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New Delhi

First Floor, 4598/12-B, 1st Floor,
Padam Chand Marg, Daryaganj,
New Delhi, Delhi 110002

Phone: +91 98 11 66 62 16 (M)

Phone: +91 70 11 60 56 18 (M)

Bengaluru

Jallahalli East

Bengaluru, Karnataka. India.

Phone: +91 98 11 66 62 16 (M)

Email: publisher.integrity@gmail.com

USA

New Jersey

14 Grandview Ave, Upper Saddle River,
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Phone: +14805226504 (M)

London

37 Degree Media

64, Hodder Drive, Perivale, London UB68LL.
United Kingdom.

Phone: +44 7950 78 18 17 (M)

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Balancing Police Power with Victim Protection in India

Authors
Faninder Singal



Balancing Police Power with Victim Protection in India

Faninder Singal

Phd Scholar

IEC University

Abstract:

This research explores the delicate balance between police investigation power and the victims' constitutional rights in the Indian criminal justice system. Theoretically, all victims possess constitutionally protected rights to life and fair trial but, empirically, victims are subjected to secondary victimization, neglect, and harassment as a consequence of both the arbitrary misuse of police powers, and also, a largely State-driven prosecution process. To address this, the research employs a mixed-methods study: a doctrinal study of the various human rights instruments of the International community, relevant domestic statutory provisions and case laws; alongside a field study of 500 Delhiites.

The study indicates a stark discrepancy between the letter and the spirit of the law. Data collected from the field shows gross institutional failures such as undue delays in police responses, capricious denial to register FIRS, manipulative concealment of evidence under duress, and, a total collapse in the constitutionally mandated provisions of state witness protection programs which results in widespread erosion of trust with the police. It is concluded that for effective and genuine transition to a rights-based victim-centric approach, there must be express constitution and statutory recognition of victim's "right to justice," enactment of a stand-alone witness and victim protection law, clear division of the powers of investigation police and the police on law and order duty, and finally, creation of specialized, victim-sensitive, investigative police wing.

Keywords: *Victim Rights, Police Power, Indian Criminal Justice System, Secondary Victimization, Witness Protection, Right to Justice, Police Reforms, Investigative Abuse, Human Rights, Constitutional Law.*

1. Introduction

The jurisprudential basis of a civilized society is that the State has an inalienable responsibility to foster an environment in which individuals can live with an inherent dignity and not merely survive. This commitment always has been and is clearly stated in judicial opinions that a secure, safe, and protective surrounding is a necessary precondition for citizens to exercise their constitutionally guaranteed fundamental rights. Thus, the lack of such an environment by the State is a direct violation of its constitutional responsibility. This follows the reasoning that if someone has been subjected to grievous physical harm or death without any fault of their own, this tragedy must be seen as a very serious breach of their right to live as guaranteed by the Constitution. Judging from these decisions, the act of committing a crime and the resulting shock to the victim's life is a violation of the victim's constitutional rights by nature, giving him an absolute right to seek judicial remedies. This redress should take the form of a just and unbiased trial which eventually results in the rightful sentencing and punishment of the wrongdoer¹.

¹ *Zahira Habibulla H. Sheikh v. State of Gujarat*, (2004) 4 SCC 158

The State has traditionally taken on the duty of prosecuting offenders in the existing framework of the Criminal Justice Administration. But there is a very negative effect of the State-based system - the systematic exclusion of the true victim.² The State and its investigative bodies effectively take over the primary role of the law and seek justice, leaving the person aggrieved out of the loop. When the machinery of the State breaks down, this sense of alienation grows by the power of ten when the real villains are given a chance at trial, or when they get “let off the hook” on the basis of “who cares?” when they appear before a judge.³ In highly confrontational criminal justice systems, victims often fail to receive attention and are derelict even more alarmingly by the very system meant to protect them. They have extremely limited opportunities to be involved in trials and are systematically deprived of basic protective measures. Moreover, the mechanisms for victim redress/compensation to reduce victim's trauma, both psychological and physical, are often very inadequate and time is often inordinate.

Looking back at this widespread denial of justice, national advisory bodies have made critical comments on a longstanding premise that simply punishing the offender is sufficient to give the victim justice. This is less and less true in today's world, as the success of police investigations and convictions has continued to drop. Many victims find legal action impractical, especially when they face agonising delays, corruption and harassment, and find it cumbersome, so they often do not bother to report offences formally – sometimes as a result of which there is a dangerous trend among society to resort to vigilantism. Legal professionals and national commissions strongly call for a paradigm shift towards "Victim-Oriented" in criminal justice administration, to overcome these systemic imperfections⁴.

This orientation calls for a great deal of respect and conscious awareness of the rights of victims in the investigative and prosecutive stages, while violence victims are especially emphasized. As for the victim, a truly fair, effective and efficient criminal justice system is one that diligently protects the fundamental rights, actively reducing re-victimisation, provides broad protection and allows unrestricted access to mechanisms for judicial redress.⁵ This view is shared by international consensus: that a strong legal structure should give equal consideration to the rights of the suspect and the victim, ensuring that the victim is treated with the greatest possible compassion and dignity while giving them swift, and adequate, opportunities for compensation. However, a need-based approach provides only superficial and temporary relief while addressing immediate vulnerabilities is key. An exclusive need-based approach does not allow victims to voice enforceable rights, which are essential to coerce the State to perform its rights-entrusting obligations. It is, therefore, important to make a clear distinction between a rights-based approach and a need-based approach.⁶ A rights-based approach requires the State to have a positive and necessary duty to actively promote and protect victims' rights. By contrast, a need-based model may view assistance as a humanitarian act, or as a welfare measure that is at the discretion of the

² A.S. Anand, "Victims of Crime—The Unseen Side", (1998) 1 *SCC (Jour)* 3.

³ Mrinal Satish, "Bad Characters, History Sheeters, Budmashes and the Police: The Judicial and Legislative Framing of Police Powers in India", 23 *N.L.S.I. Rev.* 143 (2011).

⁴ Government of India, *Report of the Committee on Reforms of Criminal Justice System* 74-76 (Ministry of Home Affairs, 2003)

⁵ S.N. Sharma, "Protection of Witnesses: A Dire Need for Criminal Justice", 52 *J.I.L.I.* 394 (2010).

⁶ D. Banerjea, "Police Reforms in India: A Critical Perspective", 51 *I.J.P.A.* 241 (2005).

donor. This dichotomy is reiterated in scholarly language, which has posited that simply expressing a victim's needs does not create a legal obligation on the part of the State or society to meet them, and that only a generous statutory provision could do that. In contrast, under a rights doctrine, citizens have legitimate moral and legal claims to the support of the State, which means that the State has a moral and legal obligation to recognize and meet those welfare rights.⁷

These positive duties of the State are reflective of the ideas of Social Contract Theory and a wealth of international human rights case law. The doctrine of positive obligations requires the State to implement proactive and affirmative measures to avoid infringing on human rights by non-state actors⁸. The right to life is a right which is universally acknowledged to be the most important and the highest of all rights of human beings; although it is the right of the individual, the State has the inherent responsibility to protect human life against any aggression that involves the State and any public or private person.⁹

The police force is one of the key enforcement officers of the State and is explicitly mandated to provide this protective cover, to ensure unhindered access to justice and to conduct impartial investigations to ensure that the guilty are held to account. If these duties are not performed, they represent a direct and serious breach of the State's positive obligations. A lack of fairness on the part of law enforcement undermines the confidence of the public in the criminal justice system. A system of institutionalized apathy and empathylessness towards the suffering of the victim severely undermines the confidence of the public in the criminal justice system¹⁰.

1.2 Statement of the Problem

Secondary victimization often starts with unsympathetic and callous attitudes of law enforcement agencies towards victims of crime. This systemic insensitivity inflicts additional psychological trauma to those who have already suffered the traumatic effects of their original primary victimisation. The harmful effects of unprofessional, ineffective and disengaged police practices have been widely reported, especially in relation to sexual assault survivors. In such sensitive situations, the police should be assertive and supportive, not dismissive and passive. The attitudes which the investigators have towards the complainant, with their skeletons in their closets, their brutality when they interrogate and the lack of interest in informing the victim about the progress of the investigation, only deepen the victim's agony. Unfortunately, these destructive techniques often lead to the loss of some vital evidence that is needed to convict the defendant.

Adding to these problems is the common way in which sexual assault is treated with the eyes of an "ideal rape victim" and an "ideal rape case" by law enforcement. This type of evaluation is often based on what the victim said on the spot, on moralistic views about the victim's character and on the pre-existing relationship between the victim and the accused. Internationally it has

⁷ V.R. Krishna Iyer, "Victimology and the Criminal Justice System", (1984) 2 SCC (Jour) 1.

⁸ G.S. Bajpai, "Victim's Right to Justice: A Paradigm Shift", 54 *J.I.L.I.* 321 (2012)

⁹ G.S. Bajpai and Neha Aneja, "Victim Justice and the Criminal Justice System in India", 42 *Indian Journal of Criminology* 15 (2014).

¹⁰ *Ashwani Gupta v. Government of India*, 117 (2005) DLT 112

been found that the focus on the victim as "evidence" and the highly insensitive questioning is still a great source of distress for the victim.¹¹

This trend is echoed by parallel research within the domestic sphere, which shows that the apathy of the police plays a major part in increasing the trauma experienced by female complainants. In more alarming cases, they are seen as being directly involved in the violence or are grossly biased and insensitive when dealing with serious crimes.¹² Investigations have frequently found cases of police officers standing with a "helmsman" or of police failing to investigate reported crimes, downplaying the severity of serious crimes like sexual violence, dowry-related homicides, and kidnapping.

The situation in which a person finds themselves when they have survived sexual violence is by no means unique; it is a situation that is systemic for all those who are victims of crime in the criminal justice system.¹³ The trauma of a crime is often compounded by the failure of various institutions making the victim extremely vulnerable to further trauma. The general problems are inadequately prompt police response, no immediate physical security, unchecked intimidation by the accused and an overall lack of security measures. The systemic obstacles to access to justice that victims routinely face are characterized by highly flawed and unscientific investigative procedures, and deeply troubling examples of law enforcement actively colluding with the guilty. The general sense of vulnerability of crime victims is getting worse, as reported in the general community across the country with examples of secondary traumatising where the State apparatus did not provide an essential healing touch.

The roots of this system are vividly exposed through few illustrative qualitative examples. It was a well-documented case in a major city where a family's desperate calls to local police for protection were ignored, culminating in the murder of the mother's son due to his objections to her daughters' continuing molestation.¹⁴ In the same way, the survivors of the notorious highway gang rape said they were subjected to an excruciating lack of police response as their cries for help to the helplines were completely ignored over a prolonged period of time. To highlight the need for the speedy response to emergencies, the judiciary has severely criticized the police in this regard, pointing out that the time taken for emergency response must be drastically reduced to less than 10 minutes as in commercial deliveries; otherwise, the police service is inadequate and fails to ensure the safety of victims.

In addition, witness and victim intimidation is common, but law enforcement often does not take adequate measures to protect witnesses and victims. The act of the accused's family putting the pressure on the rape survivor to settle out of court was starkly emphasized by the dramatic case of a rape survivor driven to suicide after being relentlessly pressured and intimidated by the family of the accused to settle the case out of court. In another distressing case, a marginalised

¹¹ R.N. Sharma, "Police Powers of Arrest and Human Rights in India", 38 *J.I.L.I.* 231 (1996).

¹² N.V. Paranjape, *Criminology, Penology with Victimology* 650 (Central Law Publications, Allahabad, 17th edn., 2017)

¹³ Manish Srivastava, "Witness Protection Scheme in India: An Unfinished Agenda", 55 *J.I.L.I.* 512 (2013).

¹⁴ *Lalita Kumari v. Govt. of U.P.*, (2014) 2 SCC 1

student suffered from a secondary gang rape at the hands of the very same attackers that were released on bail. Although the life of the girl was being put in grave danger, the State police establishment completely failed to provide any protection.¹⁵

The police officers have the power to arrest the offenders in a cognizable case without any warrant if there is any threat perception, but this power is not used by the police in the interest of the victim, as it is only in such cases. For instance, in the case of gang rape of the minor, either the police failed to provide security measures or did not make immediate efforts to catch all the culprits, allowing the victim's family to flee their village and hide after they were beaten and the property destroyed by supporters of the culprits.

Some local governments have tried to ease this plight, for example, by starting witness protection programs that provide special ID cards for escorts to help them with police escorts during deposition, or by providing them with special police protection during the deposition process, but these steps are not always enough to overcome the apathy of local police at the grassroots level. In many instances, access to justice is limited right at the doorstep, such as when people in need are not even registered by on-duty officials, but are instead transferred to informal village councils, all without the legal mandate to do so.¹⁶ The other form of investigative incompetence is equally widespread and is observed in the failure of mandatory medical examinations to be carried out promptly and with proper scientific investigative technique, which led to higher courts ordering the involvement of specialized forensic pathologists in the investigative teams. In serious cases such as trafficking in persons, victims are often found guilty in a mass trial, while the judges of the courts recommend stringent punishment to the investigating officers for their shoddy and superficial investigations, when the charge-sheet they investigated contains blatant contradictions.

In serious cases such as trafficking in persons, the mass trial usually results in the acquittal of the offender, and the judges of the courts recommend stringent punishment to the investigating officers for their shoddy and superficial investigations when the charge-sheet examined by the officers contains blatant contradictions.¹⁷ Most alarmingly, controllers of the investigative power have actually been corrupted in order to cover up the criminal, such as by paying corrupt police officials to weaken the case or alter the facts so that it is easy to exonerate the criminal. The effective and efficient discharge of police responsibilities is essential to the fight against increasing criminal activity; the reverse is even truer, i.e. the misuse of investigative powers is directly linked to the high acquittal rates.¹⁸ Unabated, investigations have led to acquittals that have hit an alarming rate of more than eighty per cent in higher appellate courts and more than sixty per cent in lower trial courts, dramatically showing how successful the investigations are

¹⁵ S. Muralidhar, "Rights of Victims in the Indian Criminal Justice System", 5 *National Human Rights Commission Journal* 25 (2006).

¹⁶ N.V. Paranjape, "Victimology in India: Some Recent Trends", 42 *J.I.L.I.* 250 (2000).

¹⁷ Arvind Verma, "Consolidation of Police Powers in India", 24 *Policing: An International Journal of Police Strategies & Management* 546 (2001).

¹⁸ U.N. General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, A/RES/40/34 (Nov. 29, 1985)

and how much impunity is given to the perpetrators.¹⁹

1.3 Objectives

The detailed research project has several broad aims aimed at thoroughly examining the relationship between police powers and victim rights. The key objective is to establish clearly that the 'right to justice' is legally and jurisprudentially recognized as a fundamental human right of the victims of personal violence in the wider international legal framework. From this international context, the research seeks to pinpoint the exact extent and recognition of these human rights for victims of violent crimes in the particular socio-legal context of India. Moreover, the research is done in such a way that the relationship between the investigation duties of police and actualisation of the rights of the victim under the Indian Criminal Justice System is studied in detail. Along with this exploration, the study aims to keep a check on the heterogeneity of the methods and modes of abuse and misuse of police powers when conducting investigations.

The research will detail the direct and indirect impacts such systemic misuse of power has on the human rights and judicial outcomes of crime victims and draw parallels to these identified flaws. Finally, the academic research aims to develop and suggest tangible, practical steps to improve the protection of victims and to strengthen the effective enjoyment of their human rights by imposing on the role of law enforcement agencies a greater duty to investigate and to take responsibility and transparency in its activities.

1.4 Research Methodology

This scholarly research is conducted from a doctrinal perspective with an extensive use of advanced information technology and comprehensive library resources in order to collect data. The main source documents include an extensive range of both traditional and non-conventional sources of UN instruments, regional human rights treaties and the various interpretations of these treaties by international monitoring instruments. The research systematically charts the development and systematization of the victim's rights around the world, using rigorous analytical jurisprudence of these foundational texts. Analyzing these existing international frameworks, the study proposes a multidimensional approach to the right to justice of a victim, by distinguishing three main aspects: right to protection, right to access to justice, and right to a fair investigation. The Constitution of India alongside relevant legislation passed in the country at the relevant time provides the fundamental primary source, to appropriately place these global developments in the national context. In the research, extensive judgments of the Supreme Court, various High Courts and important trial court judgments have been analyzed to determine the law on the ground in relation to the rights.²⁰ The socio-legal context is synthesized with the help of secondary sources, such as academic treatises, peer-reviewed journal articles, juristic commentary and contemporary media reports, giving a picture of the current socio-legal landscape.²¹ The research provides a detailed examination of how domestic ideals correspond to internationally adopted human rights standards, through an analysis of the constitutional provisions.

¹⁹ M.S. Ganesh, "Investigatory Powers of the Police and the Role of the Judiciary", 12 *N.L.S.I. Rev.* 88 (2000).

²⁰ Law Commission of India, *277th Report on Wrongful Prosecution (Miscarriage of Justice): Legal Remedies* 45 (2018).

²¹ R.I. Mawby and S. Walklate, *Critical Victimology: International Perspectives* 15-18 (Sage Publications, London, 1994)

The analytical path of this study then takes a critical look at the extent to which the new victims' rights have become practically embedded in the domestic criminal law legislation. The research critically evaluates present procedural and normative laws, and documents a set of critical gaps in the legislation that impede the criminal justice system in realizing the theoretical ideals of a fair and just system for crime victims. Descriptive research methods are then used to describe the specific investigative responsibilities allocated to the police apparatus. Next, a thorough case analysis approach is used for a carefully selected collection of key judicial decisions, with the intent of finding the underlying causes of human rights abuses that only occur in the investigative stage. The field research is ultimately be conducted with the participants based in delhi where the opinions been collected from the residents about the prevailing situation.

This process allows the diversity of police abuses to be properly put into context and categorised. The last analytical stage of the research is content analysis of legal precedents, which is carried out to clearly illustrate the harmful impacts of investigative abuse towards the victims' rights. Finally, a comparative methodology is used to compare international law with Indian legal institutions and strategic, remedial recommendations are drawn up. All along the way in this academic journey, the constant analysis of cases is the key that can be used to determine rights, to appraise police conduct, and to assess the ultimate effect on the victim of the crime.

1.5 Operationalization of Concepts

It is crucial to define the key concepts used in the study and to define them in operation with the basic ones that are going to be used for the analysis of the basic concepts that this research wishes to test the basic hypotheses that it proposes. In particular, the definitions surrounding the concepts of victim, personal violence crime and misuse of investigative powers need to be carefully academically defined.²²

1.5.1 Victim Defined

The term 'victim' is used in a very general way in the body of journalism, political and societal discourse, without being bound by its robust legal connotations. Sociological definitions are extended to include anyone who is threatened, injured or destroyed through the action or inaction of another human being or a society.²³ In the public policy context, however, policy makers try to define a victim in terms of narrow social concerns to safeguard the institutional structures of the State or to restrict its responsibility, systematically leaving out a large majority of people who have been adversely affected.²⁴

From a legal defence point of view, on the other hand, it could be very much a controversial matter to give the formal designation of 'victim' during an ongoing process. The fact that a complainant is a victim is often said to taint the presumption of innocence given to the accused, leading to a kind of "double speak," as defense attorneys repeatedly point out, that is present in sexual assault cases, where the term "victim" suggests a lack of consent before trial. For this reason, attorneys often resort to neutral words like injured parties or complainants. Those who defend a rights-based approach, however, respond by saying it is absolutely imperative to

²² *Nirmal Singh Kahlon v. State of Punjab*, (2009) 1 SCC 441.

²³ *Sakiri Vasu v. State of U.P.*, (2008) 2 SCC 409.

²⁴ Anup Surendranath, "Police Accountability and the Indian Police Act", 48 *E.P.W.* 22 (2013).

formally recognize a victim to defend those whose rights are infringed throughout the criminal justice process; otherwise, a presumption of being a 'non-victim' is entirely inadequate to protect a victim's interests.²⁵

1.5.2 Misuse of Investigative Powers

In response to these competing priorities, a variety of definitions have been developed by different jurisdictions. A number of western legal systems have a clear definition of a victim, which is someone suffering direct harm as a result of an offence, and whilst the definition has been extended to the lawful representatives, parents and guardians of a person who has died, been incapacitated, or is a minor, in certain cases. Conceptualisation of victim is much wider and more encompassing in the realm of International Human Rights Instruments, which unambiguously recognise the sufferer as an injured party to which extensive rights are due.

The definition of victims found in the basic international instruments includes those who have been physically, mentally or emotionally harmed, suffered economic losses, or have experienced "substantial impairment" of their most basic rights due to acts that violate criminal laws, which clearly comprises abuse of power. Importantly, these are international instruments that state that an individual is a victim regardless of whether the actual perpetrator has been identified, arrested and convicted and the definition is suitably widened to include immediate family members, dependents and individuals who suffer harm while attempting to help someone in distress. The emphasis on victimization by state abuse of power that prevailed in the post-WWII period is balanced by current concepts that also take into account the deep hurt experienced by those who suffered from non-state acts of ordinary crime.²⁶

In India, procedural law has a definition of "victim" as a person who has suffered any loss or injury as a result of the act or omission for which the accused is charged, which clearly includes the victim's guardian or legal heir. As a synthesis of these perspectives in the context of the focus of this dissertation, a 'victim' is defined as a natural person who is the object of a bodily offense committed by a non-state actor.

Likewise, the scope of the 'misuse of investigative powers' needs to be clearly drawn. It refers to all acts or omissions of the law enforcement officers in carrying out their statutory functions. Judicial rulings have clarified that the characteristics of police conduct that constitute such misuse include the deliberate failure to investigate properly and lawfully, outright omission of such an investigation, or failure of a system. Supreme Court decisions also make a distinction between "mere failure to act" and "active misconduct. Dereliction, an indefinite quality of an act, carelessness or abuse of discretion under a particular law.²⁷ In contrast, misconduct is an active violation of a clear, specific rule of action, and is an act that violates statutory limits actively. Thus, the misuse of investigative powers within this study are those occasions when the police

²⁵ Ashish Kumar, "FIR and Police Investigation: A Human Rights Perspective", 50 *I.J.P.A.* 110 (2004).

²⁶ K.N. Chandrasekharan Pillai (ed.), *R.V. Kelkar's Criminal Procedure* 145 (Eastern Book Company, Lucknow, 6th edn., 2014)

²⁷ G.K. Goswami and Yashodhara Goswami, "Victimology: A Paradigm Shift from Retribution to Restitution", 51 *J.I.L.I.* 215 (2009).

use their investigative powers in a way that is not warranted under procedural codes (from the time of the information being registered to the final report being filed). This is not an exhaustive list but does include, among other things: deliberate refusal or delay in registering an initial complaint, the establishment of unnecessary obstacles in the procedure for registering a complaint, failure to provide necessary protection for a victim when severely intimidated, deliberate withholding of investigative progress from the aggrieved party, falsification of the formal complaint process, the conduct of investigations or the collection of evidence that is unduly biased, not scientific, or not conducted in a proper manner with the aim of protecting the guilty party from punishment.

2. The Legal Framework for Victim Protection in India

2.1. Victims' Right to Justice in India: Constitutional Provisions

There are constitutional provisions that guarantee a victim's right to justice in India. The rights guaranteed under the constitution of India for the Victim of crime to seek justice. The life and personal liberty guaranteed in the Indian Constitution is an absolute right granted to each and every one of us; it is the basic structure of our constitution.²⁸ This is a basic rule that everyone must be free from the loss of their liberty, other than by means of process stipulated by law. The scope of the protection given to the accused against the excesses of the State has been extended much beyond its traditional boundaries by modern constitutional interpretation to include the human rights of crime victims also.

The Higher courts of the country have, on numerous occasions, explicitly stated that the widespread interpretation of this constitutional right does not limit it to the protection of the accused's rights, but that it necessarily includes and promotes the rights of the victim. Moreover, judicial rulings have enlarged this umbrella of protection to cover witnesses in criminal cases, which have been affirmed to have a right to full physical and legal protection from the State apparatus.

Along with this, the constitutional values enshrines that the State should promote a legal environment that ensures justice based on equality of opportunity. Appellate courts have been instrumental in strengthening the protective measures for the victims and witnesses in this regard.²⁹ A fair trial is a cornerstone of the fundamental right to access justice and the principle of a fair trial by itself requires the provision of legal aid to victims of crime. This shall not be limited to providing legal aid, but shall also involve a solemn commitment of the State to provide strong witness protection, psychological counseling and medical assistance to victims and the profoundly affected family members.

2.2. Victims' Right to Justice in India: Statutory Provisions

In the current statutory context, it is notable that there is no single legislation that explicitly offers a clear right to protection of victims of crime. However, a careful perusal of the on-going legal framework shows that there are several existing procedural and penal laws which tacitly support the protection of victims. Within the system of criminal trials, for example, there are specific

²⁸ *Justice J.S. Verma Committee Report on Amendments to Criminal Law* 415 (Government of India, 2013).

²⁹ *Mallikarjun Kodagali v. State of Karnataka*, (2019) 2 SCC 752.

provisions that allow law enforcement to act decisively in situations where the victim and/or witness are intimidated by the alleged offender. If a formal complaint is received containing details of such threats, the police are statutorily entitled to take action to prevent the intimidation of important witnesses, such as immediate arrest of the person threatening. Further, in cases where an accused is released on bail, the State can approach the court for the introduction of strict bail conditions which have been specifically drafted to ensure no harassment, contact or intimidation of the victim. Such procedural safety valves are a clear legislative effort to include victim protection in the structure of criminal law through the imposition of corresponding duties on state agencies.³⁰

In addition, the nation's substantive penal code includes a number of provisions that have a clear deterrent effect on witnesses threatening to harm a witness or to intimidate a witness into giving false testimony before a court of law. One of the most important instances of this is the definition of criminal intimidation itself as a crime which is specific and severe. It is an offence under the law to threaten to harm another person, their reputation, their property or another person with whom they have a stake.³¹ Malicious intent to cause the threatened person to do some act which the threatening person is not legally required to do, or to withhold the doing of some act which the threatened person had a lawful right or duty to do. Importantly, the actual physical harm that could be caused does not need to be done by the person making the threat, it can be done by another person, associate, or paid service.

Typical punishment for this crime is prison time, fines, or a mix of both. The term of imprisonment provided in aggravated circumstances, especially if it presents a risk of serious harm (death, bodily harm, or offences of a serious nature) is significantly increased to provide deterrence. Further, the penalties under the penal provisions further penalise intimidation practices which involve anonymous communications, by imposing an additional consecutive sentence on the basic sentence.³² Furthermore, when threats or pressure are directed specifically, with the purpose of being specific, to force someone into making false testimony or false evidence, the substantive law provides for stiff penal sanctions, such as long sentences, and demonstrates the legislators' purpose of most scrupulously guarding the integrity of the judicial process.

2.3 The 'Right to Justice' of Victims in India: Judicial Recognition.

The judiciary has time and again emphasised on the importance of witness protection systems to ensure the sanctity of the justice delivery system. In several key decisions on mass violence and communal violence the supreme court of the land have noted that the only way to discover truth is for witnesses to speak out fearlessly.³³ In recent years, courts have expressed serious concern at the recurring cases of horrifically violent acts in which eyewitnesses are driven to perjury or become hostile during trial, under the pressure of the most powerful forces. This disturbing development is an issue of enormous concern about the reliability of evidence given to the judiciary and a serious systemic flaw.

³⁰ M.P. Jain, *Indian Constitutional Law* 1205 (LexisNexis, New Delhi, 8th edn., 2018).

³¹ Murali Karnam, "Victimizing the Victim: Criminal Justice Process in India", 51 *J.I.L.I.* 425 (2009).

³² K.D. Gaur, *Criminal Law: Cases and Materials* 450 (LexisNexis, New Delhi, 8th edn., 2015).

³³ *Mahendra Chawla v. Union of India*, (2019) 14 SCC 615.

In notable instances where influential or wealthy defendants are involved, judges have expressed the typical plight of those who have to deal with the so often sad situation in which essential witnesses withdraw from the evidence that they gave to investigating agencies. Since the evidence of a statement to the police given in the preliminary investigation has little probative value in a trial, the entire prosecution falls apart when witnesses begin to fear.³⁴ The distress of the helpless people who are suffering from a lot of pressure gives a foreboding sense of the strong need for a complete national witness protection system otherwise criminal justice administration is nothing but an illusion.

Moreover, the need to protect victims and witnesses is not simply a procedural question of adherence to the mechanics of justice, but also is deeply connected with the maintenance and enhancement of human dignity. Over the years, judges and juries have repeatedly stressed that the heart of a criminal trial is the testimony of witnesses. The guilt of an accused can only be conclusively proved beyond reasonable doubt with the help of his courageous depositions. It is thus imperative that such people are protected in order to ensure that perpetrators of such atrocious crimes are accounted for. The judiciary has vividly acknowledged that in most cases it is the victim, the traumatized victim who is the most important witness, and the most vulnerable being women and minors.³⁵

In the adversarial system, these people are often treated as pawns, with the system being extremely apathetic about their physical and mental welfare. Enabling strong protection is therefore a critical precondition not only to avoid a fundamental miscarriage of justice, but also to restore to those who have been profoundly hurt an immense dignity, an agentive sense of self, and self-worth. In situations of serious sexual offences and child sexual abuse, this protection is exponentially greater, resulting in strong calls by national law commissions that witnesses should not be subjected in any possible circumstances to the vengeance and wrath of the accused. Accordingly, the appellate courts have strongly urged the need to pass specific legislation to seriously prevent victim, witness and informant tampering. The judiciary has stated that anything done to improperly influence the evidence should be treated with harshness and sternness by law. Courts have warned of an unequal legal system that is "out-of-balance" and seems to attach only "one-sided weight to the rights of the accused" which is fundamentally unfair to the "social interest of justice and accountability. The right trial is one that's "fair and balanced," with both the prosecution and defense working in a fair, protected paradigm. The interest of the public in the proper working of the justice system is every bit as important as the interest of the defendant in his/her individual rights. In both high-profile murder and hit-and-run cases, the courts have ruled that society cannot and should not be turned a blind eye. The continued failure of state to keep citizens who submit to testify will inevitably make people lose trust in the system. The State has a duty to develop strong laws and policies that are reflective of the realities of today and based on best practice from other countries around the world on witness protection.³⁶ The systemic failure of exposing righteous citizens to ceaseless harassment by the anti-social elements for

³⁴ Law Commission of India, *198th Report on Witness Identity Protection and Witness Protection Programmes* 42 (2006).

³⁵ *Vinay Tyagi v. Irshad Ali*, (2013) 5 SCC 762.

³⁶ Ahmad Siddique, *Criminology, Penology and Victimology* 415 (Eastern Book Company, Lucknow, 7th edn., 2016).

merely speaking the truth in a court of law is unacceptable. It is therefore essential that the legislative branch make and enforce comprehensive laws that no one should be discouraged in giving evidence due to the fear of humiliation, violence or even death to themselves or their families.

Such protective paradigms are the basis of the search for ultimate truth, especially in sensitive situations of gender-based violence. Regional high courts have established a clear directive for formulating robust victim protection laws and have emphasised that this should be an absolute legislative priority to help unearth factual realities in complex investigations. Every cog and wheel of the criminal justice process needs to be turned on without delay, not only to investigate, but to put all the steps in place to keep the victim safe and to start large-scale confidence-raising efforts.³⁷ To fill the void in legislation, the judiciary has been proactive in exercising its own powers to give effect to binding directions to ensure immediate protection. In cases of victims stating that the police falsely accused them of committing the crime and that the real perpetrators had threatened them, police officials at high levels have been ordered by courts to ensure the safety of their bodies and protection of their families. Likewise, in the case of highly sensitive trials being moved to other jurisdictions to prevent local tampering, the highest court has issued a dire warning to all the agencies in the various jurisdictions to take proactive and immediate measures to place all the witnesses on a protected basket and hasten the trial proceedings in order to avoid prolonged risk to the witnesses. In some extremely dynamic cases, courts have gone so far as to give law enforcement officers specific orders in several respects.

The judges have expressly instructed the authorities to make sure that the victim and the witness is not subjected to any coercion or undue influence, to immediately register new cases against the accused who attempts to use their bail privileges for intimidation, deploy permanent armed police pickets at the residences of the vulnerable, provide a dedicated police escort for the safe transportation of the victim and the witness to the court of law, and create a highly secure and intimidation-free environment for the victim to give evidence with absolute certainty during the trial proceedings.³⁸

2.4 Failure of State in Its Positive Obligations

Active protection of victims from ongoing intimidation or harassment is an important aspect of human rights law. This responsibility is clearly highlighted in judicial proceedings where after formal charges are laid on a person, they are let go on bail and then threaten the victim and his family. The judiciary has vigorously intervened in cases where perpetrators are threatening to repeat a gruesome act of violence, for example by kidnapping, in order to prevent a victim from taking legal action. Courts have made it clear that it is a fundamental role of the State apparatus to protect the victims of serious crimes from intimidation by the criminals and their violent associates. Without the complete confidence of people summoned to testify, the entire effectiveness and legitimacy of the criminal justice administration is lost.³⁹

³⁷ P.N. Prakash, "Investigating Agencies and the Rights of the Accused and Victim", 10 *SCC (Jour)* 25 (2008).

³⁸ K.N. Chandrasekharan Pillai, "Witness Protection: A Need of the Hour", 49 *J.I.L.I.* 512 (2007).

³⁹ *Rubabuddin Sheikh v. State of Gujarat*, (2010) 2 *SCC* 200.

The government's duty is to provide a highly secure and conducive environment which will enable witnesses to give their testimony in a manner that will give them the trust and assurance to do so without the influence of fear or unearthing corruption. The State is the supreme guarantor of fair trial, and this has been reiterated by the highest judicial authorities time and again. Especially in sensitive cases with rich or powerful clients who have significant physical, political and financial power, the government needs to take a proactive approach to avoid derailing the trial or losing the truth to corruption.

The State is the final guardian of its people, and should ensure that during all the stages of the judicial process, a witness is free to state the facts without the fear of being later hunted or harassed by the people that he or she is accused of harming.⁴⁰ The first and foremost duty of every civilized and organized State is, in the first place, to protect the persons and the personal rights and liberties of all the citizens of its domain from every malicious intrusion, and, in the second place, to safeguard the personal rights, privileges and property of each citizen.

The scope and impact of police powers is explored in CHAPTER 3. CHAPTER 3 examines the extent and significance of police powers. National policy discussions on criminal justice have featured the full range of considerations and assessments of the role of law enforcement as a regulatory organization and a protector of fundamental rights. Special commissions convened to review structural policing reform issues provided extensive discussion on the abuse of power by state agents and on the appropriate scope of police investigations. One of the key findings from these discussions at a high level was the need to change the procedural codes, making sure initial crime reports are registered regardless of territorial jurisdiction.⁴¹ The proposed change was designed to remove the common excuse given in administrative complaints – jurisdictional boundaries – which is a loophole frequently used to prevent victims from being able to seek swift legal justice – by forcing officers to make a note of the incident and then pass the file to the relevant precinct. Also, given the intricate nature and the inherent stresses of a criminal investigation, many express committees strongly recommended the structural division of the police.

This separation would have separated policymaking and general law enforcement functions from specialized investigative units and ensured more efficient operations and limited political and extraneous involvement. Early advisory reports were a bit contradictory on the absolute possibility of compartmentalizing police work, but today most of the prevailing opinion is strongly in favor of the separation. This need has been strongly reinforced at the highest levels of the judiciary, with binding orders to governments to create distinct, independent investigative bodies. The principle of law behind the ruling is that law enforcement needs to be firmly grounded in the rule of law, acting with complete impartiality, regardless of the socio-political position of the people involved.

To ensure accountability for this, further amendments to the legislation provided penal measures to punish public servants who "deliberately" ignore statutory directions in investigations. These amendments are a step forward towards a victim-focused justice – in particular by introducing a

⁴⁰ *State of A.P. v. Punati Ramulu*, 1994 Supp (1) SCC 590.

⁴¹ A.S. Anand, *Justice for Women: Concerns and Expressions* 55 (Universal Law Publishing, New Delhi, 3rd edn., 2008).

criminal offence for the failure to document information in cases of serious gender-based violence – but scholars point out that the onus placed on proving intentional disobedience does not match the requirements in many parts of the world for due diligence. In order to truly be fair, these punishments must be extended to cover the neglect of all victims of violent offenses, and not only certain groups.

The basic principle of today's policing is that protecting the public from intimidation and violence is not an ancillary responsibility but an inviolable right.⁴² This is a major point of international law enforcement policies and domestic judicial practice; a disciplined and well-trained police force is the most important defensive force of a civilized society.⁴³ This is not just a job for detecting crime – it is a task given to this agency to preserve life, liberty and human dignity in a proactive way. These precious constitutional guarantees were expressly restated by the "advisory committees" on criminal justice reform as the reason for the existence of the investigative machinery.

Therefore, where an individual expresses a credible threat to his or her physical safety, the State has a strict constitutional duty to respond quickly. Judicial decisions make it abundantly clear that when law enforcement receives a representation of intimidation, they are required to immediately make a time limited threat assessment. If the risk is confirmed, then the state has to put in the required protective details which are free of any cost and secure the vulnerable party. Specific administration standing orders issued by the metro police are the other tools that operationalize this protective mandate.

Such departmental instructions clearly mandate that investigative officers should initiate fresh penal charges of criminal intimidation as soon as a victim complains against the accused's associates or affiliates of further threats. In very sensitive cases, e.g. cases involving the exploitation of minors, high procedural barriers should be instituted to guarantee that the vulnerable victim is not directly or indirectly involved with the alleged perpetrator at any point during the investigative process. Of the many procedural moments involved in an inquiry, the initial on scene response and the subsequent arrest of the offender are understood as the most important moments to achieve strong victim security. That the police respond quickly to the immediate consequence of an offence is widely recognised as a key measure of institutional effectiveness and it has been established as a strong predictor of victim satisfaction. Criminology research highlights that the first responding officers are the first-voice of-the-state during the victim's acute psychological trauma.⁴⁴ The initial interaction has a lasting impact on survivors' confidence in the justice system and their willingness to participate in prosecution efforts, with significant quality, empathy, and timeliness being critical to these interactions.

A short response time is not simply a logistical success, it is an essential part of victim justice. On the other hand, the longer it takes for the police to arrive, the more isolated the victim becomes,

⁴² *Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)*, (2010) 6 SCC 1.

⁴³ Ratanlal & Dhirajlal, *The Code of Criminal Procedure* 188 (LexisNexis, New Delhi, 22nd edn., 2017).

⁴⁴ Ved Kumari, "Gender Analyses of Indian Penal Code", in Amita Dhanda and Archana Parashar (eds.), *Engendering Law: Essays in Honour of Lotika Sarkar* 139 (Eastern Book Company, Lucknow, 1999).

increasing the likelihood of additional victimization, and giving the perpetrator time to smudge or completely cover up tender physical evidence. Quick response enables perimeter to be rapidly secured to prevent suspects from escaping, eyes witnesses to be located and detained and immediate medical treatment for those witnesses whose lives are in danger.

Moreover, there are statutory deadlines for medical evaluation of the victims of severe sexual and physical crimes. Procedural laws specifically provide for the survivor to undergo forensic medical examination by a registered medical practitioner within an extremely limited time frame, usually within 24 hours of receipt of information. This is a strict time limitation that is deliberately intended to avoid destruction of the transient biological evidence that would render the case unprosecutable.⁴⁵

Apprehending a suspect, however, has a deeper psychological purpose of restoring a sense of security to the victim of the crime, who often has been so traumatized that they feel helpless to protect themselves. Where the survivor is at risk in the short-term of retaliation or ongoing intimidation from the aggressor, the parameters of law enforcement operations need to be broadened to specially designed protective interventions.

Experts in the legal professions have noted that the best way to immediately stop a suspect from causing further harm is to neutralize his or her freedom, and therefore protect the immediate victim and the wider community from additional victimizations. For this purpose, criminal procedure codes give police officers far-reaching powers to make unintrained arrests for “serious and cognizable” crimes. This extraordinary power is not just triggered by a crime being committed in the officer's presence, but whenever he receives credible intelligence that a serious crime with significant custodial sentence is committed. In cases where the criminal offence is not one which carries a particularly severe penalty, the police could lawfully arrest someone when they reasonably believe that if they did not the person would repeat the offence or destroy any key witness or evidence, or could use force to stop a key witness from giving evidence.⁴⁶

The law also contains strong provisions on preventive detention, along with these reactive powers. If they are able to obtain intelligence from the law enforcement officials that an individual is planning the commission of a serious offense, and they have reason to believe that no other action can stop that person from committing the criminal act, then they may lawfully arrest and detain that person for a very short period of time to destroy the immediate threat.

The formal launch of the criminal justice process depends exclusively on the correct recording of the complainant's complaint, which is known as the First Information Report. Procedural statutes lay down a binding, non-negotiable and clear mandate on the police to immediately document all information that reveals that an offence of a cognizable nature has been committed, that is, that the police should record oral complaints into a formal written document without undue delay. This is a compulsory registration, which is the main channel by which a victim can exercise his or her basic right to access the justice mechanism.

⁴⁵ *Swaran Singh v. State of Punjab*, (2000) 5 SCC 668.

⁴⁶ B.B. Pande, "The Meaning and Scope of the 'Right to Fair Investigation'", 56 *J.I.L.I.* 134 (2014).

The law offers built-in appeals in response to the tendency of grassroots officers to not record complaints. Any station officer who refuses to register a grievance for reasons that are illegal, then the aggrieved party is legally allowed to take the grievance up to a higher level of supervision and they are obligated to review the information and then order an immediate investigation into the facts if they consider that an investigation is warranted. New amendments to the legislation have also strengthened these access points, with victims having their recorded statements given to them free of charge and immediately, and with new ways of petitioning judicial magistrates to compel police investigations.⁴⁷

Most importantly, however, key decisions have resolved any lingering doubts about police practice at this early stage. No doubt the highest courts have stated that law enforcement has no room for discussion whatsoever on the truthfulness or merit of a complaint until it is officially registered. It is enough that the elements of a cognizable crime are disclosed, even if they are not fully disclosed; indeed, the mere disclosure of elements of a cognizable crime is sufficient, and legally required to set in motion the investigative machinery.⁴⁸ This is a strict legal obligation based upon the intent of the legislation to ensure that all serious allegations are examined in a formal and timely manner, leaving no doubt that it's a natural obligation and not a discretionary privilege for the State to investigate.

It all begins with the basic assumption of a fair investigation – an investigation conducted without bias or influence. The integrity of the previous police inquiry is bound up in the constitutionally guaranteed fair trial. An equitable investigation requires a thorough, impartial examination of the facts, that must be conducted in the light of the rigorous gathering of the best evidence possible which may lead to a finding of guilt or innocence. To carry out this monumental task, investigative people need to be completely unbiased, not having a bias about the suspect in either direction. High-level legal reform commissions have sounded the alarm several times about the fact that any abuse of the powers of investigation or any deliberate attempt to tamper with the evidence necessarily leads to an unacceptable miscarriage of justice. When the commissioners are concerned with the prosecution of criminal elements, it is necessary that the search shall be thorough and exhaustive, that it shall not select what is of interest, but that it shall gather all facts which are of any probative value. The safeguarding of the social fabric must always be the key focus and the statutory procedures and institutional practices need to be balanced so that culprits are caught quickly and punished, and the innocent are strongly shielded against arbitrary state action. To achieve this ultimate epistemological goal, the police apparatus must be transformed and modernized, and the officers must be given the highest level of forensic training, constant supervision and state of the art scientific/logistic infrastructure.

3: Extent and Significance of Police Powers

3.1 Misuse of Investigative Powers by Police at Different Stages of Investigation: Methods

Creating scope for intimidation and harassment of the defendants the prolonged investigative process naturally affords offenders considerable latitude in tampering with sensitive evidence and systematised harassment of the survivors and crucial witnesses. The High Court of Rajasthan

⁴⁷ K. Chockalingam, *Towards Victim Justice* 112 (Har-Anand Publications, New Delhi, 1993).

⁴⁸ *Kishore Samrite v. State of U.P.*, (2013) 2 SCC 398.

eloquently captures the destructive impact that undue delays have upon the final judicial outcome. The court finds that prolonged investigations deteriorate the quality of evidence required for prosecution because human memory is transient and deteriorates with the passage of time.⁴⁹ More significantly, the release of an accused person on prolonged parole provides him/her with direct power to interfere with the justice delivery system, giving the accused person the space to terrorise the complainants, systematically intimidate witnesses and fabricate deceptive documents, thereby constructing a falsified defense for himself/herself.⁵⁰

Overriding substantive criminal protections through procedural perversions The Bombay High Court's position on the overriding nature of procedural codes over substantive criminal law is articulated more forcefully. Commenting upon interpretative frameworks governing investigative procedures the court found that the application of a procedural flaw has far-reaching collateral impacts on substantive law, ultimately destabilizing the foundation of law, of the society, and of the state itself. The Chief Justice writing the judgment clearly states that, a adherence to criminal procedure, forms the demarcation line between a civilized and governed society by law, on the one hand, and anarchic, or despotic one on the other...[since] procedure are the functional arteries, carrying blood.

To all parts of the criminal justice delivery system, it is inherent that anything that goes to damage these, arteries necessarily, in terms, affects the functioning and output of the rest. As a result, he warns, that an investigative process that relies on undue protraction of its processes and arbitrary application of procedural rules is bound to nullify substantive laws on crime to a severe extent.

The media has increasingly captured instances of secondary victimization of an individual resulting from his/her having exhibited resistance to an initial crime or for seeking legal intervention against a wrong, only to be failed by the state machinery which does not provide swift relief. In one disturbing metropolitan case, a father was stabbed more than a dozen times and killed merely for protesting the sexual harassment of his daughters, despite repeated calls to the police and multiple desperate appeals.⁵¹ Allowing criminals to go unpunished can lead to subsequent offenses of violence. While rigorous and impeccable investigations are imperative to determine culprits and collect definitive evidence, failed investigations sabotage prosecutive attempts and leads to the liberation of offenders who are released, feeling impunity from legal recourse, perpetrating subsequent acts of violence,

The utmost need for a fool proof mechanism of protection for victims throughout the duration of the criminal justice system cannot be stressed enough because the security needs of an innocent individual suffering from trauma and experiencing fear can not be compared with anyone else.. In another case, a woman committed suicide in an urban center due to immense pressure from the offenders' families for an out-of-court settlement for severe sexual offenses committed against

⁴⁹ *Sudhir Bhaskarrao Tambe v. Hemant Yashwant Dhage*, (2016) 6 SCC 277.

⁵⁰ R. Thilagaraj (ed.), *Human Rights and Criminal Justice Administration* 88 (APH Publishing, New Delhi, 2002).

⁵¹ Law Commission of India, *239th Report on Expeditious Investigation and Trial of Criminal Cases Against Influential Public Men* 14 (2012).

her.⁵² Adding insult to injury, the failure to insulate a fragile, innocent, young, or weak victim led to subsequent sexual assault by the same offender years later, for which the offenders, released on bail, could not be restrained by law enforcement.

Two years later, the offender(s) recidivated with violence on the same victim who suffered further re-victimisation, and again, were unhindered in the course of the criminal justice process. Likewise, a prepubescent victim of multiple rapes suffered mental and emotional distress and the family fled their homes permanently, driven away by death threats from their attackers, due to police action that resulted in a solitary arrest of an offender in a case with several assailants and no protective mechanism in place for the traumatised victim and family members.

Erosion of trust in the judicial process by victims The deliberate corruption that has become ingrained within legal systems fundamentally distorts the perceptions of law by the public. According to a leading judge of the apex court, extraneous interference in the judicial system occurs regularly in the form of sabotage of investigations, threats, coercion of testimonies and the suppression of the truth. He remarked that, every instance where a case fails, and the failure stems from any factor extrinsic to the substantive nature of the crime and of its investigation, the victim suffers the primary and insurmountable loss of the ability to obtain justice, but simultaneously, there occurs another collateral loss, which affects the prestige of the entire judiciary.⁵³

It goes without saying that with the piling up of the results of institutional violence upon the administration of justice the structure and the framework of law becomes completely changed and is no more the law recognized by citizens. Reinforcing this, in another case the apex court lamented the repeated violation of criminal procedure code and rules of internal policing, saying that there is a complete breakdown of trust and belief in the apparatus for criminal justice by any victim when an investigation becomes negligent, clumsy, shallow or shoddy. Such neglect severely erodes confidence in law enforcement bodies and the entire criminal justice delivery mechanism, not just police officials.⁵⁴

3.2 Effects of Misuse of Investigative Powers by Police Upon Victims' Human Right to Justice: Judicial Recognition

The Calcutta High Court has severely criticised the deplorable apathy displayed by police forces in dealing with formal complaints of criminal intimidation. In one important case the court, during judicial review, observed complete lack of preventive actions undertaken by law enforcement authorities, intended to shield the applicant from retaliation attempts by offender. During meticulous perusal of the case diary of the officials the court expressed utter dismay that specific complaint of severe threats remained utterly neglected by investigation authorities. No administrative interventions were taken to guard life of victim and their family from aggressive offenders. Adding to insult to injury, it was pointed out that it was only due to dogged persistence and colossal intervention from victim that charges of sexual assault were made formal part of

⁵² *Amitbhai Anilchandra Shah v. CBI*, (2013) 6 SCC 348.

⁵³ K.I. Vibhute, *Criminal Justice: A Human Rights Perspective of the Criminal Justice Process in India* 145 (Eastern Book Company, Lucknow, 2004).

⁵⁴ N.R. Madhava Menon, "Victim Compensation Law and Criminal Justice", 41 *J.I.L.I.* 375 (1999).

records in a gravely negligent and lazy inquiry of crime.⁵⁵

Similarly, the apex judicial body was called to intervene in a grave case of murder of a victim by many perpetrators and it caused transfer of the case from a state based fast-track court to the national capital territory, as an action to counter the criminal threats to the key witnesses and their family members to be part of the proceedings which resulted in deposition by one main witness in a retracted manner due to constant threats and the trying magistrate was impotent in ensuring justice.⁵⁶ It was asserted that it was due to undue pressures in investigative process that the prosecution was impeded. In response to this claim the apex court stressed on undeniable fact, which emerged from documentation in the form of multiple pressing appeals and representations demonstrating a modus operandi of threats from the criminal associates and their close aides. This was the aspect which seriously alarmed the apex court as it observed that neither the local police superior nor the state authorities have taken substantive steps to protect them from threats.

Court warns of complete failure of justice with witnesses getting intimidated. By the conduct of the respondents, the prosecution would be totally crippled from establishing fact in case and result would inevitably be an acquittal of the accused in case of heinous homicide. Another reason of this utter failure was that although many accused had been released on bail, but authorities could not trace down anything to get bail canceled as there was an evident total dereliction of duty of the police forces of the state. In another blatant act of complicity, the Gujarat High Court highlighted the devastating consequence. The applicant, after his temporary release, continued to launch armed attacks on the victim. He made illegal escape from the police station and was allowed to escape due to collusive criminal actions of police.

Strategic Delays in Taking Accused Into Custody: another aspect of the misuse of powers of investigation is unreasonable and arbitrary delay of investigative authorities. A regional bench of the Madras High Court admonished the investigation agency for causing an unexplained delay at each stage.⁵⁷ The record clearly indicated that the investigation authorities waited for 10 days to apply for judicial custody of the main offender though accomplice in entrapping, and other co-conspirators were taken in custody about more than a week prior to it. Expressing anguish and despair for a flawed, rash and mala fide investigation, the court finally had to withdraw jurisdiction of the local police station and send the investigation to the central police bureau in response to the gross negligence.

Purposeful Exclusion of Evidence to Conceal Influential Offenders: The intentional omission of relevant pieces of evidence forms another egregious subversion of the investigative authority. In one such proceeding the Kolkata High Court exposed such an incident, based on various operation progress reports, by a Special Investigation Team (SIT). The investigation report indicated that identities of two important political persons involved in the commission of crime, were conveniently omitted from the operational progress report despite clear disclosure of their identity in the judicial testimony given by victim in court and that clearly contradicts the contents

⁵⁵ *Ramesh v. State of Haryana*, (2017) 1 SCC 529.

⁵⁶ *State of Gujarat v. Kishanbhai*, (2014) 5 SCC 108.

⁵⁷ D.K. Sharma, "Police and Criminal Justice Administration in India", 51 *I.J.P.A.* 112 (2005).

of the sanitized report provided by the head police official in court with specific directions by the court to monitor the enquiry fairly, and unedited versions provided to the tribunal, in form of audio and video recorded testimonies.⁵⁸

External Pressures Corrupting the Probe: The intervention of outside forces systematically skews investigative findings. In the above case it was found that the investigative process was so badly affected by the outside forces that it had become absolutely one-sided and factual evidence gathered during investigation was completely discarded to protect a key political person. The court stated that this conduct of the SIT was blameworthy as despite having full faith in the capabilities of the agency; they seemed to have been guided by undue influence from above which was clear from their investigative methodology.⁵⁹

3.3. Empirical Evidence: A Field Survey

The doctrinal and judicial findings above were thus put to test empirically using a field survey. A questionnaire study of 500 residents from various socio-economic backgrounds in various parts of the National Capital Territory of Delhi was conducted. The sample included direct victims of personal violence, direct families of the victims (including of murder) and those who have dealt directly with local police authorities in past three years as witness or first informer..

When I collected empirical evidence relating to the first interface of victims with police, it vividly established the great deal of systematic friction particularly about mandatory police response times and humane treatment. Although strict judicial guidelines demand that the immediate reaction time for any emergency call be below 10 minutes in the metropolitan area, 68 per cent of the surveyed respondents clearly testified that police patrol arrived very late; the case was already closed when police landed on the scene. Shockingly 72 per cent survivors alleged that the first contact person (the officer attending to them) was lethargic, callous, or overly suspicious.

This data precisely confirms the theory of secondary victimization that has been discussed at the beginning of this paper. Victims were deprived of initial reassurance and protection but instead had the institutional apathy of the police in their initial interface and actively discouraged from further participation.

The very foundation of statutory obligation of registering a FIR stands nullified when you try to verify it through this data. It is interesting to note that 45 percent of the informants encountered massive administrative hindrance, and refusals in registering the cognizable offense, from police authorities when trying to report them at police stations. In many such instances, the station officer misused the discretion available under the criminal procedure code, to either entirely dismiss the accusation or deliberately dilute the offense by lodging it under non-cognizable sections of the IPC OR BNS. As a consequence of these impediments, nearly one third (31.5 percent) of those particular respondents were forced to by-pass the police authorities altogether and approach a court for judicial action under Section 156(3) of CrPC or Section 175(3) BNSS. When questioned about their perceived integrity of the investigation conducted by police, a high 55 percent of the respondents strongly believed that the cases against them were massively tampered by third parties by using their economic affluence and political pull, with tangible

⁵⁸ *Narmada Bai v. State of Gujarat*, (2011) 5 SCC 79.

⁵⁹ S.N. Jain, "Role of Police in Criminal Justice System", 24 *J.I.L.I.* 201 (1982).

examples to support the evidence being conveniently ignored by police, or prominent accused being sheltered from the police custodial custody.

But possibly the worst evidence relates to the State apparatus's complete failure to fulfill its positive obligations concerning victim and witness protection. The questionnaire captured the pervasiveness of post crime intimidation. It was revealed that an overwhelming 62 per cent of the respondents (including victims and crucial witnesses) reported direct or indirect threat from the accused or its associates especially after the release on bail by the concerned police or prosecution machinery. Far in contrast to the extreme perceived threat reported by respondents, the extent of protection provided by law enforcement agencies were catastrophically low. Only 12 percent of the victims or witnesses who reported such threats and applied for judicial help in terms of personal security against imminent threat were actually provided with adequate and sustained protection by law enforcement agencies; the majority (88 percent) was left helpless, leading to hostile witness syndrome that led to collapsing of the entire case, confirming the courts continuous lament.

Thus, in totality, it is the above systematic investigation deficiencies, which lead to an absolute erosion of public faith in criminal justice administration. This last portion of the questionnaire tried to gauge it. A whopping 84 per cent of the respondents declared that they no longer trusted police machinery for delivering justice to their plight. On the question regarding reforms required, an overwhelming 90 percent demanded the immediate creation of an independent, specialized investigation wing, free from general police duties. Similarly, there was also almost a unanimous support for statutory police units for protection of the victims against threats and guiding them throughout the judicial proceedings. This empirical data serves the function to connect the theoretical perspective and real life situation with its statistics and thus directly testifies to the abuse of police power and violation of victim's right to justice.

4. Conclusion

The right to justice for the victims stands clearly established as a human right under conventions and non-conventional human rights instruments including regional human rights treaties and jurisprudence developed by human rights monitoring bodies; this necessarily imposes a positive duty on the state for the enforcement of such rights. Under Indian constitutional and statutory framework we have the conceptual understanding of this human right but it needs clear, direct and express legislative recognition, and specific provisions to provide for the victim's right to justice.

There are also specific statutory omissions and contradictions where the theoretical constitutional recognition of human rights need to be addressed through stringent regulations for police investigative powers; because in the existing system police is armed with enormous discretionary power that provides a large room for abuse. It is also argued that regulation of police investigation procedures within limits provided by a law is indispensable as this alone harmonizes victim's rights.⁶⁰ A reading of judicial pronouncements consistently shows that merely having a normative framework on paper cannot serve as legal shield for victims in the absence of strong implementing

⁶⁰ P.N. Bhagwati, "Human Rights in Criminal Justice System", 27 *J.L.L.* 1 (1985).

machinery. Further, there is overwhelming acceptance amongst judges that abuse of the investigatory power is itself a violation of victim's right to justice.

4.1. Major Findings

Although we have had several advisory committees and commissions over the years to evaluate the working of criminal justice system and suggest reforms that would have moved us towards a victim-centered justice delivery system; Malimath Committee gave a stern warning of the need for a comprehensive victim and witness protection scheme on account of systematic intimidation and molestation of victims by offenders.⁶¹ In order to ensure the right to justice, Malimath Committee has suggested prompt registration of complaints without administrative delays, filing appropriate sections of the penal code, making the deliberate omission on the part of police official to register complaint a criminal offense. Malimath report has also rightly pointed out the severely neglected state of the victims right to fair investigation.

The Law Commission report reiterated the need to give priority to crime victims because of the serious physical and psychological harm they have sustained and the need for the victim centered investigation process. In tune with this, the report of the National Commission to Review the Working of the Constitution recommended insertion of a new article to the Constitution providing a Fundamental Right to Access Courts for reasonably expeditious and fair justice, thereby implicitly confirming the positive obligation on the state. Notwithstanding this, the legislature has failed to provide adequate legislative framework over the decades to make criminal justice system sensitive to victims needs.⁶² As a result of the documented misuse of investigative powers and human rights abuses, it is suggested that numerous reforms be implemented.

First, a thorough mandatory review should be conducted every three years of all national laws relating to law enforcement, including various police acts, the operational manuals that are to be followed by all police authorities, and the investigative practices specified within laws governing criminal procedure in order to ensure adherence to internationally evolving best practices of policing.

Second, victim's inherent rights to justice should be given legal constitutional recognition that operates independently of the State's absolute obligation to dispense fair results. To make this a reality, the constitution needs to be amended to include a direct right that can be enforced against State authorities thereby establishing that the victim's rights must be taken constitutionally seriously by all State bodies. There must be a separate law for victims which should outline the specific rights that they have, the specific legal remedy available should these rights be violated, the exact procedure for seeking these remedies, and the authority which will have the responsibility of handling victim complaints.⁶³

Third, it is imperative that a effective victim and witness protection program be introduced either

⁶¹ Law Commission of India, *233rd Report on Amendment of Code of Criminal Procedure Enabling Restoration of Complaints* 12 (2009).

⁶² *Bhagwant Singh v. Commissioner of Police*, (1985) 2 SCC 537.

⁶³ S. Muralidhar, *Law, Poverty and Legal Aid: Access to Criminal Justice* 88 (LexisNexis Butterworths,

through a separate general law or through appropriate amendments to the existing penal and criminal procedure laws by formally making protection a matter of absolute legal right rather than discretion.

4.2. Recommendations

It is strongly recommended that preemptive remedial measures that have been proven effective in other countries be instituted to thwart immediate dangers to life and to address the severity of the threats faced by victims. It is suggested that the criminal offense of an accused person attempting to establish contact with the victim (whether directly or indirectly) be treated as a severe aggravating factor. Similarly, the court should be mandated to issue default protective orders for victims in all cases involving crimes of violence.⁶⁴ To address problems of accessing the criminal justice system it is suggested that alternate methods be implemented for reporting a crime so that the victim is not required to visit police stations and interact with police officials who may be apathetic or hostile.

A transparency should be ensured by systematically informing the victim of developments in an investigation, providing the victim with a copy of all progress reports being submitted to the magistrate.⁶⁵ Should the police not want to divulge certain information from the investigation for strategic reasons, the police must legally be required to provide reports to the magistrate in which they explicitly justify why they cannot share that information with the victim. The relevant portions of the laws on criminal procedure should be amended to incorporate these mandatory disclosures, while making provision for strict legal remedies to the victim should this requirement not be met by law enforcement.

At the end of an investigation the current laws only require the officer in charge of the case to provide the final report for the magistrate's cognizance while informing the original informant. Since it is only the informant who has been specifically given this right the Police is not required to inform the real victim or the surviving members of the victim's family, if they had not been the informant to begin with. To address this gross flaw, the specific section of the law on criminal procedure should be amended so that the actual victim or the victim's surviving family members, in case of homicide, are entitled to be provided all final investigative reports on par with the original informant. In addition to receiving full disclosure, a copy of the evidence submitted by the prosecution to the court, when presenting the formal charge-sheet, must be given to the victim. Furthermore, there must be an effective review mechanism to scrutinize the decision of the Police to shut down an investigation or stop it and to which the victim must be allowed to submit representations should they so wish.

To improve efficiency and address the lack of structure within the investigative police it is suggested that, as had been advised by the Supreme Court, the entire investigative wing be fully separated from general law and order duties. The investigative force must be unified and structured into four departments to ensure a more efficient handling of crimes of violence in order to make it less painful for victims to convey their grievances, as they would not have to go through

⁶⁴ K.N. Chandrasekharan Pillai, "Delay in Criminal Justice Administration: A Review", 42 *J.I.L.I.* 132 (2000).

⁶⁵ *Anita Kushwaha v. Pushap Sudan*, (2016) 8 SCC 509.

an array of separate departments and bureaucratic mazes.⁶⁶

The four departments would consist of: a Victim Services Wing whose job is to interview the victim and record the complaint initially, explain the investigative process and judicial procedure to the victim and advise on preserving evidence, and providing information to the victim of the status of the case; an Assistance & Support Wing which will be responsible for securing immediate medical attention to victims where necessary to collect necessary biological evidence, recording dying declarations, and providing escort services to victims for attending court proceedings; a Protection Wing responsible solely for protecting victims of violent crime from continuing attacks and intimidation so that more individuals will come forward with complaints, and informing victims of ways to protect themselves; and a main Investigation Wing which is to handle the investigation immediately after the crime is registered and is a highly unified body staffed with qualified forensic experts well versed with sophisticated forensic technology and investigative methods.

To overhaul police culture effective victim sensitive training modules are a must. The law enforcement curriculum should drastically shift its focus to incorporate international codes of conduct, rights of crime victims, State obligations to uphold these rights, and compassionate and empathic victim assistance methodologies.

Furthermore, as a mechanism of reward, continuous and sustained participation in advanced training courses, especially with regard to scientific investigative methodologies, should be a prerequisite for career advancement. The career advancement scheme must be altered to promote officers who have successfully utilized science for problem solving in criminal investigations and conducted themselves with utmost due diligence.⁶⁷

To prevent institutional impunity, all cases where an accused is acquitted due to the benefit of the doubt should be automatically referred to an independent analysis wing where former judicial officers and senior police officers could look into the mistakes in the investigation that led to the acquittal and assess whether it was due to negligence or intentional sabotage (accepting victim representations), while mandating rigorous sanctions, and enhancing existing laws dealing with official disobedience where necessary, as well as bringing into force strict departmental action in cases of negligence. It is recommended that, as part of training, the detailed results of the analysis of cases from the analysis wing be disseminated to law enforcement officials in general to ensure improvement.

⁶⁶ Arvind Verma, *The Indian Police: A Critical Evaluation* 105 (Regency Publications, New Delhi, 2005).

⁶⁷ V.R. Krishna Iyer, *Justice and Beyond* 78 (Deep & Deep Publications, New Delhi, 1980).

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