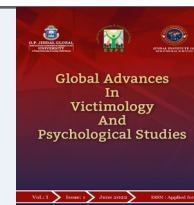


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Directory Right or Mandatory Obligation to Participate: Psycho-Legal Dimensions of Victim-Person's Participation in Criminal Justice System

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Abstract

A crime is a wrong against the society and hence the state, acting under the social contract, prosecutes the accused. The injured or the victim person, while being entitled to some rights, is expected to act as a star witness in the trial. This paper analyses the role of the victim person in a criminal trial, and puts forward arguments rooted in legal philosophy, comparative law, psychology and sociology to argue that--though the victim's participation is necessary ascertaining 'harm element' of an offence and that victim is entitled to participatory rights including recording of Victim Impact Statement (VIS), Opinion statement and restorative justice negotiations--the participation of the victim person should be a directory right with an option of waiver, rather than a mandatory obligation to participate.

Keywords: Psycho-legal Dynamics of Victim Participation, Soft and Hard Victim Participation, Victim's Participation, Victim Impact Statement (VIS), Victimhood of State and Injured Person

1. Introduction

N A crime is a wrong against: an individual, a fundamental social-value or an institution (Ashworth & Horder, 2013). While it is clear that the commissioner of this wrong would be the defendant-party in a criminal-trial; albeit the person who experienced the wrong may not necessarily become the second or the prosecuting party. In most of the criminal justice systems ['CJS', for short], the state assumes the authority- deriving from the theory of social contract- to prosecute. This prerogative of the state, when extrapolated, leads to a jurisprudential question that the

accused is the "offender of whom"? Some jurists argue that he is the "victim's offender" (Erez & Roberts, 2007) and the injured party should lead the case against the offender in the court; while the collectivists and supporters of social contract would argue that the offender belongs to the state, and victim-person's role is to assist the state in prosecuting the offender.

The Weberian social-contract argument labels the state's agency of prosecution as a role to take revenge for the act of deviation from the norm set by "community agreement"; and the compensation for the injured

individual as a by-product of this process. (Mueller, 1955). In fact, in some wrongs like war, racism, and colonialism, the injured individual is not even conferred the status of a victim, as the status could not be granted without challenging the status-quo of the state (Elias, 1986). Pertinently, in several criminal jurisdictions, as we would observe later in this essay, the ambiguity on victimhood was systematically perpetuated, and even the word 'victim' was not defined in their statute books until very recently. Wherefore, in the traditional prosecution-defence dichotomy based CJS model, the state derives the character and colour of victim-hood out of the 'social-contract', and the role of the 'injured-individual' is often narrowed down. In order to appreciate and academically distinguish between the *de-jure* victimhood of the state and *de-facto* victimhood of the injured person, this paper has used the connotation 'victim-person'¹ for the latter instead of 'victim' *simpliciter*.

While the victim-person, ideally, is entitled to a spectrum of rights, including the rights of protection, (interim-)compensation, and rehabilitation; the state recognises these rights not merely out of benevolence, or with a view of rectifying or compensating the wrongs done to them (Cannavele, 1975); albeit these rights are also extended to the victims to 'win' their cooperation towards the criminal justice machinery of the state. In conventional common law CJS, the persona of the victim-person and the prosecution (state) is merged as 'legal-victim'; and therefore, the state expects the victim-person to cooperate with the state in the criminal justice process, and coincide with state's prosecution concerns. This means that the state wants the participation-but, notably, limited participation-of the victim-person; not solely for her interest but for the interest of the state. Wherefore, some rights are conferred upon the victim-persons as a token of acknowledgment for their presence and cooperation with the state's CJS. In this essay, we would attempt to examine the legitimacy of this expectation of 'state-determined' participation of the victim-person in the CJS.

While appreciating the nature and scope of participatory rights, we find that the nature of victim-

person's participation in CJS may also be varied. In the classification by Chalmers, *et al* (2007) and Ashworth (1993), it could either be 'soft participation', where the victim-person makes an impact statement- expressing his experience of the offensive act, and the judge balances other records to arrive at judgment. Or, it could be 'hard victim participation' where the victim-person makes a direct 'opinion-statement' on the liability and appropriate sentence for the accused. In this essay, we would analyse two models which crystalise the concept of victim participation, that is, Victim Impact Statement ['VIS', for short] and Restorative Justice, to understand these participation characteristics. Also, while the participation may be recognised as a 'right', several victim-persons may wish to abstain from participating (Kelly, 1984)-for scores of reasons discussed later. Since a 'right' inherently includes within itself right not to exercise the right i.e., right of waiver (Gibbard, 1974; Basu, 1984), this essay would also discuss and distinguish the directory and mandatory nature of victim-person's participation rights.

Afore-discussed general landscape of victim-person's participation in CJS *ex-facie* indicates that there are multi-fold and multi-facet issues of this elephant in the room. To explore these issues, this essay is divided into three broad sections. The first section would decipher the necessity and legitimacy of the participation of the victim person in CJS, with the lens of legality. The second section would deal with the psycho-legal understanding of victim-person's participation. And, the third section would briefly present the concluding remarks by perusing the afore-discussed dynamics in practice.

2. Necessity and Legitimacy for Participation of Victim-Person

Generally, a criminal trial has two broad stages, *first* the determination of liability or establishing the charge; and *second*, arriving at the operative part of the judgment including sentence and restitution-rehabilitation plan. While the criminal liability or culpability is fixed by the court on the basis of the prescribed legal-statutory ingredients

¹The word 'person' includes singular, plural, juristic and natural persons. Further, the word 'victim-person' would include the injured person(s) and their guardian or legal-heir.

constituting the offence; in several offences, there is a judicial discretion involved at the stage of sentencing. A judge exercises this discretion by perusing several factors including severity of the offence, the perception of the society on the severity of the crime, the harm experienced by the victim, and possibility of reformation of the convict, *et al.* In other words, culpability is fixed by the objective 'yardstick-of-wrong', while the elements of subjective 'yardsticks-of-harm-and-perception' are involved at the stage of sentencing. (Pemberton, 2014). The state may express the juxtaposition of the severity involved in the crime with the dimensions of 'yardstick of wrong', for the determination of consequential culpability. Albeit, the yardstick of harm, to be used effectively, must involve the victim-person's participation in the CJS. The experience of harm varies from the person to person (Winkel, 2007) and it is the victim-person alone who can best express the 'experienced harm' of the criminal act.

By having a historical glance of the sketch of the victim-person's role in CJSs, we find that in most of the jurisdictions, it was limited to the victim-person being the identifier of the perpetrator and as a 'star-witness' to the crime. To have any other right, even if some were recognized by the system, depended upon whether victim is "lucky" to get an investigation officer or a public officer in criminal justice system who recognizes and supports the cause of victim rights. (Douglas *et al.*, 1994).

In the late 20th century, the contemporary advocates of victim rights have argued that the legal "working group" (Einstein and Jacob, 1975), or the informal 'court-cartel' of prosecution agencies, attorneys and judges-who considered the victim-persons as an 'outsider' in the courtroom who may influence their standard *modus operandi* or the 'legal-objective reasoning' (Victorian Sentencing Committee, 1988), and therefore victim-person's role was limited in CJS.

Since the 80s of the previous century, a voice for proliferation of victim-person's 'rights as an injured-person', including the right of participation in the CJS started emerging in the legal spheres across the globe. In the United-States, some of these rights were legislated through the 'Victim and Witness Protection Act, 1982'. These voices also reached the international platforms, and in the year 1985, United-Nation's seventh congress on 'prevention of crime and treatment of offenders' declaration called for enabling the victim-persons to

have protection, assistance and rights including right to participation in the criminal justice system.

The 1985 U.N., declaration led reforms in criminal processes of several jurisdictions globally. One such reform was the introduction of the VIS, where the victim-person(s) can state the details of psychological, medical, financial, or any other impact including on their life-style, wages, expenses, property, etc, which they experienced as a result of the criminal act in question (Erez & Roberts, 2007). This statement may also include a pleading for compensation or restitution. VIS tends to send a constant reminder to the public agencies involved in the criminal justice process that apart from the rights of 'incorporeal' state, the interests of a 'sentient victim'-as 'principal injured person' (Erez & Tontodonato, 1990) are also involved.

Some jurists argue that in an adversarial system, where the state and defence are the principal parties, the victim's say at the sentencing or VIS violates the core principles of the system. (Ashworth, 1993; 2002). Ashworth (2000) also discredits the VIS as a victim-right tool by terming it as a 'sweetener' which the state offers to manage the perspective that it is looking after the victim's interest. Another issue which is raised by the opponents of 'active victim participation' and VIS is that the judge may get persuaded by the statement of the victim-person and may cross the boundaries of proportionality principle. (Kim *et al.*, 2016). This, according to them, may endanger the defendant's rights.

In the support of VIS, it is argued that the judges get better and accurate sense of facts (Davis & Smith, 1994) after perusing the victim-person's expression on it. Further, in contrast to the speculation that the victim-person may exaggerate in his narration, the studies have indicated that though this argument is not completely unfounded, it is only on miniscule instances that amplification is observed. (Erez *et al.*, 1994). Also, the victim-person, in any case, is a witness for the prosecution and hence if (s) he wishes to take a recourse to embellishment of facts, s(he) can do while testifying as well. In an adversarial system, the opposite party has a right to cross-examine, and hence the defence gets an opportunity to surface the prejudicial or exaggerated part of the statement of this victim-person, in testimony or VIS, if any, and get it rectified. Moreover, as pointed by Villmoare and Neto (1987, p. 37), the exaggeration and 'emotional-appeal' by

the victim-person also stands corrected by the evidentiary materials on record, sentencing guidelines and judicial precedents which binds the court

The U.S. Supreme Court also advocated² for the VIS by observing that the statement is not viewed as 'emotionally charged testimony' of the victim-person aimed at deviating the judicial minds from the condition of the accused to the character of the victim-person, albeit the statement is precious to remind the CJS that the victim-person is an individual who represents 'unique loss to society'.

Another development in the area of victim-person's participation in CJS is the concept of restorative justice which facilitates the injured and responsible persons of a harm to come together for communication. It envisages reparation of the harm and finding a 'way forward'. A spectrum of mechanisms can be adopted to achieve the goal of restorative justice, which include (Menkel-Meadow, 2007): conference between the victim-person and the accused, mediated by a trained facilitator; community conference where victim-persons are from a community and some members of this community facilitate the dialogue with the accused; or the 'shuttle process' which involves the *ex-parte* dialogue with a facilitator or the judge, who facilitates the communication between the parties. While these models are progressive and find acceptance in less serious cases, there is a reluctance to accept them in serious cases (Reeves, 1989). It is often argued that, in serious cases, there needs to be a bridge between the restorative and punitive justice models, for having a successful implementation of both. Further, penological arguments of punishment as a tool of general deterrence is not satisfied with restorative justice. But, the argument against restorative justice, which is most pertinent for the context of our discussion, is that the victim-person may be unwilling to meet the offender (Reeves; 1989; Law Commission of Canada, 2003) or to participate in the CJS.

This reluctance of the victim-person, to participate in the CJS, may be out of several ostensibly threatening, organic, or logistical reasons. (Shapland *et al.*, 2006). In cases where the victim-person is the whistle-blower informant of offence, s(he) may be threatened of adverse

consequence to her person and property if her identity is revealed to the offender. Further, in the cases of moral or sexual turpitude, the victim-person may wish to keep her identity secret. And, if it becomes mandatory to participate, then the victim may not even prefer to report the offence. In India, for instance, experience as a law practitioner indicates that the cases of sexual misconduct ensuing from teen-age relationships or abusive partnerships remain largely unreported because many relationships exist incognito and the victim-person doesn't wish to let her relationship be known to her family or to society.

The afore-discussed two models of victim-person participation, viz. VIS and Restorative justice mechanisms, do enlarge the scope of victim rights in CJS, albeit do have certain limitations and arguments against them. The primary argument, which is coherent to the prompt question of this essay, is victim-person's refusal to participate in the process. While there is a strong advocacy for the right of victim-person, the advocate's mindfulness must also encapsulate the victim-person's liberty in non-participation.

The victim-person's participation may be less due to reasons including lack of confidence to exercise rights, limited legal resources, or unwillingness to substitute state prosecution; also, there are cases where the victim assumes guilt and feels that she was responsible for the crime which was committed on her. Especially in the offences ensuing from domestic set-up, the victim may be hesitant to get the accused punished and wish only for protection from further impact on her rights. In cases like these, the victim may not wish to participate in the criminal justice process to avoid the punishment for the perpetrator, or to avoid responsibility for punishment awarded to the accused (Reeves & Mulley, 2000).

Since the participation of the victim-person enhances the legitimacy of a CJS, a participation opportunity must be extended to her; albeit all victim-persons should not be expected to participate in all the processes of CJS in a mechanical-mandatory manner. Moreover, since the victims may not be aware of legal jargons and legal prerequisites, it may not be an intelligible idea to expect them to be the sole leading voice of the prosecution, as they may lose sight of relevant details which are legal requisite

²*Payne v. Tennessee* (90-5721), 501 U.S. 808 (1991).

in a criminal justice process. Wherefore, to balance the exercise-waiver dynamics of the participatory rights, the victim-person's participation should be a 'directory-right' and not the 'mandatory-obligation'.

3. Psycho-Legal Dynamics in Victim Participation

Anno O, the inspiration behind Freud and Breur's work *Studies in Hysteria* (1895) was a patient of hysteria. She suffered from hydrophobia, personality disorder and anxiety. Once, she saw a dog licking water from her grandma's bowl, and suddenly she screamed. It was a remembrance of a similar incidence which had caused hydrophobia in her. Post this recall-scream incidence, the hydrophobia symptoms reduced in her. This study led Freud and Breur to discover the cathartic method of psychoanalytical therapy, which is based on the underlining principle that recollection and recognition of unpleasant experiences-which get seeded in the unconscious mind of the victim-can be a cure for the mental disorders induced by them. If we extrapolate the principles of this theory to the CJS, we may find that the victim-persons feel better after narrating their experience with the offence in question. This section of the essay would examine this hypothesis, and delve into psycho-legal dynamics of the victim-person's participation in the CJS.

A victim-person, after suffering the harm of the offence, wishes to at-least have a sense of say in the justice procedure for her. There have been studies to indicate that the victim-persons don't really need the control over the decision, but they desire to have a 'process-control' in the decision-making process (Wemmers & Cyr, 2004). In other words, victim-persons feel satisfied with the CJS as long as they are heard in the process, irrespective of its direct impact on the decision. Reversely, the victim-person, if stays unheard in the CJS, develops a feeling of helplessness (Kipatrick & Otto, 1987). Further, an opportunity of participation also has healing effect from the trauma of victimization and harsh experience, if any, of the investigation and trial process. (Ranish & Shichor, 1985; Erez, 1990).

Taking a theoretical foundation from the work of Strang (2002), Sherman *et al.*, (2005) conducted a controlled trial with the restorative justice models to demonstrate the relationship of victim-person's participation in CJS and its consequence effect on her psychological-framework. This study indicated that restorative measures and participation opportunity does have a healing effect on victim-person. Though, some studies other which have analysed the empirical data have observed that the victim-person may not have a sense of 'enhanced satisfaction' after recording VIS, in fact it may ensue a contrasting outcome as well (Hoyle *et al.*, 1991). These studies are also not without a contrasting empirical analysis on the same issue (Wemmers, 1996).

Balancing these extremes, the studies have also found that the level of satisfaction doesn't solely depend upon the recognition of the right to participate, but also depends upon the nature of participation. For instance, where the victim is entitled to merely submit a written VIS, the level of satisfaction may not be as high as in the case when victim is involved in more active sense-for instance as a prosecuting-party (Erez & Bienkowska, 1993; Erez & Roberts, 2007, pp. 289).

On the other hand, the active participation of the victim-person, in court-proceedings of adversarial-system, may be followed by a cross-examination. There is no dearth of instances where the lawyers tend to cross-examine the victim-person in a shaming manner (Mc. Donald, 2020). Questioning the intimate or personal details, immodest animation or tweaked recreation of the crime story, and attempt to impeach the character of the victim-person by the defence counsel may create distressing circumstances and enhance the probability of re-traumatisation of the victim-person. (Herman, 2011)

Despite the mixed results of empirical observations and analysis, the general psycho-legal trend is in favour of the argument that victim-person's participation in CJS tends to induce a sense of equity and perception of satisfaction with CJS to the victim-person (Boer and Sessar, 1991). This trend may also surface a devil's-argument, that if the victim-person actively participates and derives 'satisfaction' from the CJS, her anger and grief may overpower her rational narration of facts and experience, and may guide her towards taking revenge with the offender. However, empirical data reveals a

contrasting picture. Studies reveal that the victim-person seeks an answer to “why-me?” question. In other words, the victim-person participates in the CJS to confront her perpetrator, and join the dots of the events and reasons which led to her victimization (Mattinson & Mirrlees-Black, 2000). In many cases, the victim-person also seeks an apology from the offender, and when it is received, the victim-person may gain back her ‘self-esteem’ and may also recover from the impact of victimization. (Bibas & Bierschbach, 2004).

Even in context to youth justice, studies have provided evidence regarding positive role of victim-person's participation. Littlechild, in report presented to Justice Committee in 2013, observed that:

“The benefits of restorative justice have been shown to be improved sense of feeling that the young people and the victims were part of the process; an understanding that actions have consequences; improved skills for managing conflict; greater empathy towards others; increased mutual respect; and improved feeling of community”. (Littlechild, 2013)

The studies, including the afore-discussed ones, have buttressed that while considering the voice of the victim-persons, be it through the perusal of written or oral VIS or through restorative justice models, injects a sense of confidence in the victim-persons and empowers them victim by extending them a feeling that they have a power to forgive or not to forgive (Petrucci, 2002) ‘their’ perpetrator. Consequently, rather than the nature of punishment awarded to the perpetrator at the end of the justice-process, one of the major factors guiding victim-person's perception of satisfaction is the opportunity to be heard and treatment with respect (Wemmers, 1996). In other words, when the victim-person is heard and her injury is respectfully acknowledged by the system, she reposes trust in the system.

Further, the Victim-person's participation in CJS may be helpful not only for the healing and psychological well-being of the victim-person, but it may also help in inducing a sense of regret and rehabilitation in the accused (Talbert, 1987), and would reduce the probability of recidivism. Additionally, where the victim-person and accused are strangers, the victim's participation in the system-especially by communication with the defence-

may facilitate familiarity between the parties. The party familiarity may result in perpetrator recognising the harm caused by them and may repent it, while the victim may forgive the accused by knowing the circumstances and situation in which the perpetrator acted.

Moreover, the direct participation of the victim-person may facilitate the understanding of legally-unornamented and factual picture of harm for the jury or the judge. Since ‘understanding’ and ‘cognition’ are contextual (Luhmann, 1996), it is important to fathom the background and context of the offence and victim-person to comprehend the crime and its ensuing consequences. An argument which opposes this participation is that it may mis-influence the judge, which may result in harsher-disproportionate punishment for the accused.

An empirical psycho-legal study (Kim, *et al.*, 2016) with a sample size of more than 200 participants has indicated that though ‘blameworthiness’ or culpability of the offender is impacted by the nature and severity of the offence as well as by the experienced harm by the victim; the increased-sentence doesn't rely upon the latter. Therefore, this observation refutes the argument that the involvement of victim may adversely and disproportionately impact the case against the offender. The same study also observed that the victim's statement about the impact and intensity of harm experienced by them, buttresses the understanding of the assessors. This understanding may then form a base to formulate rehabilitation framework for the victim. Therefore, while the VIS tends to have miniscule prejudice, if any, against the offender; it has a potential to enhance efficacy in therapeutic and purgative victim support.

Further, while referring to empirical and doctrinal data, Davis & Smith (1994), and Erez & Roberts (2007), have found strong evidences which reflect that the victim-person's participation facilitates a fair sense of justice, even among judges and attorneys (Henley, Davis & Smith, 1994). Also, a notion of satisfaction (Kelly, 1984) and procedural-justice (Dignan, 2004) is sensed by the victim-persons, irrespective of the judicial outcome. Thus, the victim-person's participation in the CJS assists the judge to clearly picture the harm while exercising the judicial discretion in sentencing and deciding rehabilitation plan.

Wherefore, the empirical and psycho-analytical evidence reinforces the proposition of participation of the victim-person in the CJS; it also indicates towards certain circumstances where the victim-person may encounter re-traumatization if compelled to participate. Hence, the observation of the first section-supporting for victim-person's right, with a scope of waiver-is buttressed in this section as well.

4. Perusing the Practice: Conclusion

Due to limitation of space and time, several other emerging issues in this area and their trends in different CJSs could not be dealt in this essay. This section would conclude the discussion by having a brief view of the operationalisation of Victim-person's participation, in practice.

Several jurisdictions acknowledged the victim-person's voicelessness in CJS, and made attempt to rectify it-for each victim-person represents the failure of the state to honour the 'social-contract' by failing to protect the victim-person from the crime. In 1982, the U.S. President's task force recommended Victim participation in the trial, and the same was endorsed by a statutory right ensuing from 1991 Omnibus Crime Bill. Presently, at-least 48 states in the U.S. have VIS at the stage of sentencing. In Canada, where VIS led to insertion of the connotation 'victim' in its criminal code, the victim-persons can record or present VIS themselves either in writing or orally (Roberts, 2003) and this right is extended even at the stage of hearing on parole. Judge, in the Canadian justice system, is bound to consider the VIS to determine the sentence on the offender (s. 722 (1), Criminal Code, RSC, 1985.)

In jurisdiction Viz. India, there is no formal provision for VIS, albeit victim-persons do record statements-narrating the facts as well as pleading for restoration and compensation-under the general provisions of the Criminal Procedure Code. Though 'victim' was defined in the Indian Criminal Procedure statutes only in the year 2009, there did exist some provisions in CJS-such as the right from disclosure of identity, reimbursement of expenditure to attend court-proceedings, right not

to be the informant of crime, right to file appeal against insufficient sentence to the offender, right to prosecute in several quasi-criminal offences like domestic violence, right to compound the offence by negotiating with offender and in several cases right to be assessed for an impact statement for interim-compensation-to support victim-person's participation in CJS. In some cases, victim-person's statement is recognised as a sole ground of conviction³.

Further, in India, there is an emerging support for formal introduction of VIS. The Supreme Court of India has stressed³ the need to have a victim impact statement "so that an appropriate punishment is awarded to the convict". The voices can be heard from the academic corridors, advocating for formal introduction of victim's right to be heard-in absence of which, it is argued, 'secondary victimization' takes place (Bajpai, 2019; Maguire, 1991) and victims of crime are marginalised in the criminal justice process.

Despite mushrooming of provisions facilitating victim-person's voice in CJS, across jurisdictions, (Roberts, 2008), the victim-person's participation is perpetually low in practice. For instance, a 2001 study (Sanders *et al*) indicated victim participation and report submission in only 30% cases in England and Wales; while in Canada, the participation is as low as 11% (Roberts & Edgar, 2006). Similarly, after a decade of introduction of plea-bargaining, only 0.45% cases (4,816 out of 10,502,256 cases) were disposed of by plea bargaining in India. (Sekhri, 2017).

The probable reasons for the lower turnout of victim-persons' participation could be legal as well as psychological. While rights are conferred upon victim-persons'; their implementation may not be *bona-fide* and in the right spirit. For instance, even in academia, while there is assertion for greater participation rights by the victims, trial is referred as 'tri-partite' (Erez & Roberts, 2007), with victim-person, who is the most impacted party, as the third party. In other words, despite recognition of rights, the victim-persons might have been discredited as legitimate party in CJS. Moreover, although participation in CJS may have purgative and cathartic effect upon the

³Ganesan v. State, S.L.P. (Criminal) No.4976/2020

⁴Mallikarjun Kodagali v. State of Karnataka (2019) 2SCC752.

victim-person, there may be circumstances, as discussed above, which would compel the victim-person to waive her right to participate. Therefore, as buttressed by afore-discussed evidences and arguments, while the advocacy for meaningful participation of the victim-person in CJS must continue; the participation must remain a directory right rather than a mandatory obligation upon the victim-person.

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