cases of disablement and in other cases of undeserved want*”.<sup>11</sup> Similarly, Article 51-A makes it a fundamental duty of every Indian

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<sup>9</sup>154<sup>th</sup> Law Commission Report (1996), <http://lawcommissionofindia.nic.in/101/Report154Vol1.pdf>.

<sup>10</sup> Art.38, Constitution.

<sup>11</sup>Art. 41, Constitution.



citizen, inter alia “*to have compassion for living creatures*’ and to ‘*develop humanism*”. The Law Commission interrupts to assert that if the jurisprudence of these Articles are ‘*emphatically interpreted*’ and ‘*imaginatively expanded*’ they can form the constitutional underpinnings for victimology.

The Law Commission also disappointedly noted that the scope for victim compensation afforded in Indian criminal law is limited. However, Section 357 of the CrPC is the point of redemption of Indian law since it incorporates victim supportive jurisprudence by empowering courts.

### **Findings of the Malimath Committee Report**

In order to revisit the machinery of criminal justice in India, in 2003, the Committee on Reforms of Criminal Justice System was constituted under the Chairmanship of Justice V.S. Malimath. The Malimath Committee Report made observations regarding the history of the criminal justice system and how it was apparent that it mostly protected the ‘*power, the privilege and the values of the elite sections in society*’. It evaluated the way crimes are defined in the modern era. The administration of the system demonstrated that there is an ingredient of truth of such a narrow perception.

The primary assumption in the functionality of a criminal justice system is that it is the prerogative and dominant function of the State to protect all citizens from harm to their person and property. The State is believed to actualize this by ‘*depriving individuals of the power to take law into their own hands and using its power to satisfy the sense of revenge through appropriate sanctions.*’

The Committee Report argued that the State itself becomes a victim when a citizen commits a crime, and as a consequence undermines its authority and contravenes norms in society. It is this victimization that shifted the focus of attention from the real victim who suffered the actual injury to the offender and how he is handled by the State. It was this failure of the State to adequately protect the interests of its citizens that led to the transformation of torts to crimes.

With respect to the criminal, the Report noted that criminal justice has matured to comprehend the intricacies of the vehicle of crime: the criminal and the process of ascertaining his guilt, proving it in a court of law and punishing him. Civil law dealt with the

monetary and other losses suffered by the victim. Since victims were marginalized and vulnerable, the State stood forth in the shoes of the victim to prosecute and punish the perpetrator.

With respect to the rights of the victim, the Report pondered -

*“6.7.2. What happens to the right of victim to get justice to the harm suffered? Well, he can be satisfied if the State successfully gets the criminal punished to death, a prison sentence or fine. How does he get justice if the State does not succeed in so doing? Can he ask the State to compensate him for the injury? In principle, that should be the logical consequence in such a situation; but the State which makes the law absolves itself.”*

The principle of compensating victims has been recognized more often as a token relief than as a punishment to the offender, or substantial remedy to the victim offered by law. However, provisions in the procedural law of crime in India provides for sentence of fine imposed both as a sole punishment and as an additional punishment according to the wisdom of the court.<sup>12</sup> However, this provision is only invited when the perpetrator is convicted of the charges he is accused of.

In 2008, significant amendments were made to the CrPC that focused on the rights of victims in criminal trial, particularly relating to sexual offences. Although the amendments left Section 357 unaffected, they introduced Section 357-A<sup>13</sup> which empowers the court to direct the State to pay compensation to the victim in cases where *‘the compensation awarded under Section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated’*.<sup>14</sup>

Section 357A subtly recognizes compensation as one of the methods to protect the interest of victims. The provision was incorporated on the recommendation of the 154th Report of the Law Commission. The focus of the provision is on the rehabilitation of the victim even if the accused is not tried. In such instances, the victim is required to make an application to the State or District Legal Service Authorities as the case may be, for the purpose of

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<sup>12</sup> Sec. 357, CrPC.

<sup>13</sup> Inserted by Code of Criminal Procedure Amendment Act (2008).

<sup>14</sup> Sec. 357A, CrPC.

compensation. The jurisprudence of this provision and the obligation of courts have been defined by the Hon'ble Supreme Court:

*“While the award or refusal of compensation under Section 357 of Code of Criminal Procedure, in a particular case may be within the court's discretion, there exists a mandatory duty on the court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation.”*<sup>15</sup>

### **Role of the Government**

The theory of State responsibility pins the blame of crime on the State as having failed to protect the public against crime. It propounds that compensation is therefore a consequence of such failure.<sup>16</sup> Although modern jurisprudence accounts for individual deviance as being no fault of the State,<sup>17</sup> it supports the factum that the State must assist the vulnerable as a matter of public policy.<sup>18</sup>

The central government has adopted measures to realise the accessibility of compensation to victims. The Criminal Law (Amendment) Act, 2013 was enacted on 2<sup>nd</sup> April, 2013 to address the inadequacy in law relating to sexual offences of women and children. It led to the creation of a dedicated fund known as the Nirbhaya Fund. As per guidelines issued on 25<sup>th</sup> March, 2015, the Ministry of Women and Child Development is the nodal Ministry to appraise and recommend the proposed schemes under Nirbhaya Fund, it also reviews and monitors the progress of sanctioned schemes in conjunction with the related Ministries/Departments.

The central government also set up the Central Victim Compensation Fund Scheme [hereinafter: CVCF] vide the notification dated 14<sup>th</sup> October, 2015 by the Ministry of Home Affairs.<sup>19</sup> The CVCF aims at supporting and supplementing existing victim compensation schemes notified by states and union territories and reducing the disparity in the quantum of

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<sup>15</sup> Ankush Shivaji Gaikwad v State of Maharashtra (2013) 6 SCC 770.

<sup>16</sup> A. Goldberg, Equality and Government Action, (1964), 39 NYU L REV p.205-224.

<sup>17</sup> J. Culhane, California Enacts Legislation to Aid Victims of Criminal Violence, (1965), 18 STAN L REV, p.266- 272.

<sup>18</sup> B. Jacob, Reparation or Restitution by the Criminal Offender to his Victim: Applicability of an Ancient Concept in the Modern Correctional Process, (1970) , 61 The Journal of Criminal Law, Criminology, and Police Science p.152-167.

<sup>19</sup> Central Victim Compensation Scheme Guidelines, Ministry of Home Affairs, 2015, [http://mha.nic.in/sites/upload\\_files/mha/files/CVCFGuidelines\\_141015.pdf](http://mha.nic.in/sites/upload_files/mha/files/CVCFGuidelines_141015.pdf).

compensation notified thereof. It defines the scope for budgetary allocation and provides for accounting and audit. It also opens public participation by inviting funding.

The Ministry of Women & Child Development has also launched the 'One Stop Centres' [hereinafter: **OSC**] Scheme, to be piloted with one Centre in each state. The objective of the OSCs is to provide an integrated range of services including medical, legal and psychological support under one roof to women and girls who face violence. The Scheme also envisages that a lawyer and police facilitation officer associated with the OSC will support the woman during recording of her statement under Section 164 (5A) of the CrPC.

All states and union territories have notified victim compensation schemes.<sup>20</sup> However, the schemes in each state operate differently. For instance, the Mizoram (Victim of Crime Compensation) Scheme, 2011<sup>21</sup> states compensation would be given to the victim and his/ her dependants in the event of loss of property worth more than ₹1,00,000/- and in the event of death or permanent incapacitation of the victim who was the sole breadwinner of the family through the act of crime, whereas the Himachal Pradesh (Victim of Crime) Compensation Scheme, 2012<sup>22</sup> provides for certain cases, where the compensation shall not be paid at all.

The method of disbursing compensation proposed in each state scheme is also very different. According to the Karnataka Victim Compensation Scheme,<sup>23</sup> the compensation amount should be paid through cheque, while the Himachal Pradesh Scheme provides that the compensation amount awarded should be made to the bank account of the applicant. Further, there is no consistency in category of offences for which the compensation is approved. In light of such disparity, it is important to echo the wisdom of the Supreme Court observing the need for uniformity in the manner of awarding compensation under the Victim Compensation Scheme.<sup>24</sup>

### **Issues regarding implementation**

There are several problems that plague the implementation of the law as envisioned under Section 357A. This is primarily because of the allocation of responsibility between the state government for legislation, the DLSA and other instrumentalities for implementation. Most

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<sup>20</sup> Index of Notification of Victim Compensation Scheme, Ministry of Home Affairs, 2013, <http://mha1.nic.in/par2013/AnnexLSQNo203For220714.PDF>.

<sup>21</sup>Gazette of Mizoram (Dec. 5, 2011).

<sup>22</sup>Gazette of Himachal Pradesh (Sept. 6, 2012).

<sup>23</sup> Gazette of Karnataka (Feb. 22, 2012).

<sup>24</sup>Laxmi v Union of India (2014) 4 SCC 427.

states tend to forego the notification of a dedicated Victim Compensation Scheme under Section 357A since they place reliance on other relief funds that compensate victims.

The primary problem in realizing nation-wide accessibility of victim compensation is the failure of states to notify a pragmatic and effective Victim Compensation Scheme under Section 357A. Further, there is a disparity in the quantum of compensation awarded by different states for the purpose of different crimes. There is a lacuna in terms of the specificity of grounds for compensation that has been left vulnerable to the flexibility of interpretation. In terms of disbursement, there is no clarity with regard to the stage when compensation can be awarded including interim compensation and the need to attend to recurring expenses by the victim.

In states where Victim Compensation Schemes have been notified, there is either a lack of awareness as to the existence of such schemes or a failure of the state machinery to provide compensation because of poorly planned budgetary allocation. This lack of awareness also results in a lapse because of limitation period for application. Further, courts also fail in their duty of ensuring that compensation is not just approved but also received by the victim by not following up on the application for compensation.

### **Victim Compensation in the International Context**

International Covenants and General Assembly Resolutions have defined a model of victim compensation that is accepted by most States as an obligation towards their citizens. Thus, there has been a shift in the paradigm of justice, from ensuring successful sentencing to extending support to victims and their dependents in a rehabilitative capacity.

Instead of being limited to monetary compensations, legislatures and courts of various States have adopted laws to accommodate for restitution of the victim.<sup>25</sup>

### **International Obligations**

The Republic of India is a signatory to several international human rights instruments such as the Universal Declaration of Human Rights [hereinafter: **UDHR**]<sup>26</sup>, International Covenant on Civil and Political Rights<sup>27</sup> [hereinafter: **ICCPR**], International Covenant on Economic,

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<sup>25</sup> People v Lent (1975) 15 Cal. 3d 481.

<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, (Dec. 16, 1966), S. Treaty Doc. No. 95-20, 6

Social and Cultural Rights<sup>28</sup> [hereinafter: **ICESCR**] and the Convention on Eliminating all forms of Discrimination against women and children<sup>29</sup> [hereinafter: **CEDAW**]. These conventions impose on India the obligation of offering an effective criminal justice system to its citizens. This includes the concept of legal remedy such as compensation.

International law has provided for reparation in various forms such as restitution and compensation. This has been defined through Conventions, Resolutions, Codification of customary practises and International case-laws. The remedy of compensation was a creation of the former Permanent Court of International Justice [hereinafter: **PCIJ**] in the case concerning the *Chorzów Factory*<sup>30</sup>:

*“reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed.”*<sup>31</sup>

This is the basis for the maxim *restitution in integrum* as a remedy to damage and injury. In the *Corfu Channel* case,<sup>32</sup> State responsibility for damage was extended to harm that is caused by collateral incidents. As long as the injury can be attributed to the action or instrumentality of a State, that State is liable for an internationally wrongful act.<sup>33</sup> Therefore causal link is the necessary element to establish responsibility to compensate. Further, Article 36 of the Articles of Responsibility of States for Internationally Wrongful Acts [hereinafter: **ARSIWA**] deals with compensation as a form of reparation for damages caused.<sup>34</sup> Article 27 of the ARSIWA also introduces a unique jurisprudence with respect to ascertaining liability and the responsibility to compensate. It propounds that circumstances do not prejudice the claim of compensation for material loss caused by a State. Whereas a State may not be held liable for the wrongfulness of its actions, it may still be obligated to compensate for damages

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I.L.M 368 (1976).

<sup>28</sup>International Covenant on Economic, Social and Cultural Rights, (Dec. 16, 1966), United Nations, Treaty Series, vol. 993, p.3 .

<sup>29</sup> Convention on the Elimination of All Forms of Racial Discrimination (Dec.18, 1979), United Nations, Treaty Series, vol. 1249, p. 13 [hereinafter “CEDAW”].

<sup>30</sup> Factory at Chorzów (Germany v Poland) (Order, Indemnity) 1928 P.C.I.J. (ser. A) No. 17 (Order of Sept. 13).

<sup>31</sup> Factory at Chorzów (Germany v Poland) (Order, Indemnity) 1928 P.C.I.J. (ser. A) No. 17 (Order of Sept. 13).

<sup>32</sup>Corfu Channel (U.K. v. Albania), (Merits) 1949 I.C.J. 4 (Apr. 9).

<sup>33</sup>Articles On the Responsibility of States for Internationally Wrongful Acts, with Commentaries, (2001) UN Doc A/56/10, art. 12; Report of the International Law Commission on the work of its Fifty-third session, UN Doc. A/56/10, New York, p. 59 (2001).

<sup>34</sup>Articles On the Responsibility of States for Internationally Wrongful Acts, with Commentaries, (2001) UN Doc A/56/10; Report of the International Law Commission on the work of its Fifty-third session, UN Doc. A/56/10, New York, p. 59 (2001).

caused.<sup>35</sup> This principle should be extended outside the realm of international dispute to afford compensation to victims regardless of conviction of the accused.

International criminal law also outlines principles of compensation for aggrieved victims. Article 75 of the Rome Statute<sup>36</sup> of the International Criminal Court [hereinafter: **ICC**] states that the ICC shall establish principles relating to reparations to, or in respect of, victims of the crimes that the ICC deals with in accordance with its jurisdiction.

On 16<sup>th</sup> December, 2005 the United National General Assembly passed a resolution adopting the “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”<sup>37</sup> [hereinafter: **Basic Principles**]. These principles deal with the rights of victims of international crimes and human rights violations. The Hon’ble Supreme Court of India quoted these principles in their draft form in *State of Gujarat v High Court of Gujarat*<sup>38</sup> approving of their jurisprudence and contribution to victim protection laws.

The Basic Principles provide a normative framework on the obligation of the State to provide remedy and reparations, defining the contours of State responsibility to provide compensation to victims for acts or omissions which can be attributed to failure of the State machinery. The Basic Guidelines and Principles lay down the following forms of reparation:

- Restitution: These are measures to restore the victim to her/his original situation before the violation of rights including restoration of liberty, identity, family life, citizenship, residence, employment, etc.
- Compensation: For any economically assessable forms of damage as proportionate to the gravity of the violation including physical or mental harm. This encompasses educational and social benefits, material damage, medico-psychological care, legal services, etc.

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<sup>35</sup>CMS Gas Transmission Company v The Argentine Republic (2005) ICSID Case No. ARB/01/8; Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), I.C.J. Reports, 1997.

<sup>36</sup> Rome Statute of the International Criminal Court, (adopted 17 July 1998, entered into force 1 July 2002), 2187 U.N.T.S. 90.

<sup>37</sup> UNGA 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, UN Doc A/RES/60/147 (2006).

<sup>38</sup> (1998) 7 SCC 392.

- Satisfaction: These are measures to satisfy the victims of the efforts taken to redress the violation of human rights including verification of facts, searching missing persons, judicial and administrative sanctions, public apology, commemoration and tributes, etc. Satisfaction also includes the 'Guarantee of Non-Repetition'. This includes measures which contribute to effective control of security and military, protecting human rights defenders, reviewing and reforming laws etc.

### **International Practises**

The trends in victim compensation followed by the United States of America and the United Kingdom are discussed below so as to facilitative a comparative understanding.

#### ***United States of America***

Certain American laws have defined injury to include "mental harm"<sup>39</sup> and "emotional injury".<sup>40</sup> It has also been observed that most states pay for mental health counselling for individuals even though they have not suffered any physical or sexual injury.<sup>41</sup> However, many states continue to exclude "non-physical" injuries because their inclusion would facilitate fraudulent claims, and add to the costs of administration.<sup>42</sup>

The Victims of Crime Act 1992 does not provide for any compensation for pain and suffering.<sup>43</sup> The reasoning is that since the State is not the tortfeasor, it is not liable to compensate victims on that basis. However, in Tennessee, such compensation is payable only to victims of rape and crimes involving sexual deviancy "taking into account the particular circumstances involved in such crime".<sup>44</sup>

#### **United Kingdom**

Margery Fry, an eminent English Penal reformer deliberated on the access of effective remedies and the plight of victims in the 1950s.<sup>45</sup> This marked the establishment of victim

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<sup>39</sup> Uniform Victims of Crime Act, 1992 (United States).

<sup>40</sup> California Government Code, 1994 (United States).

<sup>41</sup> 'Program Handbook II-1' National Association of Crime Compensation Boards,(1992), <http://www.nacvcb.org/>.

<sup>42</sup> Texas Criminal Procedure Code, 1994 (United States).

<sup>43</sup> Dill v Commonwealth (1990) 562 N.E.2d 468; D Greer, A transatlantic perspective on the compensation of crime victims in the United States, (1994) 85 J. Crim. L. & Criminology p.333.

<sup>44</sup> Tennessee Code Annotated, 1994 (United States).

<sup>45</sup> A. Logan, The International Work of Margery Fry in the 1930s and '40s. Women's History: The Journal of the Women's History Network, 23 ISSN 1476-6760.



compensation institutions in Britain. In 1964, a non-statutory program was set up where funds were sanctioned by the British Parliament annually. This acquired statutory legitimacy with the Criminal Inquiries Compensation Act, 1955. Subsequently, the Criminal Justice Act, 1982 required courts to make an order for compensation in every case of death, injury, loss or damage or record reasons for not passing such an order.<sup>46</sup>

### **Intertemporal Aspects of the Concept of Victim Compensation**

Victimological jurisprudence in particular has focused the lens of its attention on sexual offences. This is particularly because of the nature of gender-related crimes and their tangible effects on the victim's life – be it medically, psychologically or socially. Since these offences require immediate attention and result in recurring offences, compensation schemes with respect to victims of sexual offences must be expedient and effective.

Generally, the pattern of crimes such as rape and other forms of sexual assault, such as acid attacks have been targeted against women who belong to the strata of society that is economically weak. While a sizeable number of cases are reported from rural areas, those unreported cannot be discounted.

The societal conditions in villages and small towns in India remain rigid, myopic and patriarchal. Most victims endure emotional trauma because of the lack of emotional support from friends and family. They have to instead deal with their angst by themselves. Therefore, most victims choose to drop out after braving through the incident and registering a First Information Report [hereinafter: **FIR**] but before the filing of the charge-sheet. In most cases, the victim turns hostile and refuses to cooperate with the police or other non-governmental organisations [hereinafter: **NGO**]. They even resort to recanting their testimonies under Section 164 of the CrPC.

It is significant to note that most women in rural areas are dependent on their families, either emotionally or financially, and require their support to institute a case and pursue prosecution. They fear the stigma attached to sexual offences like rape and acid attack and the manner which society would prejudice the respect of their families. Further, there are also instances where the family themselves prevent the victim from undertaking any legal action because of their hesitation to accept the offence and support the victim. Thus, most victims

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<sup>46</sup> Delhi Domestic Working Women's Forum v Union of India and Ors. (1995) 1 SCC 14; Oxford Handbook of Criminology, p.1237-1238 (1994).

are left without any financial support from the family to fight the long drawn battle in courts. Although the National Crime Records Bureau offers no clarity on the number of drop out cases or the reasons for those drop outs, it is a well-known fact that it is on account of the socio- economic profile of the victim, that a majority of the charge-sheets suffer a still birth. Furthermore, in cases which require surgery, cosmo-dermatological reconstruction or even continued medical support, these victims do not have adequate finances and therefore have to reconcile with the pain of suffering and continued mental trauma.

While it is the obligation of the State to have to take initiative to protect and support the victim, it abandons the victim to shoulder the burden alone. There is no emergency infrastructure afforded to her, nor is there a compassionate hand to guide and urge her to carry on. It is but a fact that in India justice is definitely delayed and sometimes even denied. So, there is little to assure her of the conviction of the offender, let alone financial support in the form of compensation. This also applies to cases of sexual assault against children whose parents are not in a financial position to afford the litigation expenses, or to provide medical or psychological assistance to the nascent minds of young children.

Therefore, apart from constituting Legislative Committees to study contemporary jurisprudence, it is imperative for India to direct its efforts towards assimilating these practices either in the form of legislated law or as a practice adopted by the instrumentalities of the legal machinery. Instead of limiting victim compensation to a remedy in public law, its scope must be expanded to include restitution in more than just monetary terms. It must evolve to constitute an entire mechanism that will assist the victim in her endeavour of justice in the court, and in her efforts to steady herself and recover both medically and psychologically. It must encompass all stages of prosecution such as registration of FIR, filing charge sheet, investigation, pursuing the matter in court and post-prosecution rehabilitation of the victim. This will ensure that the victim will participate as an active stakeholder as opposed to merely being shrouded by the grim pain of victimization.

### **Gender related aspects of Victim Compensation**

The UN Special Rapporteur for Violence against Women, Prof.RashidaManjoo has introduced a feminist perspective to the issue of responsibility of States while making

reparations to the victims.<sup>47</sup> According to the Report of the Special Rapporteur, the CEDAW places upon the State the duty to develop penal, civil, labour and administrative sanctions in domestic legislature to provide reparations to women subjected to violence.<sup>48</sup> The ambition of law must be to achieve transnational justice for gender sensitive reparations. In order to realise this, nations must continuously undertake efforts to involve women in legislative reforms through discussion and discourse. The nature of reparation must be rehabilitative and not merely compensative. It must attempt to return the victim to *status quo ante*.

There is a need for change in the gender perspective with respect to victim compensation since the experience of women as victims and their consequent collective participation in sharing experiences is more productive and cathartic as opposed to a male-centric discussion of violation.

### **Recommendations**

Victim Compensation Schemes in India must be treated as an institution larger than Section 357 or Section 357A. It must envision a program that harmoniously ties criminal provisions, civil remedy, rehabilitative support, role of courts and State accountability.

The prevalent law in India must be reformed and redesigned to be in consonance with international standards. Further, it must engage and involve victims, not only for the purpose of recommendation, but also as a participant so as to reform the compensation scheme into an inclusive process that empowers the victim.

The best way to ensure effective implementation of the schemes under Section 357A would be to address the various issues in each provision of the CrPC with a focus on outcome. Further, in order to achieve success nation-wide, it is imperative for all states to collate recommendations and notify a uniform scale for deciding the grounds and the quantum of compensation. All states must also create awareness of the Victim Compensation Scheme and the procedure for application. Where there are multiple relief fund schemes available, States must recognise that these schemes operate to the benefit of victims, and therefore must not actively prevent victims from availing more than one scheme simultaneously. Further, where

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<sup>47</sup> U.N.H.C.R, Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, (2010) UN Doc A/HRC/14/22.

<sup>48</sup> CEDAW, art. 4 (d).

compensation is denied by the competent authority, a fluid redressal mechanism must exist which assists the applicant in their appeal.

The procedure for obtaining compensation under most schemes is extremely rigid. Requirements such as medical report may delay the disbursement of compensation that may be urgently required by the victim. Therefore the scope for interim compensation must be defined and provided for. Further, most schemes focus only on disbursement of compensation rather than following up on rehabilitative support, thus addressing only visible bodily injuries and permanent mental retardation while turning a blind eye to the psychological scars suffered by the victim. Moreover, most children realize they were actually abused at later stages of their lives where physical remnants of the assault have disappeared. Therefore, amnesty must be provided to those who have overstepped the limitation of time in law.

The coordination between the various limbs of justice i.e. the courts, the police, the DLSA and the State Legal Services Authority must be streamlined. Each instrument must inform and assist the victim in realizing compensation. Further, the courts themselves must make recommendations for compensation in cases its wisdom considers such assistance necessary.

### **Conclusion**

Victim compensation as a concept in India is still nascent and shy to continuous development. While the courts no longer subscribe to the archaic approach of limiting victim support to monetary penalty imposed on the convict, there is much momentum to be gained so as to adequately assist victims from various backgrounds.

The development of victim centric jurisprudence must transcend legislative necessity, and afford participating instruments flexibility to respond to the diverse needs of a victim. Compensation must be actualised in the sense of realising rehabilitation for the victim. Therefore, a holistic Victim Compensation Scheme must encompass assistance through the process of prosecution, psychological support and rehabilitative measures to integrate the victim back into the norm of society. Apart from defining the role of various stakeholders, a successful victim compensation scheme must necessarily provide for transparency in the expenditure of the budget, and a mechanism for accountability. The State exchequer must be prepared for contingencies and be supportive of the expenditure incurred by the victim. There must be a channel for inviting and recording funds received from various international organisations and the public towards this purpose.

The law under Section 357 and Section 357A of the CrPC must witness a marriage of the State and the courts in functioning harmoniously to alleviate the plight of the victim. Further, it must evolve to accommodate instances where states have either failed to notify effective schemes or the scheme notified are ineffective in operation. The Legislature must realise that the outlook of the Law Commission may be limited to scholarly knowledge, and therefore integrate victims and other stakeholders in the process of making the law. While the scope of this article is limited to case-study and analysis of scholarly work, there is much to be learnt by actually recording data of applications, complaints and stories of victims.

The machinery of criminal justice in India must be reinvented to become a system that is curious to the nature of crimes, their effects on the victims and the stigma it bears in society, and alive to the developments of human rights jurisprudence internationally. As responsible citizens, we must constantly remind the consciousness of justice that it owes a sacrosanct obligation towards the rehabilitation of a victim.