

BALANCING THE RIGHTS OF VICTIM AND ACCUSED IN AN ADVERSARIAL CRIMINAL JUSTICE ADMINISTRATION - A CRITICAL ANALYSIS IN LIGHT OF CURRENT INDIAN SCENARIO

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Abstract

India, being a common law country, reflects the reign of an adversarial criminal justice system, the primary objective of which is to ensure equal participation and fair representation opportunity to both the prosecution and defense in a trial. Delving deeper into such objective, what forms the cornerstone of this system is basically a balance between the rights of victims and accused, and an impartial judge who weighs the evidence so collected and representations so made, for the purpose of reaching the ends of justice. Since from the Law Commission Reports to the constitution of Malimath Committee and so on, various recommendations have been continuously put forward to achieve that balance in criminal justice administration of India. The present article hence sheds a light upon the status of such balance in the Indian criminal justice system, with a critical analysis to the unsettling challenges which continue to persist till date in this context.

Keywords : *Rights, Adversarial, Victim, Accused, Custodial Violence*

Introduction

It is not a matter of centuries but a series of recent incidents in India revolving around the police encounters, inhuman torture, custodial deaths, delayed justice and politically influenced police investigations that evince the declination of public confidence towards the criminal justice administration and the presence of a balance disorder underlying the protection of both the rights of victim as well as accused in a trial. A revisit to the origin of the standardized form of criminal justice system prevailing in India takes us to a tour to the ideals of adversarial

system and its incessant debate with the inquisitorial system. Considering the aforesaid difficulties and the recent NCRB Crime¹ and Prison Statistics² Reports reflecting an increase of registered crime rates from 21.2 in 2018 to 22.8 in 2019 per lakh population as well as the increasing rate of prisoners from 4,66,084 in 2018 to 4,78,600 in 2019 respectively, it is therefore inevitable to assess the status regarding the preservation of the rights of victims and accused vis-a-vis the efficiency of present adversarial system in such context. In light of the above, the present article shall focus on the existing legal provisions and challenges arisen in protecting the rights of the victims and accused in the criminal justice administration in India, respectively.

Existing Legal Framework in India for Protection of Victims' Rights

In India, the rights of victims in a criminal justice administration are mainly protected by Article 21 of the Constitution of India ('Constitution'), 1949, Indian Penal Code, 1860 ('IPC'), the Code of Criminal Procedure 1973 ('CrPC.') and the Protection of Human Rights Act, 1993. However, the United Nations by way of adopting the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 have duly identified the four components forming the human rights of the victims i.e. the right to access fair treatment and justice, right to restitution, right to compensation and right to assistance or humanitarian aid. Justice Malimath Committee Report³ has recognized two prime rights i.e. right to participate in criminal proceedings and right to compensation to the victims, as available in India. while tracing these rights back to the Constitution of India or the Indian Penal Code the following provisions are witnessed to lay down the existing legal framework to protect the victims' rights in the criminal justice administration :

¹NCRB, Crime in India 2019 Statistics, available at <https://ncrb.gov.in/en/crime-india-2019-0> (Last accessed on January 2, 2021).

²NCRB, Prison Statistics India - 2019, available at <https://ncrb.gov.in/sites/default/files/Executive-Summary-2019.pdf> (Last accessed on January 2, 2021).

³Report, Committee on Reforms of Criminal Justice System, Government of India, MHA, Volume I (March 2003, India) available at https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf (Last accessed on January 4, 2021).

Right to Fair Treatment and Access to Justice

The following provisions act as a pathway to entitle the victims the right to fair treatment and access to justice :

1. Right to receive a copy of the FIR at free of cost by the victim u/S. 154 CrPC
2. On refusal by the Investigation Officer in charge to cognize such FIR, the victim is entitled to request to the Police Superintendent for issue directions against such failure / refusal,
3. On refusal by the Police Superintendent, the victim is entitled to file a complaint before a Magistrate for taking cognizance on such complaint or issue directions to the police officers [S. 190 CrPC]
4. Victim plays the role of a witness in the trial process in an adversarial system like India and can participate in the investigation only on being called upon to identify the recovered material objects or the whereabouts of the accused.
5. The sexual assault victims are entitled to legal assistance and the victims in general are entitled to be informed of their right to legal representation.
6. Victim is entitled to a right to move before the Court for cancellation of a bail u/Section 439 CrPC.
7. Victims have a say before the acceptance of a closure report by the Court. The participation of victim is mandatory in case of compounding of offences u/S.320 CrPC
8. Although the victim under Section 24(8) Cr.P.C can appoint a special prosecutor but the participation of such prosecutor shall be indirect and subject to the guidance and instructions under the public prosecutor.
9. Victims are entitled to be testified as the prosecution witness in a criminal trial.

Right to Compensation and Assistance :

Before the 2008 Cr.P.C. Amendment Section 357 was the sole-governing clause to regulate the amount of compensation and assistance to the victims of crime. Section 357 protracts the applicability of compensation clause in cases of stipulation of fine as a sentencing and to those cases where fine does not form the part of sentencing to the accused.

The insertion of Section 357A in 2008 Cr.P.C. amendment was preceded by the recommendations of the 152nd Law Commission Report which proposed Rs. 25,000/- for

bodily injury and Rs. 1,00,000/- for resulting in death as the compensation to victims and the 154th Law Commission Report which mandated the fair and adequate victim compensation scheme under the heads of ‘injury’, ‘loss or damage to the property in course of injury’, ‘death resulting from injury amounting to loss to dependants’. Due to non-implementing both the LCI recommendations, the precedents like *State of Gujarat v. Hon’ble High Court of Gujarat*⁴, *Delhi Domestic Working Women’s Forum v. National Commission for Women*⁵ etc. were passed by the Apex Court with a sole intention to give effect to the victim compensation scheme. Further Sections 357B and 357C Cr.P.C. as amended in 2013, protracts the scope of the victim compensation and assistance by way of adding the compensation payable under Section 357A, to the fine payable under Sections 326A and 376D of the Indian Penal Code, 1860 as well as inserting an immediate and free first-aid or medical treatment facility by all the public and private hospitals to the rape and acid attack victims.

Right to Restitution:

The State and its authorities shall have the duty to provide redressal to the victims and its families - which is mainly regulated by Sections 357 and 357A of Cr.P.C. Except Section 5 of the Probation of Offenders Act, 1958, there is no separate legal provision in India which differentiates the right to restitution and right to compensation and assistance.

Existing Legal Framework in India for Protection of Accused’s Rights

According to the existing criminal laws framework in India, the accused are entitled to the following rights :

- Right against double jeopardy under Article 20(2) and self-incrimination u/Article 20(3) of the Constitution of India,
- Right to fair and expeditious trial and not to be deprived of life and liberty except according to the procedure established by law u/Article 21,

⁴State of Gujarat Hon’ble High Court of Gujarat, (1998) 7 SCC 392.

⁵Delhi Domestic Working Women’s Forum v. National Commission for Women, (1995) 1 SCC 14.

- Right to legal representation u/Article 22(1) and Section 41D Cr.P.C., though not during interrogation.
- Right to be produced within 24 hours of the arrest/detention before the Magistrate u/Article 22(2) and Section 57 Cr.P.C.,
- Right to be informed of grounds of arrest [for the arrested persons] u/Section 50(1) Cr.P.C. and released on bail in case of bailable offences u/Section 50(2) Cr.P.C.,
- Right not to be subject to more than necessary restraint for preventing his escape u/Section 49 Cr.P.C.,
- Rights under Section 50A Cr.P.C. to be informed about the arrest and place of arrest to any of the friends or relatives or nominated persons of the arrested person and right to be informed about his rights by the Police officer after bringing in the Police Station,
- Right of the arrested person to be examined by a medical officer (for female, by a female registered medical practitioner) for any injuries or marks of violence u/Section 54 Cr.P.C.,
- Right to be entitled to reasonable care of the health and safety u/Section 55A Cr.P.C.,
- Right to be released on bail under Section 436 in case of bailable offences.

Balancing Rights of Victims and Accused : Malimath Committee Recommendations

While addressing the challenges underlying the necessity to balance both the rights of victim and accused in India, it is pertinent to delve deeper into the recommendations put forward by Justice Malimath Committee, 2003⁶:

1. Lack of efficiency of Adversarial Systemas compared to Inquisitorial System : Considering the Indian system as adversarial and in light of increasing challenges, the Committee raises a question on its efficiency as compared to inquisitorial system as followed in Germany, France etc. wherein the entire investigation process is monitored by Judicial Magistrate thus resulting into a rigid system and hike of conviction. The Committee therefore realized that the adversarial system, wherein judges play the role of an umpire - impartial and less active than the rigid inquisitorial system, ends up protecting fairness to the accused than

⁶Supra Note 3.

the latter. However, with regard to the question regarding balancing both sides, the Committee recommended adoption of some good and rigid feature of inquisitorial system (such as, proactive role of judges in issuing requisite directions to the prosecutors and police officials, monitoring the due compliance of laws, guiding the authorities towards a quest for truth, proper exercise of inherent powers etc.), leading to creation of a semi-flexible system.

2. Protecting rights of the accused : Justice Malimath Committee Recommendations revolve around the implementation of right to silence as guaranteed u/Art. 20(3), by way of amendments in Section 313 Cr.P.C. Besides, several other rights as provided shall be translated in regional language to increase awareness and specific provisions on handcuffing, misuse of police powers and requisite accused protection must be enacted in detailed.

3. Serving justices to the victims : Active participation of victims in criminal trial, proper legal representation, NGO assistance and compliance with the adequate compensation scheme and preferring appeal in violation of it, creation of victim compensation fund, provision of interim compensation etc. must be ensured and implemented by the State

4. Reforms in Investigation, Standard of proof, Prosecution, No. of Courts and Judges, Witness protection and treatment, Court Vacations frequency, enhancing sentencing in terms of fines, treatment to pregnant prisoners, compounding of offences in petty cases, life imprisonment without remission /commutation as an alternative to death sentences, drawbacks in offences against women such as maintenance provisions, adultery, cruelty, rape etc., suitable stringent framework to deal with organised crime, federal crimes and terrorism etc., judicial and executive training etc. have also been recommended.

Persisting Challenges in Protecting the Victims' Rights in India

Failure to protect victims and witnesses : While discussing the status of victim's rights in India, the nature of adversarial system has mostly confined the victim and its role as a witness in reality. A political will is in general witnessed in major sexual violence or rape cases where the victims and her families are merely served with basic protection, which reflects the ends of justice as a far-fetched dream to them. In spite of adopting a Witness Protection Scheme of 2018, its efficiency to protect victims and witnesses can better be understood from the recent

*Unnao rape case*⁷ or the notorious *Kamduni rape case*⁸ wherein the victims and/or her family members being the key witnesses have been subjected to death by politically-induced police officials even before the examination and cross-examination were completed. Several decades passed, but the witness protection law in India still suffers from an uncertainty - which ultimately tends to miscarriage of justice towards the victims.

Inability to adopt UN Declaration on Justice for Victims of Crime and Abuse of Power, 1985 - A Declaration which acts as a basis for victim-oriented legislations in most of the nations has not yet been ratified by India, and neither is the *UN Convention against Torture* (1987) - which reflect a death blow to the protection of rights in the criminal justice system of India.

Violation of the Victim's rights by the Law Enforcement Agencies : The various law enforcement agencies such as the Police officers play major role in adversarial system. But the reality portrays the sheer violation by the police officials in terms of tampering evidences, lacking basic dignity in interrogating the rape and acid attack victims, willfully attempting to close the investigation in the politically-induced crimes, failure to provide requisite legal and medical assistance to the victims of various offences such as accident, offences against the body etc.

*Failure to implement the Victim Compensation Scheme*⁹: Although the long-standing dormant status of Section 357 Cr.P.C. followed by the insertion of Section 357A by the 2008 amendment to Criminal Procedure Code, 1973 reflect a ray of hope for the plight of victim

⁷India Today, *Unnao Rape Victim, set on fire a year after being brutalised dies*, 12 July 2019, <https://www.indiatoday.in/india/story/unnao-rape-victim-set-on-fire-a-year-after-being-brutalised-dies-1626035-2019-12-07> (Last accessed on January 7, 2021).

⁸Daily Pioneer, *Beaten by cops Kamduni rape case key witness dies*, 14 Sept 2013, <https://www.dailypioneer.com/2013/india/beaten-by-cops-kamduni-rape-case-key-witness-dies.html> (Last accessed on January 7, 2021).

⁹Adv, Amit Bhaskar, *Analyzing Indian Criminal Justice Administration from Victim's Perspective*, Bharati Law Review, Oct-Dec., 2013, available at <http://docs.manupatra.in/newsline/articles/Upload/D4A9C7F0-8A98-4E34-B88E-0145775149D7.pdf> (Last accessed on January 7, 2021).

redressal by means of ensuring adequate compensation, facilities to rape victims etc., however its effective implementation by the District and State Legal Service Authorities is still a far-fetched dream - which is why we witness the cases like '*Serina Mondal v. State of W.B.*'¹⁰ wherein violation of Section 357A Cr.P.C. is equated with infringement of Article 21 and the failure to structure a adequate victim compensation scheme is witnessed in most of the states.

Persisting Challenges in Protecting the Rights of Accused in India

Victims of Custodial Deaths : India, being the proponent of the adversarial system, instructs its machineries the adherence to the presumption of innocence while trying an accused in a criminal proceeding, as the entire investigation in an adversarial system is primarily executed by a bunch of enforcement agencies. But at the same time, an increasing rate of custodial deaths is axiomatic from the **NCAT (National Campaign Against Torture) Report**¹¹, according to which, at least 1,731 numbers of accused subjected to police and judicial custodial death in 2019 - hence accounting to 5 custodial deaths on daily basis, as contrary to no conviction of a police official. Therefore, it draws an inference from the above statistics that the adversarial system in India portrays a gross violation of human rights guaranteed to the accused under the Constitution as well as various criminal statutes. Unlike the recent *Jeyaraj-Bennix case*¹², most of such custodial deaths in India are hardly brought into the limelight, especially in case of petty and less serious offences. Although the Apex Court in *Nilabati Behara v. State of Orissa*¹³ ordered compensation for families of victim of custodial death, the same does not stand as a deterrent mechanism due to cognizance of no action on the police officials.

¹⁰*Serina Mondal v. State of West Bengal*, 2018 SCC Online Cal 4238.

¹¹National Herald India, Nov 3 2020, <https://www.nationalheraldindia.com/india/nobody-knows-how-many-indians-die-in-custody-because-official-figures-vary-wildly> (Last accessed on January 8, 2021).

¹²LiveLaw, Jayaraj - Bennix Custodial Deaths : Questions about lapses of Magistrate in ordering remand. 27 June 2020 5:00 PM, available at <https://www.livelaw.in/columns/jeyaraj-bennix-custodial-deaths-questions-about-lapses-of-magistrate-in-ordering-remand-158998> (Last accessed on January 8, 2021).

¹³*Nilabati Behara v. State of Orissa*, (1993) 2 SCC 746.

Victims of Other Policing Violence : Even apart from the custodial deaths, other forms of violence such as inhuman torture and atrocities, third degrees, illegal encounters, unlawful and arbitrary detention etc. steadfastly erode the essence behind the right to fair trial of the accused.

Undertrial prisoners and detenues : The fact that the NCRB Prison Statistics Report 2020 shows an increasing trend of undertrial prisoners and detenues¹⁴ and the standstill status of their long overdue trials and production before the Court, respectively, infringe their basic right to fair and expeditious trial itself, as continuously recognized by the Apex Court within the ambit of Article 21.¹⁵

Lack of providing Legal Aid & Rehabilitation¹⁶ : In the bailable cases wherein bail is a matter of right under Section 436 of Cr.P.C., mostly the indigent accused becomes the victim of discrimination and ends up spending the longer period unreasonably in the prison due to inability to furnish requisite security amount. Further, a lack of providing the indigent and illiterate accused legal aid, legal representation opportunity and necessary rehabilitation is very much axiomatic in Indian Criminal Justice System.

Conclusion

While assessing the status of implementation of Malimath Committee Recommendations in the existing Criminal Laws in India, it is evident that there are several other reforms subsequently attempted with an aim to achieve the desired balance of rights. Such attempts can be traced in forms of Reports by Law Commission of India (41st, 78th¹⁷, 154th LCI reports) or the draft national policy on criminal justice¹⁸ by Madhav Menon Committee, or in form of

¹⁴ Supra Note 2.

¹⁵ Hussainara Khatoun v. Home Secretary, State of Bihar, AIR 1979 SC 1369.

¹⁶ Section 436, 436A, and 437 Cr.P.C. Also, referred : State of Rajasthan v. Balchand, AIR 1977 SC 2477 wherein the bail and not jail was held as the basic rule.

¹⁷ Law Commission of India, 78th Report on Congestion of Undertrial Prisoners in Jails 1 (1979).

¹⁸ Report of the Committee on Draft National Policy on Criminal Justice, (July 2007), accessible at: <https://mha.gov.in/sites/default/files/DraftPolicyPaperAug.pdf>. (last accessed on January 11, 2021).

several amendments to the existing Criminal Laws (2005, 2008, 2013, 2018 amendments and enactment of POCSO Act, 2012 and Juvenile Justice Act, 2015) or the recent passage of Shakti Bill¹⁹ by Maharashtra Government etc. Further, a bare visit to the landmark and recent judicial developments cannot deny its role as a effective machinery to uphold the balance between victims and accused rights. Cases like *Sunil Batra v. Delhi Administration*²⁰, *Nandini Sathpathy v. P.L. Dani*²¹, *Maneka Gandhi v. Union of India*²², *Vishaka v. State of Rajasthan*²³, *Ruhi v. Anees Ahmad & Ors.*²⁴ etc. are constantly reflecting judicial activism in balancing the victims and accused's rights in criminal justice system. Despite introducing the above reforms in existing criminal justice system in India, a rapid growth of gross human rights violations is still an unsettled concern on account of continuous non-compliance of duties imposed on the investigating officials and prison authorities and the lack of periodic impact assessment of the laws, amendments and recommendations as put forth by the various committees. In view of the same, it is a need of the hour that the Government in consultation with the judiciary must delve itself in processing with an effective and expeditious enforcement of a quasi-adversarial system to balance the blatant violation of victim and accused rights.

¹⁹Vinaya Deshpande, 'Speedy Courts, CrPC Amendments: Features of Maharashtra's Shakti Bill to curb crimes against women & children, News 18, available at <https://www.news18.com/news/india/speedy-courts-crpc-amendments-features-of-maharashtras-shakti-bill-to-curb-crimes-against-women-children-3176462.html> (Last accessed on January 11, 2021).

²⁰*Sunil Batra v. Delhi Administration*, AIR 1980 SC 1579.

²¹*Nandini Sathpathy v. P.L. Dani*, AIR 1978 SC 1025.

²²*Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

²³*Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

²⁴*Ruhi v. Anees Ahmad & Ors.*, Criminal Appeal No. 7 of 2020 decided by the Supreme Court on January 6, 2020.