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## Muffled voices. Making way for impact statements in criminal justice system in India

### Voix étouffées. Faire place aux déclarations des victimes dans le système de justice pénale en Inde

Dipa Dube\*

#### Riassunto

Il *Victim Impact Statement* (VIS) rappresenta un aspetto cruciale del processo di amministrazione della giustizia. Tale dichiarazione rafforza il modello partecipativo del sistema di giustizia penale in cui entrambe le parti, l'imputato e la vittima, assumono un ruolo significativo e interconnesso. L'utilizzo del VIS non è stato fortemente appoggiato dagli attivisti pro-imputato, in quanto essi asseriscono che l'accettazione di tali dichiarazioni provocherebbe ricatti emotivi e un conseguente inasprimento della pena. Al contrario, i vittimologi di tutto il mondo hanno accolto favorevolmente la possibilità di avere il VIS in quanto ciò rappresenta un'affermazione dei diritti della vittima nell'ambito della determinazione della pena.

In altri termini, il *victim impact statement* è una dichiarazione scritta o orale che diventa parte del procedimento penale e che viene resa dalla vittima del crimine prima del ritiro in camera di consiglio. Essa permette alla vittima o ai suoi familiari di elaborare il trauma e di condividere le difficoltà incontrate a causa del crimine commesso. In tal modo, ciò contribuisce a chiarire anche al giudice la condizione attuale della vittima e della sua famiglia, permettendogli di aggiungere elementi utili al fine della determinazione della pena.

Anche se il VIS è stato considerato come un elemento significativo e incluso nell'ambito del procedimento penale in diverse nazioni al mondo, l'India è rimasta alquanto indifferente. Molteplici approcci vittimologici sono stati recentemente inclusi nella procedura penale dell'India, mentre il VIS non è stato preso in considerazione dai legislatori. Questo aspetto è particolarmente significativo anche alla luce delle sentenze emesse dalle quali appare che i Tribunali hanno a più riprese sottolineato che la punizione deve rispondere alle "richieste di giustizia della società".

#### Résumé

La déclaration de la victime (VIS – Victim Impact Statement en anglais) est fondamentale dans le processus de l'administration de la justice. Elle renforce l'approche participative de la justice pénale dans laquelle les deux parties (le prévenu et la victime) sont aussi importantes l'une que l'autre et tissent un lien d'interdépendance dans le mécanisme de fonctionnement de la justice. La VIS a reçu un faible soutien de la part des militants en faveur des prévenus, car ils affirment que l'acceptation de ces déclarations pourraient donner lieu au chantage affectif et au durcissement conséquent dans la détermination du quantum approprié de la peine. Toutefois, ces affirmations ont frappé les victimologues du monde entier qui, au contraire, les ont saluées comme une évolution positive de la capacité du processus de détermination de la peine de répondre aux besoins et aux droits de la victime.

Pour résumer, la déclaration écrite ou verbale de la victime est faite dans le procès et lui donne la possibilité de parler dans le cadre de la détermination de la peine. Cette déclaration donne à la victime et à ses proches la possibilité d'affronter le choc traumatique et de travailler sur les difficultés rencontrées à cause du crime commis. Ainsi le juge peut se rendre compte de la situation actuelle de la victime et de sa famille en lui permettant de prendre sa décision.

Même si la VIS a été considérée comme importante et fait aujourd'hui partie du procès pénal dans plusieurs pays à travers le monde, l'Inde est demeurée indifférente. Plusieurs approches victimologiques ont été récemment incluse dans la procédure pénale de cette nation, mais la VIS semble avoir échappé aux législateurs. Cette situation revêt pour les jugements indiens une importance particulière, car les tribunaux ont souligné à plusieurs reprises que la punition doit répondre « au cri de la société pour la justice ».

#### Abstract

Victim Impact Statement (VIS) is a crucial aspect in the process of dispensation of justice. It reinforces the participatory model of criminal justice system, wherein both the accused and the victim are significant and intertwined in justice delivery mechanism. VIS has received little support from pro-accused activists who assert that the acceptance of such statements

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would make way for emotional blackmail and consequent enhancement of quantum of sentence. The claim has, however, been assailed by victimologists the world over, who have hailed the same as a positive assertion of the rights of the victim in the sentencing process.

Simply speaking, a victim impact statement is a written or verbal statement made as part of the judicial legal process, which allows a victim of crime the opportunity to speak during the sentencing of the accused. It offers an opportunity to the victim or his/her family members to elaborate the trauma and hardships faced as a result of the crime committed. The present status of the victim or family, including the inconveniences faced, also become clear to the judge and allows him to make a decision.

While VIS has been considered as significant and included as part of the criminal justice process in several nations across the world, India has remained rather unmoved and untouched. Several victimological approaches have been included in recent years in the criminal procedure of the land, yet impact statements seem to have eluded the legislators. This is particularly of significance in light of Indian judgments where the courts have reiterated that punishment must respond to the “society’s cry for justice”.

**Key words:** victim; impact statement; justice; criminal procedure; offender.

## 1. Introduction.

Victim Impact Statement (VIS) is a crucial aspect in the process of dispensation of justice. It reinforces the participatory model of criminal justice system, wherein both the accused and the victim are significant and intertwined in justice delivery mechanism. VIS has received little support from pro-accused activists who assert that the acceptance of such statements make way for emotional blackmail and consequent enhancement of quantum of sentence. The claim has, however, been assailed by victimologists the world over, who have hailed the same as a positive assertion of the rights of the victim in the sentencing process.

While VIS is considered as significant and included as part of the criminal justice process in several nations across the world, India has remained rather unmoved and untouched by this development. Several victimological approaches have been included in recent years in the criminal procedure code of the land<sup>1</sup>, yet impact statements seem to have eluded the consideration of the legislators. This is particularly of significance in light of Indian judgments where the courts have reiterated that punishment must respond to the ‘society’s cry for justice’. Victims’ families have also come before the

media speaking of the crimes and their impact on their lives.

## 2. Victims in the criminal justice system.

The purpose of criminal justice is to protect the rights of individuals and the State against intentional invasion of the criminals who violate the basic norms of society. In the modern welfare state, this protection is sought to be achieved by punishing the accused in accordance with the provisions of law. However, criminal law, which reflects the social ambitions and norms of society and punishes perpetrators thereof, hardly takes any notice of the ‘by products’ of crime, its victims<sup>2</sup>. As lamented by Krishna Iyer J<sup>3</sup>:- “It is a weakness of our jurisprudence that victims of crime and the distress of the dependents of the victim do not attract the attention of law. In fact, the victim reparation is still the vanishing point of our criminal law. This is the deficiency in the system, which must be rectified by the legislature”.

Simply speaking, the victim is a forgotten party to the criminal justice system. The historical evolution of the penal system, from private vengeance to state

<sup>1</sup> Act 25 of 2005 and Act 5 of 2009.

<sup>2</sup> Gaur K.D., “Justice to Victims of Crime: A Human Rights Approach”, in Vibhute K.I. (ed.), *Criminal Justice*, Lucknow, Eastern Book Company, 2004, p.350.

<sup>3</sup> *Rattan Singh v. State of Punjab* (1979) 4SCC 719.

administered justice has resulted in a criminal justice process in which the victims play only a secondary role<sup>4</sup>. While the entire focus of the law is on the offender, to protect his rights, to punish him and thereby bring about his reformation and rehabilitation with all the resources and goodwill available through courts and other agencies, the victim, more often, is left to fend for himself with little or no assistance coming his way. The violation of his rights, the invasion of his dignity, the actual losses incurred by him do not constitute matters of concern for anyone, but himself<sup>5</sup>. His role is limited to reporting the crime to officials who decide whether to prosecute the case, how to proceed, and what type of punishment to recommend<sup>6</sup>. Strange but true, justice fails to redress the wrong perpetrated by the offender on the victim; on the contrary, it aggravates the injustice by focusing solely on the offender, sidelining the victims' minimum needs and requirements.

### 3. The procedural framework.

What is the present role assigned to victims in the criminal justice system? When a person who has been the victim of a cognizable offence gives information to the police regarding the same, the police is required to reduce the information into writing and read it over to the informant. The informant is required to sign it and get a copy of the FIR<sup>7</sup>. If the police refuses to record the

information, the victim – informant is allowed to send it in writing and by post to the Superintendent of Police concerned<sup>8</sup>. If the police refuse to investigate the case for whatever reason, the police officer is required to notify the informant of that fact<sup>9</sup>. Alternatively, victim is entitled by Section 190 of the Code of Criminal Procedure (Cr. P. C.) 1973 to avoid going to the Police Station for redress and directly approach the Magistrate with his complaint. The investigation process is exclusively a police function and the victim has a role only if the police consider it necessary. They may be called for recording of statement, medical examination or for identification. Other than this, till police report (charge sheet) is filed under Section 173 Cr. P. C. 1973, the victim has no role.

The victim has a say in the grant of bail to an accused. S. 439 (2) Cr.P.C., 1973 recognizes the right of the complainant or any “aggrieved party” to move the high court or the court of sessions for cancellation of a bail granted to the accused. A closure of report by the prosecution cannot be accepted by the court without hearing the informant. Also, compounding of an offence cannot possibly happen without the participation of the complainant<sup>10</sup>. The victim of a crime may move the government to appoint a special prosecutor for a given case<sup>11</sup> though S. 301(2) mandates that such lawyer of the private party “shall act under the directions of the public prosecutor...and may, with the permission of the court, submit written arguments after the evidence is closed in the case”. Further, though there is no legal provision in the code for providing legal aid to victims of crime, S.12(1) of the Legal Services Authorities Act, 1987

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<sup>4</sup> Raineri A.S., “Re-Integrating the Victim into the Sentencing Process: Victim Impact Statements as an Element of Offender Disposition”, *Queensland U. Tech. LJ*, 11, 1995, pag. 79.

<sup>5</sup> Dube D., “Humanizing the Criminal Justice System: The Victim Perspective”, in Rahman A., Hossain J., Alam S. (eds.), *Issues in Human Rights*, New Delhi, Atlantic Pub, 2010, pp. 300-301.

<sup>6</sup> Erez E., *Victim Impact Statements - Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, No. 33, September 1991.

<sup>7</sup>Section 154 (1) and (2) Code of Criminal Procedure 1973.

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<sup>8</sup> Section 154 (3) Code of Criminal Procedure 1973.

<sup>9</sup> Section 157 (2) Code of Criminal Procedure 1973.

<sup>10</sup> Section 320 Code of Criminal Procedure 1973.

<sup>11</sup> S.24(8) Code of Criminal Procedure 1973.

entitles every person “who has to file or defend a case:” to legal services subject to the fulfillment of the “means” test and the “prima facie” criteria<sup>12</sup>.

The victim’s right of participation in the post-trial stage of the proceedings is recognized to the extent that an appeal against an order of acquittal can be preferred, with the prior leave of the high court by both the government<sup>13</sup> and the complainant<sup>14</sup>.

Some other provisions worth mentioning, so far as rape victims are concerned are S. 228A Indian Penal Code, 1860 which prohibits the disclosure of the identity of the victim in any publication concerning the offence, S. 327(2) Cr.P.C.1973 which provides for in-camera proceedings in trials and repeal of S. 155(4) Indian Evidence Act, 1872 which permitted the impeachment of the credibility of a prosecutrix by referring to her “immoral character”.

Section 357, Cr.P.C., empowers a court imposing a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, in its discretion, *inter alia*, to order payment of compensation, out of the fine recovered, to a person for any loss or injury caused to him by the offence. The court is also empowered to award compensation for loss or injury suffered by a person, even in cases where the fine does not form a part of the sentence<sup>15</sup>. In 2009, Section 357A was inserted into the Code of Criminal Procedure, 1973, to give effect to victim compensation scheme. It made way for a statutory scheme for payment of compensation to the victim for any loss or injury caused to him by the offender.

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<sup>12</sup> S.12(1)(h) and S. 13(1) of the Legal Aid Services Act 1987.

<sup>13</sup> S. 378(1) read with s. 378 (3) Code of Criminal Procedure 1973.

<sup>14</sup> S. 378 (4) Code of Criminal Procedure 1973.

<sup>15</sup> S. 357(3) Code of Criminal Procedure 1973. See, *Rohtash@ Pappu v. State of Haryana* (2008) P & H (Cri. Appeal. No.250 Of 1999)

With these bare provisions, the Indian criminal justice system tends to address the concern of victims and their integration into the system as a whole. Unfortunately, however, these aforesaid provisions do little to ameliorate the condition of the victims. Neither are their losses compensated adequately nor are their voices heard; even the pain, ignominy and agony undergone as a result of the offence remain unaddressed. The system accords a hostile treatment towards the victims. It misses out the fact that victims of crimes suffer in terms of health, money or other emotional loss and justice demands that the same is meted out by the State, not by aggravating the punishment of the offenders, but by giving them a fair and reasonable opportunity to participate in the process of justice. Studies of victims’ attitudes towards the criminal justice process indicate that they are frustrated with and alienated from the system. Victims’ grievances pertain more to the procedures of the criminal justice system, particularly their lack of involvement and standing in the decision-making process, than to the supposed injustice of the outcome.<sup>16</sup>

It is in this context that victim impact statements become significant amidst the growing concerns of victimologists to bring the victims back into the process. It assures a right to be heard, the right to voice one’s anger, frustration and experience arising out of the crime and maybe, to even express their opinion regarding the offenders’ disposition.

#### **4. Victim impact statements.**

Victim Impact Statements have been heralded as a means of promoting involvement in criminal court decision-making and of increasing satisfaction with the justice process. “A VIS is a statement made by

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<sup>16</sup> Erez E., “Victim Participation in Sentencing: Rhetoric and Reality”, *Journal of Criminal Justice*, vol. 18, 1990, pag. 20.

the victim and addressed to the judge for consideration in sentencing. It usually includes a description of the harm in terms of financial, social, psychological and physical consequences of the crime. In some jurisdictions, a VIS also includes a statement concerning the victim's feelings about the crime, the offender and a proposed sentence, referred to as a victim statement of opinion<sup>17</sup>. In gist, VIS involves the taking of the physical, financial and psychological impact of the crime on individual victims by the court at the stage of sentencing.

In fact, the stage of sentencing is a distinct phase which involves deciding the quantum of punishment which the offender should undergo for the crime committed. It is the judge, or in some countries, the jurors, who decide the matter based on law as well as the accused's plea for leniency based on circumstances beyond the strict domain of law. It may be mentioned that the prosecutor is given an opportunity to demand for enhanced penalties based on the seriousness of the crime, its impact on the society and the victims, in particular. In no situation, however, the victim is afforded an opportunity to personally narrate his experiences. "Sentencing brings a great deal of satisfaction if it meets the expectations of the one wronged. The sentence hearing stage mandates a valuable right for the accused. ...A similar voice, as of right, has not been strangely accorded to the victim"<sup>18</sup>. VIS attempts to remove this embargo by giving an opportunity to the victim to share his experiences in open court. In some situations, it may also be by means of writing, read out by the prosecutor, or

<sup>17</sup> Erez E., *Victim Impact Statements - Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, No. 33, September 1991.

<sup>18</sup> Bajpai G.S., Gupta S., *Victim Justice-A Paradigm Shift in Criminal Justice System in India*, New Delhi, Thomson Reuters, 2016, pp. 63-64.

video recording, played in court, that the voices of the victims are heard loud and clear. They provide victims with the opportunity to participate in trials, have their voices heard, experience a sense of control and influence and be actively involved in the legal process<sup>19</sup>.

## 5. The debate on VIS.

Much of the attention on VIS has centered on two broad themes; the purpose and appropriateness of VIS and the effect of participation on the criminal justice system and crime victims<sup>20</sup>. Some scholars have argued that victim involvement in the criminal justice process fuels the system's desire for 'retribution', using victims suffering as a tool to rationalize punitive measures. Yet others contend that the inclusion of victims voices in the justice process is an important part of 'justice done' for crime victims<sup>21</sup>.

Cassell outlines four justifications for allowing victims and their representatives to give VIS<sup>22</sup>. First, in sentencing, the judge needs to decide the appropriate sentence to be imposed on the offender based on the seriousness of the offence. "[A] judge cannot evaluate the seriousness of a defendant's conduct without knowing how the crime has burdened the victims"<sup>23</sup>. It is for this reason that VIS provide valuable information to the judge in respect of the physical injuries sustained, the mental agony undergone or the financial losses actually

<sup>19</sup> Peace K.A., Forrester D.L., "Gender, emotionality and victim impact statements", *Journal of Criminal Psychology*, vol. 2, n. 2, 2012, p.108.

<sup>20</sup> Englebrecht C.M., "Where Do I Stand: An Exploration of the Rules that Regulate Victim Participation in the Criminal Justice System", *Victims and Offenders*, 7, 2, 2012, p.162.

<sup>21</sup> *Ibid.*

<sup>22</sup> Cassell P.G., "In defense of Victim Impact Statements", *Ohio State Journal of Criminal Law*, Vol. 6, 2008, p. 620.

<sup>23</sup> "President's Task Force on Victims of Crime", Final Report, 1982. Available at <https://www.ovc.gov/publications/presdntstskforcrprt/87299.pdf>

incurred by the victim as a result of the crime in question. A related secondary point is that a VIS can contain important information about restitution or compensation.

Secondly, VIS formally recognizes a victim's suffering and trauma resulting from the act of another. It acts as a succor to relieve the victim of the pain undergone and the violations suffered. Somewhere it also tends to signify an 'inclusive approach' on the part of the criminal justice system towards the victim. As stated by Professor Mary Giannini<sup>24</sup>, "the victim gains access to a forum that directly and individually acknowledges her victimhood. The moment of sentencing is among the most public, formalized and ritualistic parts of a criminal case. By giving victims a clear and uninterrupted voice at this moment on par with that of defendants and prosecutors, a right of allocate signals both society's recognition of victims' sufferings and their importance to the criminal process".

Thirdly, it has the effect of explaining the harm to the defendant. "[V]ictim impact evidence lays out before the *offender* the precise nature of [his] act, ideally in such a way as to permit and encourage [him] to identify with the victim's suffering as person. In this way, victim impact evidence can help legitimize the process of [his] punishment in the eyes of the offender and perhaps even contribute to [his] recognition of [himself] as one person among others entitled to mutual respect and, in this sense, to [his] 'rehabilitation'<sup>25</sup>. VIS assists in the process of recognising the devastating effect of the crime on the victim and his near ones. It thereby enables the

accused to realise the nature and extent of the pains or losses which the victim has endured due to him. His sense of remorse is kindled assisting in the process of his reformation.

Lastly, Cassell explains that it is no longer appropriate to evaluate criminal justice process solely in terms of the venerable 'due process' or 'crime control' models. Instead, a third dimension, victim participation model, must be recognised to provide 'fairness'; to victims, including an opportunity to participate in criminal proceedings, including sentencing proceedings<sup>26</sup>. Just as a defendant is allowed to speak at sentencing because this opportunity is critical to the legitimacy of the proceedings, by the same token allowing victims the same opportunity assures perceived fairness.

Roberts and Erez have put forward two possible ways of understanding the role of VIS: as instrumental or expressive.<sup>27</sup> The expressive function of VIS suggest that the aim is to communicate a message, whether to the court, the public, or the offender, about the harm that was caused. It has been linked to therapeutic benefits, as making such a statement can help crime victims recover from the harm. The statement can also have an instrumental function in determining the appropriate sentence. According to this model, the statement is evidence at sentencing and its main goal is to inform the court on the harm caused by the offence and ultimately, on its gravity<sup>28</sup>.

Other arguments for the participatory approach towards victims revolve around the moral,

<sup>24</sup> Giannini M.M., "Equal Rights for Equal Rites? Victim Allocation, Defendant Allocation and the Crime Victims' Rights Act", *Yale Law & Policy Review*, 26, 2008.

<sup>25</sup> Dubber M.D., *Victims in the War on Crime: The Use and Abuse Of Victims' Rights*, NYU Press, 2002, pag. 336.

<sup>26</sup> *Supra* n. 22, p. 624.

<sup>27</sup> Manikis M., "Victim Impact Statements at Sentencing: Towards a clearer understanding of their aims", *The University of Toronto Law Journal*, 65, n. 2, 2015, p.90.

<sup>28</sup> *id.*, p. 92.

penological and practical concerns<sup>29</sup>. It has been suggested that since the aim of sentencing is public condemnation of the criminal act, the sentence may be more effective if it is conveyed by the victim, who has personal involvement in the case and has suffered directly from it. Victim participation also renders the process more democratic and thus makes the sentence imposed more reflective of the community's response to crime. Some argue that the victim is the most appropriate person to represent the community in its attempt to convey the social abhorrence of the crime<sup>30</sup>. In this respect the victim is the embodiment of the public desire to have input into the sentence. Sheley<sup>31</sup> maintains that victim narrative effectively conveys the social experience of harm, without which the criminal justice system loses its legitimacy as a penal authority. The victim, defendant and state are not separate entities vying for narrative accounts of harm in determining punishment. Rather, the stories of the victim and defendants already circulate through society outside of the courtroom, and the function of the state is to vindicate the interests of the society.

Reasons afforded in the reintegration of victims are practical and include improvement of the criminal justice process, increase in victim's cooperation and better prospects for psychological healing. The victims' dissatisfaction and alienation from the system makes them reluctant to cooperate, resulting in non-reporting of crimes. Allowing victim participation tends to increase consumer satisfaction, encourage involvement and

cooperation and thereby enhance system efficiency<sup>32</sup>. Talbert<sup>33</sup> has contended that victim participation in fact advances the various goals of sentencing. Retribution is enhanced when the extent of the harm caused to the victim is disclosed so that the punishment meted out can be measured against the level of harm caused. Victim participation enhances deterrence because it increases the prosecutorial efficiency, which in turn increases the certainty of sanction. Incapacitation is advanced if the victim has a special knowledge about the defendant's potential for future criminal activity. Lastly, victim participation might promote rehabilitation as the offender confronts the reality of the harm he or she caused to the victim.

The objections to victim participation in the sentencing process are mostly centered on legal grounds<sup>34</sup>. It stems from the conception of crime as a public matter and of the state as representing the victim. It tends to undervalue the role of the state, of judges and prosecutors, in the process of dispensation of justice. Another ground which has been held against victim impact statements center around the fact that allowing victims to participate in sentencing may undermine the insulation of courts from unacceptable public pressures<sup>35</sup>. A regressive, retributive and vengeful punishment would be the resultant effect where society, through the victim, would emphasize on stiffer sentences. Some commentators have raised objections about the possibility of an increase in sentence disparity and arbitrariness, if victims are included in the

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<sup>29</sup> Erez E., "Victim Participation in Sentencing: And the Debate goes on...", *International Review of Victimology*, vol. 3, 1994, p.18.

<sup>30</sup> *Supra* n. 4, p. 85.

<sup>31</sup> Sheley E-L., "Reverberations of the Victim's "Voices": Victim Impact Statements and the Culture Project of punishment, *Indian Law Journal* , 87, 2012, p. 1249.

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<sup>32</sup> *Supra* n.16, pp. 22-23.

<sup>33</sup> Talbert P.A., "The relevance of victim impact statements to the criminal sentencing decision", *U.C.L.A. Law Review*, 36, 1988, pp. 199-232.

<sup>34</sup> Sebba L., "The victim's role in the penal process: a theoretical orientation." *The American Journal of Comparative Law*, 1982, pp. 217-240.

<sup>35</sup> *Supra* n. 4, p. 88.



sentencing process<sup>36</sup>. Studied in the context of capital sentences, Susan Bandes<sup>37</sup> notes that, VIS ought to be suppressed. They are stories which should not be told, at least not in the context of capital sentencing, because they block the jury's ability to hear the defendant's story. Moreover, they evoke emotions that do not belong in that context. She further adds that, VIS evoke not merely sympathy, pity and compassion for the victim, but also a complex set of emotions directed towards the defendant including hatred, fear, racial animus, vindictiveness, undifferentiated vengeance and the desire to purge collective anger<sup>38</sup>.

Participation in the process makes a victim to relive the trauma of the crime. It leads to secondary victimization of the victim who is made to narrate the pain and sufferings undergone as a result of the violence perpetrated by the other. Thereby, a detrimental effect is a possibility with the exposure of the victims to the criminal justice process.

## 6. Impact of VIS.

There are definite links established between victim participation and satisfaction<sup>39</sup>. Davies, Russell and Kunreuther<sup>40</sup> found that victims who were consulted about their wishes by the judge or prosecutors were more satisfied with case outcomes than those not consulted<sup>41</sup>. Another study indicated

that victim satisfaction increased when they believed they had influenced the criminal justice process. It has also been demonstrated that victims' evaluation of sentencing decisions was more positive when they attended the sentencing<sup>42</sup>.

VIS has been known to have therapeutic effects on victims<sup>43</sup>. Giving crime victims the chance to deliver impact statements is an attempt to make the legal process an agent of therapeutic change. As explained by one victim, "The Victim Impact Statement allowed me to construct what had happened in my mind. I could read my thoughts...It helped me to know that I could deal with this terrible thing."<sup>44</sup> "The cumulative knowledge acquired from research in various jurisdictions in countries with different legal systems, suggests that victims often benefit from participation and input. With proper safeguards, the overall experience of providing input can be positive and empowering."<sup>45</sup> Lens, in his longitudinal study, to empirically examine the psychological effects of delivering VIS in terms of two important emotional reactions of crime, anger and anxiety, concluded that although delivering a VIS does not give rise to direct therapeutic effects, feelings of anxiety decrease for victims who experience higher feelings of procedural justice. Moreover, increasing feelings of control over the

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<sup>36</sup> *Supra* n. 16, p. 24.

<sup>37</sup> Bandes S., "Empathy, Narrative and Victim Impact Statements", *The University of Chicago Law Review*, vol 63(2), 1996, pp. 392-393.

<sup>38</sup> *id.*, p. 395; see Logan W.A., "Through the Glass Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Criminal Trials", *Arizona Law Review*, 41, 1999.

<sup>39</sup> Davis R., Barbara E. Smith B.E., "Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise", *Journal of Criminal Justice*, vol. 22(1), 1994, pp. 1-2.

<sup>40</sup> Davis, Russell and Kumreuther, *The role of the complaining witness in an urban criminal court*, New York, Vera Institute of Justice, 1980.

<sup>41</sup> Smith B.E., *Non-stranger violence: The criminal court's response*, Alexandria, VA, Institute for Social Analysis, 1983.

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<sup>42</sup> Hagan J., "Victims before the law: A Study of victim involvement in the criminal justice process", *Journal of Criminal Law*, 73, 1982, p. 317; Kelly D.P., "Victim participation in the Criminal Justice system", in Lurigio A., Skogan W., Davis R. (eds.), *Victims of Crime: Problems, Policies and Programs*, Newbury Park, CA, Sage Publications, 1990.

<sup>43</sup> Erez E., Kilchling M., Wemmers J-A. (eds.), *Therapeutic Jurisprudence and Victim Participation in Justice-International Perspectives*, Durham, Carolina Academic Press, 2011, pp. ix-x.

<sup>44</sup> Cassell P.G., "In defense of Victim Impact Statements", *Ohio State Journal of Criminal Law*, Vol. 6, 2008, p. 621.

<sup>45</sup> *id.*, p. 622.

recovery process could lead to a decrease in the feelings of anger and anxiety as well<sup>46</sup>.

Thus, VIS has been somewhere correlated with the psychological healing process. Though not same for all victims, it does have a positive impact on the victims. Accordingly, the worldwide there has been efforts to integrate the victim in the justice process including his participation in the sentencing stage.

## **7. International development and experience of nations.**

The 7th United Nations Congress on Prevention of Crime and Treatment of Offenders, held at Milan, Italy, 1985 went deep into the question of victims' rights and came out with a Comprehensive Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which was later adopted by the U. N. General Assembly in its resolution 40/34<sup>47</sup>.

The Declaration acknowledged basic needs of victim to enable them to seek redress. The four crucial aspects underlined towards a victim-oriented approach were, access to justice and fair treatment, restitution, compensation and victim assistance. The concept of 'fair' treatment demands affording victims a fair and reasonable opportunity to express their feelings or views with regard to the crime and its impact. In fact, the Declaration provides for "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..."<sup>48</sup>.

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<sup>46</sup> Lens K.M.E., Pemberton A., Brans K. (et. al), "Delivering a Victim Impact Statement: Emotionally effective or counter-productive?", *European Journal of Criminology*, vol 12(1), 2015, p.30.

<sup>47</sup> UN General Assembly, *Declaration of basic principles of justice for victims of crime and abuse of power*, 40 UNGA Resolution 34, 1985. Available at <http://www.un.org/documents/ga/res/40/a40r034.htm>

<sup>48</sup> *ibid.*

Thus, the Declaration in its enumeration of the rights of victims made way for the inclusion in national legislation of appropriate measures to give voice to the victims of crimes.

Somewhere in line thereof, as well as developments at municipal levels, different states have proceeded to introduce VIS in their national legislations.

The American criminal justice system, historically, excluded victims from any meaningful participation in the prosecution and sentencing of criminals. The system treated victims as nothing more than useful tools for the reporting of criminal offences<sup>49</sup>. The movement towards recognition of victims' rights began in early 1970s. In 1982, the federal government established the presidential task force on victims of crime. The task force concluded that the criminal justice system had "lost the balance that has been the cornerstone of its wisdom". It recommended that "[v]ictims, no less than defendants, are entitled to have their views considered "at sentencing"<sup>50</sup>. By 1984 the number of states having impact statement laws was twenty-two and by August, 1987, forty-eight states had provisions authorizing some form of victim participation in conjunction with sentence imposition<sup>51</sup>.

In 2004, Congress overwhelmingly passed the Crime Victims' Rights Act. The Act established a "broad and encompassing statutory bill of rights" meant to "make crime victims full participants in the criminal justice system"<sup>52</sup>. The federal legislation is noteworthy since it included (among other things)

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<sup>49</sup> Riley M.B., "Victim Participation in the Criminal Justice System: In re Kenna and Victim Access to Presentence Reports", *Utah Law Review*, 2007, p. 236.

<sup>50</sup> *Supra* n. 22, p. 613.

<sup>51</sup> *Supra* n. 39, pp. 2-3.

<sup>52</sup> *Supra* n. 49, p. 236.

a guaranteed right for all victims in federal cases to be “reasonably heard” at any sentencing<sup>53</sup>.

In the USA, two models express the current possibilities for victims' involvement in the sentencing process. The first model requires or allows the preparation of a written VIS that is introduced at the sentencing hearing, typically as an attachment to the pre-sentence report. The second model expands on the first by granting the victim the right to allocution—an oral statement by the victim at the time of sentencing. The party responsible for preparing the victim impact information varies, ranging from probation departments, to prosecutors' offices, to victim service agencies. The VIS also differs in content and form, ranging from simple checklists in some states, to lengthy descriptive statements, both oral and written, in others. As plea bargains are the most common way to dispose of cases, many states have passed laws that allow or mandate victim participation and input in plea bargaining<sup>54</sup>.

In the Netherlands, the right to deliver an oral VIS was afforded to victims of severe violent crimes in 2005. The implementation of this right is accompanied by the possibility of submitting a written VIS, which is added to the file of the criminal case. However, in Netherlands, the contents of the VIS is limited in the sense that victims can only speak about the consequences of the crime, and are not allowed to speak about the facts or desired punishment<sup>55</sup>.

In United Kingdom, there exists the entitlement of victims to victim personal statements (VPS). These are statements recorded by the Police or any other authority assigned by them. The purpose of a VPS

has been stated to give victims a more structured opportunity to state how the crime has affected them, allow victims to express their concerns in relation to bail or fear of intimidation or whether they feel that the crime was motivated on considerations of gender, faith, sexuality, race or disability etc., their wish to claim compensation or necessary assistance. VPS provides ready information to the criminal justice agencies of the impact of the crime and ensures a practical manner in dispensation of justice by the sentencing court. The VPS can be made any time prior to sentencing of the offender and is considered by the court as far as it considers appropriate when determining the sentence. Provisions relating to the making of VPS and its uses in criminal proceedings are included in the Code of Practice for Victims of Crime<sup>56</sup>.

In Australia, the issue of victims' inputs into sentencing has met with much resistance with the Australian Law reform Committee (1988), the Victorian Sentencing Committee (1988), the New South Wales Task Force on Services for Victims of Crime (1987) questioning the relevance of VIS in sentencing decisions. In contrast, the Australian National Committee on Violence (1990) recommended its introduction in all jurisdictions. South Australia has, however, integrated victim into the criminal justice process through written input into the proceedings. In 1985, the government of South Australia formulated the principles on victims' rights, one of which lays down that the victim shall be “entitled to have the full effects of the crime ...known to the sentencing court...”<sup>57</sup>. Subsequently, the Criminal Law (Sentencing) Act was passed in 1988 allowing for written statements

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<sup>53</sup> 18 U.S.C.A. § 3771(a)(4) (2004).

<sup>54</sup> *Supra* n.4, pp. 84-85.

<sup>55</sup> *Supra* n. 6, p. 18.

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<sup>56</sup> “Victim personal statements”, Available at [http://www.cps.gov.uk/legal/v\\_to\\_z/victim\\_personal\\_statements/](http://www.cps.gov.uk/legal/v_to_z/victim_personal_statements/)

<sup>57</sup> *Supra* n. 4, p. 84.

to be filed in court but not the right of allocution or victim statement of opinion concerning the offender or a proposed sentence<sup>58</sup>. The Sentencing Act, 1991 of Victoria requires the impact of the crime on victim to be taken into account during sentencing. Such statements maybe partly or wholly read or presented to the court at sentencing and may include photographs, drawings, poems, and other material relating to the impact of the offence on the victim.

The participation of victims in criminal justice process is, by now, well acknowledged and appreciated the world over. Critics tend to undermine the impact of VIS on victims; rather highlight the pernicious effects of the same on the judge, the jurors, the counsels and finally, the defendant. Quite contrary to popular belief, however, studies in various jurisdictions confirm that 'victims do not seem to use the statements as retributive tools and there is no evidence to suggest that the statements are vengeful in nature'<sup>59</sup>. In a study conducted by Kristine A. Peace and Deanna L. Forrester on how emotional content in VIS influences sentencing outcomes, it was found that highly emotional statements were not associated with greater sentencing severity<sup>60</sup>. Another study that used experimental design to study the effect of VIS on sentence severity suggests that the use of VIS did not result in harsher sentences to offenders<sup>61</sup> or in an increased likelihood of incarceration compared to probation<sup>62</sup>. Thus, VIS

do not have any impact on the severity of sentence, but they do have an influence on the conditions attached to prison sentence, including length of probation, parole, no- contact orders, compensation or even counselling for the victim<sup>63</sup>. In a way, VIS is not taken as a retributive tool but rather as an expression of the fears and trauma faced by the victim or the losses sustained. For some, it may also be an emotional closure to the wound.

## 8. Scope for VIS in India.

In India, Section 235(2) and 248(2) Cr.P.C., 1973 mandate that if the accused is found guilty and the court does not proceed in accordance with Section 360 Cr.P.C. 1973, the court shall hear the accused on the question of sentence and then pass sentence on him according to law. The word "hear" has been used to give an opportunity to the prosecution and the accused to place before the court facts and material relating to various factors bearing on the question of sentence<sup>64</sup>. The latter is an amalgam of various factors relating to the crime and criminal, viz. the extent and nature of harm perpetrated, the circumstances relating to the offence, the profile including age, socio-economic condition, prior criminal record etc. of the accused which are taken into account by the court in deciding upon the appropriate sentence. This is not a mechanical process but a fundamental rule of fair play which involves a genuine effort on the judge to elicit all information having a bearing on the question of sentence. "[Hearing has to be given to the accused on the question of sentence, but the question is what is the object and purpose of hearing and what

<sup>58</sup> *Supra* n. 6; Also see: Erez E., Roeger L., O'Connell M., "Victim Impact Statements in South Australia", Available at: [http://aic.gov.au/media\\_library/publications/proceedings/27/erez.pdf](http://aic.gov.au/media_library/publications/proceedings/27/erez.pdf)

<sup>59</sup> *Supra* n. 29, p. 21.

<sup>60</sup> *Supra* n. 19, p. 116.

<sup>61</sup> Pitt D., "No Payne, No Gain: Revisiting Victim Impact Statements after twenty years in effect", *Chapman Law Review*, 16, 2012, p. 492.

<sup>62</sup> *Supra* n. 24, pp. 431-484.

<sup>63</sup> "Victim impact statements", National Center for Victims of Crime. Available at: <http://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/victim-impact-statements>

<sup>64</sup> Chandrasekharan Pillai K.N., *R.V. Kelkar's Criminal Procedure*, Delhi, Eastern Book Co., 2014, p. 616.

matters to be elicited from the accused are. Of course, full opportunity has to be given to produce adequate materials before the court and, if found necessary, court may also give an opportunity to lead evidence. Evidence on what, the evidence which has some relevance on the question of sentence and not on conviction. But the further question to be examined is whether, in the absence of adding any materials by the accused, has the court any duty to elicit any information from whatever sources before awarding sentence...<sup>65</sup>. “Unfortunately, the meaningful collection and presentation of the penological facts bearing on the background of the individual, the dimension of damage, the social milieu and what not- these are not provided in the Code and we have to make intelligent hunches on the basis of materials adduced to prove guilt”<sup>66</sup>. Thus, the court in India has to determine the appropriate sentence, based on ‘a delicate balance’<sup>67</sup> of the factors it deems material. In its endeavour, the law makes provision for ‘hearing the accused’ and the attending circumstances leading to the crime in question. Where does that leave the victim? “The court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment”<sup>68</sup>. The Supreme Court, the highest court of the land, has clearly clarified that “The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual

victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should ‘respond to the society’s cry for justice’ against the criminal”.<sup>69</sup>The process of justice must respond to the society’s call and an apt punishment befitting the crime must be awarded to the accused<sup>70</sup>. This requires, not only an assessment of the harm perpetrated by the crime, the presentation of personal and social data of the accused but also an appreciation of the impact of the ‘harm’ on the life and living of the victim. In *Alister Anthony Pereira v. State of Maharashtra*<sup>71</sup>, where a car driven by the accused who was drunk, killed seven persons and caused injuries to eight others, the High Court convicted the accused under Sections 304A(causing death by negligence) and 338(causing grievous hurt by act endangering life or personal safety) Indian Penal Code, 1860 and sentenced him to three years imprisonment. In appeal before the Supreme Court, while delving on the issue of sentencing, the court considered the fact that the mother (of one of the victims) had no grievance against the accused but prayed for compensation. Accordingly, the court ratified the amount of Rs. 8.5 lakhs paid as compensation but stated that the ‘despicable’ act warrants punishment proportionate to the crime and upheld the punishment awarded by the court below. In yet another case of death due to road accident, the

<sup>65</sup> *Ajay Pandit v. State of Maharashtra* AIR 2012 SC 3422; *Muniappan v. State of Tamil Nadu* AIR 1981 SC 1220; *Dagdu v. State of Maharashtra* (1977) 3 SCC 68.

<sup>66</sup> *Malkiat Singh v. State of Punjab* (1991) 4 SCC 341; *Pyarali K. Tejani v. Mahadeo Ramchandra Dange* (1974) 1 SCC 167.

<sup>67</sup> *Bikram Dorjee v. State of West Bengal* AIR 2009 SC2539.

<sup>68</sup> *Ravji alias Ramchandra v. State of Rajasthan* (1996) 2 SCC 175.

<sup>69</sup> *State of U.P. v. Shri Kishan* AIR 2005 SC 1250; *State of M.P. v. Saleem* (2005) 5SCC 554; *Ankush Maruti Shinde v. State of Maharashtra* AIR 2009 SC 2609; *Bikram Dorjee v. State of West Bengal* AIR 2009 SC2539.

<sup>70</sup> *Dhananjay Chatterjee v. State of West Bengal* [1994] 1 SCR 37.

<sup>71</sup> AIR 2012 SC 3802

Delhi High Court<sup>72</sup> emphasized that the criminal justice system would look hollow if justice is not done to the victim of crime. Such justice must take into consideration the effect of the offence on the victim's family. It accordingly directed the police to prepare Victim Impact Report (VIR) in respect of such cases.

"I found myself naked. I saw dead bodies of my family members lying around. I got frightened. I looked around for some cloth to cover myself..."<sup>73</sup>. That's the statement of Bilkis Bano, the rape survivor, in the Gujrat riots describing her trauma and how she tried to save herself. "I just want to say, such people are a threat to society. Government must award him capital punishment and give us justice. We want justice and women's security"<sup>74</sup>. These were the words of agony and anguish expressed by the mother of Nirbhaya, a young girl who was brutally raped and assaulted by four accused leading to her death. However, such statements were made to the media, not to any Court, since the justice system does not as yet allow such statements from victims or their kins. It might, however, have been better to formally recognise their pain and suffering. Allowing them to express themselves before the judicial authority might have provided the much needed solace and reassurance to them.

In this context it may be pertinent to refer to the Justice Malimath Committee Report which recognised that 'victims do not get at present the

legal rights and protection they deserve to play their role in criminal proceedings which tend to result in disinterestedness in the proceedings and consequent distortions in criminal justice administration<sup>75</sup>. The existing law only envisages the prosecutor appointed by the State to be the proper authority to plead on behalf of the victim. However, that may be a false assumption. The Committee, therefore recommended that the system should focus on justice to victims and ensure the participation of the victim in criminal trial including production of evidence, asking questions to witnesses, hearings in case of bail as well as withdrawal from prosecution etc. The recommendations, however, fell short of recognising the right of victims to make impact statements in courts. In 2007, the Draft National Policy on Criminal Justice also emphasized on a victim orientation to criminal justice, thus restoring the balance in criminal procedure between the offender, victim and the society<sup>76</sup>. Explaining the notion of 'victim-centric' criminal justice system, Prof. N.R. Madhava Menon, a noted jurist, has commented that "It means restoring the confidence of victims in the system and achieving the goal of justice in whichever sense the idea is conceived. Towards that end, the system must confer certain rights on victims to enable them to participate in the proceedings...Victims may also submit a victim impact statement to the courts setting out the effect of the crime on their lives"<sup>77</sup>.

<sup>72</sup> *Satya Prakash v. State* (2013) 3 MWN(Cri) 373.

<sup>73</sup> Tamplin H., "Victim of Gang Rape woke up to bodies of 14 relatives around her". Available at: <http://metro.co.uk/2017/05/05/victim-of-gang-rape-woke-up-to-bodies-of-14-relatives-around-her-6617098/>

<sup>74</sup> "Nirbhaya's mother reacts to interview with daughter's rapist", *The Times of India*, March 4, 2015, Available at: <http://timesofindia.indiatimes.com/city/delhi/Nirbhaya-mother-reacts-to-interview-with-daughters-rape/articleshow/46452353.cms>

<sup>75</sup> V.S. Malimath, Report of the Committee on Reforms of the Criminal Justice System, Ministry of Home Affairs, Government of India, 2003.

<sup>76</sup> N.R. Madhava Menon, Report of the Committee on Draft National Policy on Criminal Justice, Ministry of Home Affairs, Government of India, 2007.

<sup>77</sup> N.R. Madhava Menon, "Towards Restorative Criminal Justice", *The Hindu*, September 9, 2016, <http://www.thehindu.com/opinion/lead/towards-restorative-criminal-justice/article8433634.ece>

## 9. Conclusion.

Giving the victims their due has long been overdue. The criminal justice system needs to integrate the victims in the process of justice delivery. “Genuinely participative approaches have the potential to reduce the gap between victims and offenders, encourage a less authoritarian climate and promote a more inclusionary society.”<sup>78</sup> Victim Impact Statement is a major step towards that end and India must make necessary reforms to allow the inclusion of impact statements at the stage of sentencing. The fear of influencing the minds of judges may be negated by the fact that world over there is a rising concern for victims, allowing such statements to be included but rarely affecting the final judgment. Neither does it impinge on the justice system, since ‘fairness’ requires presentation by both the parties and not merely the accused.

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<sup>78</sup> Sandes A., “Victim Participation in Criminal Justice”, *Criminal Justice Matters*, 49, 1, 2002, p. 31.

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