

REALIZATION OF VICTIM JUSTICE THROUGH EFFECTIVE PROSECUTION- AN INDIAN PERSPECTIVE

Dr. Mukul Raizada ¹

¹ Associate Professor, National Law University, Delhi, India



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ABSTRACT

Despite the Human Rights discourse resulting in the recognition of a 'positive obligation' upon the State to provide a mechanism using substantive and procedural measures, to ensure the victim's right to justice, the adversarial criminal justice system is not the ideal place where the victim's right to fair trial may be realized. Trends show that there is more receptibility to the idea of granting the 'service rights' to the victim of crime within the criminal justice system but still, there is a reluctance to grant the victim a status as a party in the criminal justice process. This article argues that the victim's right to justice, inclusive of the right to a fair trial, is recognized in the Indian criminal justice system but is not effectively translating into implementation. This article looks into the reasons why the public nature of the criminal trial and the structural compulsions do not leave much scope for a meaningful role that the victim might espouse for realizing his right to a fair trial. It is also trying to find out to what extent the Indian Criminal Justice System has measured up to fulfilling the State's Obligations towards fair trial rights of the victims of crime.

Keywords: Victims' Rights, Fair Trial, Fair Prosecution, Public Prosecutor, Victim's Counsel, Criminal Justice System

1. INTRODUCTION

For a long time, victims of crime remained the most neglected entity in the entire criminal justice process. The expanding dimensions of Human Rights started recognizing the plight of victims of State excesses. Victims of crime committed by non-state actors (where the primary victimization was the result of the commission of a crime by a private actor) continued to suffer silently, the trauma of primary victimization as well as suffering secondary victimization at the hands of agencies of the Criminal Justice System. Later, the new shift in the human rights discourse brought forth these victims of crime into the arena of human rights protection mandating that the State is not only under a 'negative obligation' of not violating individual liberties and freedoms but was also under a 'positive obligation' to ensure that individual rights are not violated by any actor, and at the same time recognizing the State's 'positive obligation' to provide a fair mechanism to ensure victim justice using substantive and procedural legal measures.

In the above context, this article attempts to find out how far the Indian Criminal Justice System has measured up to fulfilling the State's Obligations towards victims of crime and to what extent victims' right to justice has been recognized using substantive and procedural legal measures to ensure the rights of victims of crime? The first part of the article investigates the extent to which victims' rights especially his right to fair prosecution have been recognised. The second part of the article critically reflects upon the status of victim-advocate in a bi-partisan contest and the reasons for it. The

third part discusses, how this necessity of victim's representation through victim-counsel has been addressed under the Indian criminal justice system and the last part culminates with some reflections upon certain issues that may arise during the trial that need to be addressed to advance and protect the victims' right to fair prosecution in a better way.

2. STATE'S OBLIGATIONS AND RECOGNITION OF VICTIM'S RIGHTS

1) State's obligations towards victims of non-state crimes

Because of widespread victim rights movements across the globe, many States have started acknowledging the plight of the victims that they face while interacting with the criminal justice system and are formulating policies to address victims' issues in their domestic criminal justice systems. The human rights discourse has led to the consensus that the State is under an obligation to create such a congenial atmosphere where fundamental rights can be enjoyed and victims' human rights are equally important as that of the accused. The state has an obligation to protect the human rights of victims. This obligation of the State can be inferred from the principles enshrined under articles 14 and 21 of the Indian Constitution taken together with articles 39-A and 51 (c) of the Constitution.¹ The first part of Article 14 prohibits the State not to deny "equality before the law" to any person whereas the second part imposes an obligation upon the State to provide "equal protection of laws" to every person including a victim of a crime whose rights are also required to be equally guarded with that of the accused.² Victims of crime also deserve fair treatment in the entire criminal justice delivery process. Speaking about the constitutional obligation of the State to protect the fundamental rights of its citizens, the Apex Court has observed thus:

It is the obligation of the State to have an atmosphere where citizens are in a position to enjoy their fundamental rights..... the said principle applies with more vigour when the life and liberty of individuals are involved. We say so reminding the States of their constitutional obligation to comfort and nurture the sustenance of fundamental rights of the citizens and not to allow any hostile group to create any kind of trench in them.³

One of the ways in which the State tries to discharge its constitutional obligation of protecting the fundamental rights of its citizens is through the criminal law mechanism. Acknowledging the significance of the criminal law mechanism in ensuring fairness in the justice process for achieving the ends of criminal justice, it was observed by the Bombay High Court that:

The purpose of criminal law is to permit everyone to go about their daily lives without fear of harm to a person or property. And it is in the interest of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness on all sides..... Besides all this, the paramount duty and the very foundation of the criminal investigation and justice delivery system is fairness in the entire process and to ensure that there is no denial of justice to any of the stated parties. Importantly, it is the fairness during investigation or trial that achieves the ends of criminal justice.⁴

This Constitutional obligation of the State requires it to provide a fair mechanism including fair investigation, fair prosecution, and fair trial to protect victims' right to life. The state's obligation to ensure a fair prosecution was also recognized in the case of *Vijay Valia v. State of Maharashtra*.⁵

2) Victims' right to justice

In the context of criminal justice administration, the right to justice includes States' effective response to the crime using proper investigation, prosecution, and punishment.⁶ Just as in the case of an accused person, the victim of a crime is equally entitled to justice in the criminal justice process. Acknowledging victims' entitlement to justice, it was emphasized by Justice Benjamin Cardozo that: "Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."⁷

¹ The Constitution of India, art. 39-A; art. 51 (c).

² Justice D.M. Dharmadhikari, "Human Rights of Victims", 6 SCC J-11(2007).

³ *Shakti Vahini v. Union of India*, 2018 SCC OnLine SC 275, para 49.

⁴ *Sandeep Rammilan Shukla v. The State of Maharashtra*, 2008 SCC OnLine Bom 996, para 3.

⁵ 1987 Mah L J 49.

⁶ Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice, Reconceiving the Role of Third Parties* 159 (Hart Publishing, Oxford and Portland, Oregon, 2008).

⁷ *Snyder v. Massachusetts*, 291 U.S. 97 (1934) available at <https://www.law.cornell.edu/supremecourt/text/291/97>.

Recognizing the fact that victims of crime suffer hardships during their interaction with the criminal justice process, the UN General Assembly recommended taking all appropriate measures to ensure justice for victims of crime. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)⁸ has recognized victims' right to access to justice and fair treatment. It has been provided that the victims of crimes are entitled to an effective mechanism of justice so that they get prompt redress for their harm.⁹ The Declaration further recommends that judicial and administrative processes should be made sensitive towards victims' needs that may very well be identified with their justice needs and financial needs. The Declaration also provides that 'victims' views and concerns that have a bearing on their personal interests should be taken into consideration at appropriate stages of the criminal proceedings. It is significant here that the words 'where their personal interests are affected' may be very well taken as suggestive of their personal interests in seeking fair trial and justice within the criminal justice process. Obviously, their rights should not be in conflict, with the fair trial rights of the accused person and should be consistent with the objectives of the domestic criminal justice system.¹⁰ Emphasizing that the courts should be considerate towards the victims' right to justice while discharging the primary duty of finding the truth in any criminal trial, it was observed by the Hon'ble Apex Court in *Maharashtra v. Dr. Praful B. Desai*¹¹ that:

It must be remembered that the first duty of the court is to do justice. As has been held by this Court in the case of *Nageshwar Shri Krishna Ghobe v. State of Maharashtra* courts must endeavour to find the truth. It has been held that there would be a failure of justice not only by unjust conviction but also by acquittal of the guilty for unjustified failure to produce available evidence. Of course, the rights of the accused must be kept in mind and safeguarded, but they should not be overemphasized to the extent of forgetting that the victims also have rights.¹²

3) Victims' right to fair trial

In India, Article 14 of the Indian Constitution provides for the right to equality that makes the 'right to justice' equally available to an accused as well as to a victim in a criminal trial. The right to life and liberty as provided under Article 21 includes within its ambit the right to a fair trial and a remedy has also been provided under Article 32 of the Constitution in case of violation of these rights. Additionally, the directive principles under article 39-A of the Indian Constitution impose an obligation upon the State to ensure that justice is secured to all concerned by providing for 'Equal justice and free legal aid'. Recent judicial trends¹³ are reflective of the idea that victims' right to a fair trial is itself a fundamental right and is well recognized under the Indian Criminal Justice System. A victim of a crime is also equally entitled to demand a fair trial. It is not an exclusive right of an accused but is equally available to a victim of crime too as was emphasized by the Patna High Court that:

Article 21 of the Constitution of India, therefore, does not vest in only an accused the right to demand fair trial, but it also vests an equally important right, fundamental in nature, in the victim, to demand a fair trial. Article 21 of the Constitution of India does not, thus, confer fundamental right on the accused alone, but it also confers, on the victim of an offence, the right, fundamental in nature, to demand fair trial.¹⁴

Fair trial means a criminal trial that is fair towards all concerned including victims and their family members and in which prosecution is also conducted in an unbiased and fair manner. Elaborating on the characteristics of a fair trial the Supreme Court in the famous case of *Zahira Habibulla H. Sheikh v. State of Gujarat*¹⁵ has made its observation as:

⁸ UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, A/RES/40/34 (November 29, 1985) available at <http://www.un.org/documents/ga/res/40/a40r034.htm>

⁹ *Id.* at "4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered."

¹⁰ *Id.* at "6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system."

¹¹ (2003) 4 SCC 601.

¹² *Id.* at para 13.

¹³ *Mohamed Maraikkayar v. The Director General of Police*, 2014 SCC OnLine Mad 9759, para 7; *Ram Padarath Singh v. The State of Bihar* 2014 SCC OnLine Pat 6564.

¹⁴ *Ram Padarath Singh v. The State of Bihar*, 2014 SCC OnLine Pat 6564.

¹⁵ (2004) 4 SCC 158.

It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning Nelson's eyes to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and society. A fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated.¹⁶

Apex Court in *Rajaram Prasad Yadav v. State of Bihar*,¹⁷ while applying section 311 of the CrPC¹⁸ culled out certain principles to be kept in mind to ensure a fair trial and stated that the trial court should always bear in mind that fair trial furthers the interest of the accused, the victim and the society and the fair and proper opportunities must be granted to the persons concerned to ensure constitutional goal and human right. In *State (NCT of Delhi) v. Shiv Kumar Yadav*¹⁹, while discussing the aspects of recalling witnesses on every change of defence counsel, the Apex Court made it clear that the system cannot be held to ransom in the name of a fair trial. The fairness of a trial should be evaluated while keeping in mind all the stakeholders, the accused, the society as well as the victim.²⁰ Recognizing the hardships that victim-witnesses of serious crimes face during the trial, Apex Court expressed its concerns and observed that it is for the courts to ensure that neither an accused is refused a fair opportunity nor a victim and witness is unduly harassed."²¹

4) Victims' right to fair prosecution

During the trial, the prosecution, and the accused both are allowed to present their version of the crime incident before the court through the production of relevant evidentiary material and examination of witnesses, for the court to be able to ascertain the true events to decide the guilt or innocence of the accused. Since the adverse outcome of the criminal trial will be of great detriment to the accused, he has been provided with a sacrosanct right to be represented by an advocate of his choice.²² Similarly, it is also to be acknowledged that it is the victim, violation of whose rights resulted in initiation of prosecution against the accused. Both should be equally entitled to present their versions. Dealing with the issue of witness protection, Apex Court in the case of *Mahender Chawla v. Union of India* made this observation regarding victim justice: "Criminal Justice is closely associated with human rights, whereas, on the one hand, it is to be ensured that no innocent person is convicted and thereby deprived of his liberty, it is of equal importance to ensure, on the other hand, that victims of crime get justice by punishing the offender."²³ A Prosecution is launched also to vindicate the rights and grievances of the complainant.²⁴

The Committee on Reforms of the Criminal Justice System (Malimath Committee Report) with a victim-centric approach had recommended that victims should be given a right to participate in cases of serious offences. This right to participation is inclusive of victims' right to representation by an advocate of his own choice, right to ask questions to the witnesses and to produce evidence with leave of the court, suggesting questions which may be asked by the court and to advance arguments after the prosecutor has submitted arguments.²⁵

Judicial trends indicate that victims' right to be heard is a recognized right under the Indian Criminal Justice System.²⁶ The right to be heard is equally available to both the accused as well as the complainant and this right is to be understood as inclusive of the right to get a proper representation. Considering the 'right to get proper representation' as part of fair trial right, it was observed by the Karnataka High Court that:

The right to be heard includes the right to be represented by an able spokesman of one's confidence. The right belongs to the complainant and the accused, both. A fair trial does not necessarily mean that it must be fair only to

¹⁶ *Id.* at para 36.

¹⁷ (2013) 14 SCC 461, para 17.14.

¹⁸ The Code of Criminal Procedure, 1973, sec. 311, provides for the power of the court to summon material witnesses.

¹⁹ 2015 SCC OnLine SC 799.

²⁰ *Id.* at para 11.

²¹ *Id.* at para 29 (v).

²² The Constitution of India, art. 22 (1).

²³ (2019) 14 SCC 615, para 9.

²⁴ *Vijay Valia v. State of Maharashtra*, 1987 Mah L J 49, para 9.

²⁵ Government of India, "Report of the Committee on Reforms of Criminal Justice System" (Ministry of Home Affairs, 2003), recommendation 6 at 270-271.

²⁶ *Vijay Valia v. State of Maharashtra*, 1987 Mah L J 49; *K. V. Shiva Reddy v. State of Karnataka* 2005 SCC OnLine Kar 260.

the accused; it must be fair to the victims also. It must be fair to all. A fair trial is a concept which is much higher than the claims or ends of the parties to it.²⁷

A victim has a right to be heard, which means an effective representation during the hearing of the case. Victims' right to be heard recognizes their right to claim an advocate of one's own choice. In *Vijay Valia v. State of Maharashtra*²⁸, it was opined by the Bombay High Court that any request regarding the appointment of an advocate of one's own choice with payment of fees by the victim should be considered and granted as a rule and in case of refusal to any such demand; reasons should be communicated to the concerned victim. In such cases, the victim may be a direct sufferer of the crime or may be a person related to the victim or may be an aggrieved person. It was held by the Court that sections 24 (8) and section 25 (1) of the Code of Criminal Procedure, 1973 are not in violation of article 14 of the Constitution and recognizes a complainant's right to fair and effective representation before the court. The court made it clear that the complainant is equally entitled to a fair prosecution.²⁹

While recognizing victims' right to fair and effective prosecution, the Supreme Court emphasized that suggestions made by the victim should be taken into consideration while making an appointment of a Special Public Prosecutor.³⁰ In *K. V. Shiva Reddy v. State of Karnataka*,³¹ The Court held that appointment of a Special Public Prosecutor may be made in public interest in special circumstances giving reasons in writing and while making any such appointment, the process adopted should be fair, just and reasonable and in case the remuneration is to be paid by the victim, it should be quantified by the government and shall be deposited with the government and the same shall be paid by the government to the concerned Special Public Prosecutor. It is submitted that these judicial iterations are reflective of the recognition of victims' right to fair prosecution.

3. VICTIM'S ADVOCATE IN A BI-PARTISAN CONTEST

1) Bi-partisan contest

The idea of crime came to be conceptualised as something that offended and threatened the entire community. The State, as a custodian of community interests, has a primary duty to prosecute the offender on behalf of the people.³² To allay the apprehension that the State with its enormous resources at its disposal, may tramp upon individual liberties by invoking criminal laws, a complex body of fair trial rights came into existence that included the presumption of innocence, the right to be represented by a lawyer of accused's choice, equality before law in favour of the accused. Objective adjudication of guilt, protection of public interest, protection of fair trial rights of the accused and desirability of truth-finding, emerged as the major objectives of criminal justice in bi-partisan systems and these are the values that are considered as hindrances in the way of victim's procedural right to participation.³³

- **Fairness and Objectivity in the Trial**

These objectives of the criminal justice led to the evolution of an independent institution of public prosecution wherein the prosecutor acts not as an adversary who has to win the case at any cost but who is, in fact, a representative of the public interests and who has to ensure that 'justice shall be done'.³⁴ For a very long time, the Courts have been of the view that without effective control by the public prosecutor, prosecution by a private counsel may lead to private vengeance. Judicial trends show that there is an apprehension that private counsel would always focus on bringing the case to conviction and that will potentially sacrifice other equally important objectives of fair trial. As was observed by the division bench of Andhra Pradesh High Court, in the case of *Medichetty Ramakistiah v. State of AP*: "Unless, therefore, the control of the Public Prosecutor is there, the prosecution by a pleader for a private party may degenerate into a legalised means for wreaking private vengeance."³⁵

²⁷ *K. V. Shiva Reddy v. State of Karnataka* 2005 SCC OnLine Kar 260, para 31.

²⁸ *Vijay Valia v. State of Maharashtra*, 1987 Mah L J 49.

²⁹ *Id.* at para 23.

³⁰ *Sunil Kumar Pal v. Phota Sheikh*, (1984) 4 SCC 533, para 9 & 10.

³¹ 2005 SCC OnLine Kar 260.

³² US, Department of Justice, The President's Task Force on Victims of Crime, Final Report, 11-18 (1982).

³³ Jonathan Doak, "Victims' Rights in Criminal Trials: Prospects for Participation" 32 (2), *Journal of Law and Society*, 294-316 (2005).

³⁴ *Berger v. United States*, 295 U.S. 78 (1935).

³⁵ AIR 1959 AP 659.

That is why the legislature has subjected the role of victim's advocate strictly under the supervision and instructions of the Public Prosecutor.³⁶ Victim's counsel is denied independent prosecution rights generally due to the fear that it may adversely affect fair trial rights given to an accused under the adversarial criminal justice system. Victim's counsel cannot be given a free hand during prosecution since it may hamper the prosecution case and adversely affect the fairness of the trial. More recently, As was observed by the Apex Court in *Rekha Murarka v. State of West Bengal*³⁷: "If given a free hand, in some instances, the trial may even end up becoming a vindictive battle between the victim's counsel and the accused, which may further impact the safeguards put in place for the accused in criminal trials."³⁸

Strangely, while referring to the notion of fairness of a trial, Apex Court in this case has given some observations that go against the very idea of the prosecutor's duty to remain fair as an officer of the court to bring out the real unvarnished truth. Hon'ble apex court has referred to the possibility of prosecutorial strategic tactics of winning a case by excluding certain witnesses.³⁹ A logic, advanced for the exclusion of the victim's counsel was that the presence of the victim's counsel may result in insisting on the testimony of left-out witnesses that may result in weakening the prosecution case. The idea about the courts being entrusted to separate the wheat from the chaff after going through the testimony of all witnesses and evaluation of evidence seems to have been surrendered for the sole purpose of winning the case by the public prosecutor and it does not align with what is expected out of the role of the prosecutor.

Normatively also, victims are considered outsiders to criminal prosecutions. The dichotomous nature of the criminal justice system provides for different sets of rationale for criminal and civil law. Criminal law provides for penal sanctions to deal with the accused and to protect the larger public interest. The punishments provided are to secure the public interest in controlling crime and not to satisfy the private interest of any party.⁴⁰ The criminal justice system treats victims as "evidentiary cannon fodder".⁴¹ Purists think that recognizing the victim as a third party in the criminal justice proceedings may lead to the replacement of codified and judicially made laws and their objectives by ad hoc populism.⁴² Participatory rights to victims are considered as a threat to the objective and public nature of the criminal justice system. On the other hand, advocates of victim rights argue that victims should be given procedural rights of participation. It may be submitted that under the Indian criminal justice system, this dichotomy is getting diluted and the division between criminal and civil law is getting blurred increasingly.⁴³

• Equality of Arms

'Equality of arms' argument denies the victim's procedural right to participate since it may disturb the inherent balance of the criminal justice system. From a due process viewpoint, it is argued that giving procedural rights to the victim to participate in the trial may undermine the principle of 'equality of arms,' since the defence would be required to face the victim's counsel along with the prosecutor in the case.⁴⁴ On the contrary, the victim's counsel is required to maintain this inherent balance within the criminal justice system. The public prosecutor is expected to act fairly towards the accused to enforce due process rights of the accused and in cases where defence counsel overlooked certain beneficial provisions for the accused, the public prosecutor is required to bring the attention of the court towards such provisions. The courts expect the Public Prosecutor to take care of the interests and concerns of an accused also as can be seen from this observation:

³⁶ *Shiv Kumar v. Hukam Chand*, 1999 SCC OnLine SC 824, para 13.

³⁷ (2020) 2 SCC 474.

³⁸ *Id.* at para 11.2.

³⁹ *Ibid.*

⁴⁰ A. Ashworth, "What Victims of Crime Deserve", paper presented to the Fulbright Commission on Penal Theory and Penal Practice, University of Stirling, September 1992, as cited by M. Cavadino and J. Dignan "Towards a Framework for Conceptualising and Evaluating Models of Criminal Justice from a Victim's Perspective" 4 (3) *International Rev. of Victimology* 153 (1996).

⁴¹ M. Cavadino and J. Dignan "Towards a Framework for Conceptualising and Evaluating Models of Criminal Justice from a Victim's Perspective" 4 (3) *International Rev. of Victimology* 155 (1996).

⁴² D. Weisstub, "Victims of Crime in the Criminal Justice System" in E. Fattah (ed.) *From Crime Policy to Victim Policy*, 205, (Palgrave Macmillan, London 1986).

⁴³ Compounding of offences u/sec 320 CrPC, Sec.357 CrPC relating to compensation, determination of fine based on medical expenses for the acid attack and rape victim are good example for this blurring of the lines.

⁴⁴ S. Thaman, "Europe's New Jury Systems: The Cases of Spain and Russia" 62 *Law & Contemporary Problems* 233, 244 (1999) as cited in Jonathan Doak, "Victims' Rights in Criminal Trials: Prospects for Participation by" 32 (2) *Journal of Law and Society* 298 (2005).

The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/ conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge.⁴⁵

As far as safeguards for the accused are concerned, he has well-established sets of constitutional and statutory rights and courts are duty-bound to keep a vigil and do the necessary course correction if there is any violation of these rights. This scheme leads to a situation where not only the defence counsel is there to protect the accused's interests, but the Public Prosecutor is also there if the defence counsel misses out on protecting such concerns. So basically, defence concerns can be seen as being taken into consideration both by the Public Prosecutor as well as by the Defence Counsel, but there is no one to represent the victim in this whole contest. The actual sufferer of the crime is an outsider in this bi-partisan contest. This position questions the 'equality of arms' argument that is invoked to oppose victim's counsel appointment on the ground that equipping criminal trials with victim's counsel will result in imbalance in the Criminal Justice System. Of late, the Human Rights discourse is also espousing for victims to be given participatory rights in criminal trials by resorting to the argument of 'equality of arms. United Nations working paper states: "Looking at the rights of victims as a whole, the right to counsel seems the logical complement of the defendant's right to counsel. There is no zero-sum game between those two rights. The victim's right to be treated with respect seems to have little if any negative implications for the offender."⁴⁶

- **Prosecutor as a caretaker of Victim's Interests**

Because of the inherent nature of the adversarial criminal justice system, criminal trial is still seen as a contest between the State and the accused. In this contest, narratives of victims and witnesses are manipulated to ensure victory in the case.⁴⁷ The adversarial system, "turns witnesses into weapons to be used against the other side".⁴⁸ Under the common law system also, prosecutors are considered a "minister of justice".⁴⁹ As a minister of justice, the prosecutor is expected to work dispassionately to secure a conviction on one hand and on the other hand perform a protective function to support the victim. This seems contradictory.⁵⁰ Many empirical findings suggest that prosecutors are not able to maintain a balance in giving effect to these two competing roles that are expected of them and are not able to represent the interest of the victim in the court proceedings. A general perception has emerged from these empirical findings that prosecutors were less 'vigorous' or less energetic while presenting the case and even in cases where the prosecution was able to secure a conviction, their degree of zeal to conduct the prosecution was no match as that of defence counsel.⁵¹ The Supreme Court also has criticized this lack of zeal on the part of the prosecution and reminded the trial Courts to take all necessary steps to ensure that the victim does not suffer any adverse consequence due to the inaction on the part of the prosecution. Reminding the trial courts to play a proactive role in case the prosecution either deliberately or inadvertently makes an omission in highlighting an important piece of evidence or suppresses the statement of the witness to the prejudice of any party.⁵²

2) Necessity for victim's advocate

⁴⁵ *Shiv Kumar v. Hukum Chand*, 1999 SCC OnLine SC 824, para 13.

⁴⁶ United Nations, *Offenders and Victims: Accountability and Fairness in the Criminal Justice Process*, UN Doc A/ CONF. 187/8 (December 15, 1999), para 21.

⁴⁷ L. Ellison, *The Adversarial Process and the Vulnerable Witness*, 53-4, Oxford (2001).

⁴⁸ William Pizzi, *Trials without Truth* 197 (1999) as cited in Jonathan Doak, "Victims' Rights in Criminal Trials: Prospects for Participation" 32 (2) *Journal of Law and Society* 298 (2005).

⁴⁹ *R v. Banks*, (1916) 2 K.B. 621.

⁵⁰ L.E. Ellison, *A comparative study of Rape Trials in Adversarial and Inquisitorial Criminal Justice Systems* (1997) 281-4 (unpublished PhD thesis, University of Leeds) as cited in Jonathan Doak, "Victims' Rights in Criminal Trials: Prospects for Participation" 32 (2) *Journal of Law and Society* 306 (2005).

⁵¹ J. Shapland, J. Willmore et al., *Victims in the Criminal Justice System*, Gower 1985; Northern Ireland Statistics and Research Agency, "Victims' and Witnesses' views on their Treatment in the Criminal Justice System" (Belfast, Northern Ireland Office 2004) as cited in Jonathan Doak, "Victims' Rights in Criminal Trials: Prospects for Participation" 32 (2) *Journal of Law and Society* 306 (2005).

⁵² *Mina Lalita Baruwa v. State of Orissa and Others*, (2013) 16 SCC 173, at 19.

Victims of crime have been paid very little attention in their journey of seeking justice. Due to the apathy of the system, the victim loses trust in the justice delivery process and justice itself becomes the casualty.

In the existing procedure of the court, hardly any attention is paid towards the plight and rights of the victim and witnesses on whose evidence the efficacy of the trial and the verdict of the court depends. The apathy towards the rights of the victim and very little or no participation given to him in the course of the trial, coupled with frequent occurrence of witnesses turning hostile under compulsions e.g. intimidation, coercion or allurement deflects the course of justice, invariably resulting in acquittals.⁵³

In an adversarial system, where the required standard of proof is 'beyond reasonable doubt', and the accused is presumed innocent until proven guilty, any inefficiency on the part of the public prosecutor not only affects society but is detrimental to the interests of the victim also.⁵⁴ Supporters of victim justice argue that sometimes public prosecutors may fail to perform their functions efficiently either due to oversight or deliberately. He can fail to examine or cross-examine a witness properly. Due to the heavy workload, prosecutors sometimes may miss certain important points in a case.⁵⁵ In a case of rape and murder of a six-year-old child where the acquittal was the consequence of lapses on the part of investigating officer and public prosecutor, Supreme Court while reiterating that an inefficient prosecution resulting in acquittals subverts the cause of victim justice, vehemently criticized the role played by the prosecution in the case thus: "The investigating officials and the prosecutors involved in presenting this case have miserably failed in discharging their duties. They have been instrumental in denying to serve the cause of justice."⁵⁶ In *Sunil Kumar Pal v. Phota Sheikh*⁵⁷, wherein an allegation of unfair prosecution was made in the appellant's younger brother's murder case, the public prosecutor represented the defence side and only two, out of 12 witnesses were called upon to depose before the court by the additional public prosecutor and material witnesses were not called upon. Due to no protection from threats and intimidation, witnesses turned hostile and resultantly the court acquitted all the nine accused. The Supreme Court vitiated the trial conducted by the trial court and ordered a retrial on the same charges.

In *K. V. Shiva Reddy v. State of Karnataka*,⁵⁸ the Karnataka High Court made some valuable observations mentioning the circumstances when the need may arise for the victims' say in prosecution as under:

The third respondent has been a silent spectator in the whole episode. This Court cannot ignore her rights and genuine apprehension in the matter of effective trial, as her husband is the victim.If she feels the representation for the State is comparatively less effective and may also be easily tampered with through a variety of nefarious influences, and that the accused are represented by a leading criminal lawyer and feels impelled to engage a counsel of her own choice in whose competence and probity she has full faith and approaches the State to engage a Counsel of her choice, the Government is bound to consider such request and pass appropriate orders.⁵⁹

In another case, the Guwahati High Court, while allowing the petition filed by the victim for seeking permission from the court for his advocate to intervene, had observed as under:

However, when the court sees reasons that the Public Prosecutor is not properly discharging the duty to be performed by him, such court may allow the complainant or a private person, who is aggrieved by the alleged offence (s) to engage a counsel to act under the direction or supervision of such Public Prosecutor, as provided in section 301 (2), Cr. P.C maintaining the overall charge of the conduct of the case with him.⁶⁰

But the court failed to appreciate the complexity of the situation wherein the public prosecutor is not properly discharging his duties thus necessitating the victim to engage his advocate, how effectively the victim's advocate would be able to protect the victim's right to fair prosecution if he had to act under the supervision and directions of the very same disinterested public prosecutor. Such situations arising in criminal trials due to the prosecutor's oversight can be addressed by giving a greater participatory role to the victim and the same was observed by a two-judge bench of the Supreme Court in *Rekha Murarka* case: "A victim-centric approach that allows for greater participation of the victim in

⁵³ *Supra* note 3.

⁵⁴ Government of India, "Report of the Committee on Reforms of Criminal Justice System" (Ministry of Home Affairs, 2003), Para 2.2 at page 23.

⁵⁵ *Rekha Murarka v. State of West Bengal*, (2020) 2 SCC 474, para 11.3.

⁵⁶ *State of Gujarat v. Kishanbhai*, (2014) 5 SCC 108, para 17.

⁵⁷ (1984) 4 SCC 533.

⁵⁸ 2005 SCC OnLine Kar 260.

⁵⁹ *Id.* at para 40.

⁶⁰ *Mahammad Ali v. State of Assam*, 2017 SCC OnLine Gau 867, para 9.

the conduct of the trial can go a long way in plugging such gaps.”⁶¹ It was further stated by the Supreme Court that the lacunas left in the prosecution case due to oversight of the prosecutor (either deliberate or unintentional) can be filled up by the role of the victim’s counsel as provided under Proviso to section 24 (8) and Sec. 301 (2). A faulty prosecution may lead to adverse effects upon the victim’s right to appeal under the proviso of section 372 of The Code of Criminal Procedure, 1973. Apex Court emphasized that the victim’s counsel should be given a significant role at the stage of prosecution but the same should not be done by diluting the role of the Public Prosecutor or by disturbing the inherent balance in the scheme of the Code.⁶² The extent of assistance to be provided by the victim counsel to the public prosecutor and how this assistance is given will depend upon the facts and circumstances of the particular case.⁶³

It can safely be argued that at least these special circumstances as highlighted by the courts in the above-cited cases necessitate the active engagement of the victim’s counsel. It can be asserted that the victim counsel’s role should be extended and should not be limited to filing of written submissions and that too after evidence is closed in the case as provided under section 301 (2) of the Code of Criminal Procedure, 1973. The conditions that the private pleader shall act under the directions of the Public Prosecutor or the Assistant Public Prosecutor and may submit written arguments only after the evidence is closed, restrict the role played by the victims’ pleader to the extent that it may be of very little utility. This role of the victim’s advocate should be extended so that victims’ grievances can be addressed more meaningfully. Such a pleader should have the facility to submit written arguments not after the closure of the evidence but at the stage of the evidence.

4. VICTIM’S REPRESENTATION UNDER INDIAN CRIMINAL JUSTICE SYSTEM

In conformity with international concerns and advocacy for victim’s rights, the Law Commission in its 154th Report has recommended victim orientation in the criminal justice system. This understanding was further given effect by the Criminal Procedure (Amendment) Act, 2008 that inserted a proviso in section 24 (8) of the Code of Criminal Procedure, 1973. This proviso⁶⁴ provides for the power of the court to allow the victim to engage an advocate of his choice to assist the prosecution. Section 225 mandates that prosecution in the trial in the Court of Sessions shall be conducted by the Public Prosecutor.⁶⁵ Section 301(1) of the Code of Criminal Procedure, 1973 provides that only the Public Prosecutor or Assistant Public Prosecutor in charge of the case may appear in any court in that case. Section 301 (2) of the Code of Criminal Procedure, 1973 provides clearly that a pleader engaged by a private person shall act under the direction of the Public Prosecutor or the Assistant Public Prosecutor and may also submit written arguments in a case but only after the closure of the evidence in the case.⁶⁶

Section 302 of the Code of Criminal Procedure, 1973 also deals with “Permission to conduct prosecution”. It provides that in a Magistrate court trial, any person other than a police officer (who was involved in the investigation in that case) may conduct the prosecution with the permission of the Magistrate.⁶⁷ Section 311 of the Criminal Procedure Code, 1973 gives power to the Court to summon any material witness or examine any person present to arrive at a just decision in the case.⁶⁸ Further, section 165 of the Indian Evidence Act, of 1872 gives power to a judge to put questions or order production of any document or thing.⁶⁹

The legal position that emerges from the combined reading of Ss. 24 (8) proviso, 225, 301 and 302 reflects as to what extent the victims’ right to fair prosecution has been recognized under the Code. It can be inferred safely that the court can permit the victim to engage an advocate of his choice only to assist the prosecution. In Sessions trials only the Public Prosecutor can conduct the prosecution and the victim’s advocate can only act under the direction of the Public Prosecutor to assist him. The victim’s advocate may, with the permission of the court, submit written arguments after

⁶¹ *Supra* note 38 at para 11.3.

⁶² *Ibid.*

⁶³ *Id.* at para 11.4.

⁶⁴ Inserted by Act 5 of 2009.

⁶⁵ The Code of Criminal Procedure, 1973, s. 225.

⁶⁶ *Id.*, s. 301.

⁶⁷ *Id.*, s. 302.

⁶⁸ The Code of Criminal Procedure, 1973, s. 311.

⁶⁹ The Indian Evidence Act, 1872, s. 165.

the evidence is closed. In Magistrate Court trials, any person may conduct the prosecution subject to Magistrate's permission.

The judiciary has given different interpretations of the relevant provisions having a bearing on the cause of victim-justice. In *Mahammad Ali v. State of Assam*,⁷⁰ during the stage of evidence, prosecution by an independent counsel of victim was challenged by the defence counsel and in revision, such an order of the trial court permitting private prosecution was held not tenable. The Guwahati High Court, while reminding that free and fair investigation as well as fair trial are part of fundamental rights and are guaranteed under the Constitution of India in its articles 14, 21 and 39 A, allowed the petition and set aside the judgment and order passed by the Additional Sessions Judge and observed as under:

The words "Prosecution to be conducted" appearing in the subsequent section 302 (1), Cr.P.C. have the same meaning to the words "Conduct the Prosecutions" appearing in section 301, Cr.P.C. meaning thereby that like the Public Prosecutor, a private pleader, subject, of course, to the satisfaction of the court, may apply for invocation of any of the powers of the court vested under the provisions of Cr.P.C. Thus, although only the Public Prosecutor is empowered to conduct the prosecution before the Sessions Court as per section 225, Cr.P.C., the private person, who is aggrieved by the alleged offence (s) is also permitted under section 302 (2), Cr.P.C. to participate in the trial to meet out justice through a fair trial in the Court of Magistrate.⁷¹

But recently, the Supreme Court in the case of *Rekha Murarka v. State of West Bengal*⁷² read the victim's advocate role very restrictively and observed that there is a difference between 'assisting' the prosecution and 'conducting' the prosecution. Use of term 'assist' in the proviso to section 24 (8) indicates that victim's counsel has been given only a secondary role in criminal justice proceedings. To allow only a 'secondary' role to victim's counsel, the words 'coordinate with' were removed while finalising the Amendment Bill (2009) to CrPC. This role of victim's counsel is in consonance with the limited role of a pleader of a private person under section 301 (2).⁷³ Another reasoning given by the court for exclusion of victim's counsel from any direct prosecutorial role was the lack of advocacy experience as compared to the public prosecutor having minimum seven years of experience.⁷⁴ But the instances were not taken into consideration where a victim may engage an advocate having more experience than the public prosecutor in the case. In the same case, the Court has made some contradictory remarks where on one side it has been accepted that due to the overload of work public prosecutors may miss out certain important aspects from bringing them out before the courts; and there may be a need for victim-advocate for plugging the gaps left out by the public prosecutor; that the proviso to section 24 (8) works as a safety valve because due to this provision victim's counsel may be able to make up the deficiencies left by the public prosecutor in the case; and public prosecutor may commit such errors at trial stage that render victims' right to appeal meaningless but on the other hand, it has been emphasized that prime role assigned to the public prosecutor should not be diluted and victims' advocate should only be allowed to assist the prosecutors. Even the possibilities were not taken into account wherein the leaving out of the important prosecution evidence was not because of the unintentional error on part of the prosecutor or due to the work pressure upon him but was due to an intentional connivance with the accused and thereby deliberately affecting the cause of the justice in the case. In such scenario, how the remedy suggested under para 11.4, that: "if the victim's counsel feels that a certain aspect has gone unaddressed in the examination of the witnesses or the arguments advanced by the public prosecutor, he may route any questions or points through the Public Prosecutor himself"⁷⁵ be of any effective use for advancing the cause of justice?

The apex court (in the above case) reasserted that, this Proviso to section 24 (8) cannot dilute the unequivocal mandate of section 225 of CrPC that a Session trial shall be conducted by a Public Prosecutor. While refusing to give victim's counsel a right to make oral arguments or right to examine witnesses, Apex Court held that the principle inherent in section 301(2) should apply in case of victim's counsel under the Proviso to section 24 (8). This provision helps in representing victim's interest during the prosecution.⁷⁶ If the victim finds that a particular aspect has not been taken into

⁷⁰ 2017 SCC OnLine Gau 867.

⁷¹ *Id.* at para 9.

⁷² *Supra* note 38.

⁷³ *Id.* at para 11.1.

⁷⁴ *Id.* at para 11.2.

⁷⁵ *Id.* at para 11.3 & 11.4.

⁷⁶ *Id.* at para 11.4.

consideration by the prosecutor, he may route any questions through the public prosecutor himself but victim's counsel cannot be given power to deal (making oral arguments or examining witnesses) with the case independently.⁷⁷

Despite reasserting the restrictive approach while interpreting the legislative scheme provided in criminal procedure code and thereby limiting victim's advocate role, the court introduced an alternative going beyond the legislative provisioning and allowed that in cases, where even after being indicated by the victim's advocate towards the important aspects so left out, prosecutor does not pay attention towards the flagged issues, victim has a recourse of channelling his questions through the judge. Victim or his counsel may bring questions to the notice of the court. The Supreme Court observed thus:

If the victim's counsel finds that the Public Prosecutor has not examined a witness properly and not incorporated his suggestions either, he may bring certain questions to the notice of the court. If the Judge finds merit in them, he may take action accordingly by invoking his powers under section 311 CrPC or section 165 of the Evidence Act, 1872.⁷⁸

The observations made by the Apex Court, is significant here because it gives an opportunity to the victim. These observations do not make any reference to the phrase used under section 301(2), "submit written arguments after the evidence is closed in the case." Thus, giving wider scope to victim's counsel to bring the attention of the court towards any point left out by the prosecutor at any stage of prosecution whether the evidence is closed or not. This ruling is important because it extends the role given to the counsel of victim and now, he has a recourse whereby he can bring to the attention of the court his arguments even before the closing of evidence in the case.

5. CONCLUSION

Just like fair investigation, fair prosecution is a must to ensure fair trial. Not only an accused is entitled to fairness during the criminal justice proceedings including fair investigation, fair prosecution, and fair trial but a victim of a crime also has a right to be represented fairly by an able spokesman of his confidence. It is the constitutional obligation of the State to ensure fair and effective prosecution in cases where a non-State actor commits a crime against an individual. State agencies should perform their duties diligently to ensure victim-justice. The State has a Constitutional Obligation to ensure justice to all individuals. Time and again, Courts in India, have recognized victims' right to justice, right to fair trial and right to fair prosecution. Where victim requests for a counsel of his own choice, he is entitled to get representation by a counsel of his own choice. In case of refusal to any such demands, the victim has a right to know the reasons.

The judicial trend has provided an accepted legal position that the Prosecutor should deal with the case in a fair and effective manner and should not show a casual approach and should bring all relevant facts to the knowledge of the court. He is bound to play fair and safeguard the interests of all the concerned including the victim of crime. He is dutybound to bring all the relevant facts before the court including the important aspects raised by the victim's advocate, since only then he could be said to have discharged his duties in 'good faith.'

It cannot be disputed that the role envisaged for the public prosecutor in conducting the trial in an impartial and objective manner is significant for pursuing justice for all the parties involved. At the same time, one should not discount this fact that an adversarial criminal justice system overzealously safeguards the accused' rights and the way the prosecutor plays his role, is increasingly leading to such situations where the victims' rights are at great casualty. This phenomenon may be checked if the victim is given the statutory right to make timely interventions through written submission addressed to the court, at all the significant stages in the trial and is not to be kept waiting till the end of the evidence stage. This will go a long way in safeguarding victim's right to fair trial and fair representation and ultimately advance the cause of victim justice.

The argument of purists that broader policy objectives would get diluted does not seem to hold the ground, especially in Indian criminal justice administration settings because the due process rights of the accused are already constitutionally cemented and unlike pure adversarial systems where judges play a detached role, in Indian courts, judge has been given many powers to regulate the trial and actively intervene to do justice. Moreover, one of the broader objectives of the criminal proceedings is to get to the truth and if the victim's uncensored version which is not being

⁷⁷ *Id.* at para 11.4 & 11.5.

⁷⁸ *Id.* at para 11.5.

structured compulsively to fit into the objectives of maximizing the adversarial effects, is allowed and his highlighting of the unintended or deliberate omissions in the trial are remedied timely, it may go a long way in arriving at the truth.