

# Idea of Victim Participation and Ideals of Sentencing

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**Abstract:** *The position of victim was at higher pedestal before the birth of state as a regulator of crime. The role of victim had been sidelined due to the shift in the perception of crime from crime as a 'wrong against an individual victim' to that of crime as a 'wrong against state'. It made criminal trial a fight between adversaries rather than fight for justice to victim. Despite various legislative efforts the fair representation of victim is not fully achieved and the sense of detachment from criminal trial still exists for a victim. Criminal trial overemphasizes the role of accused persons and their rights at the cost of voice of victim for securing justice. In this context, it becomes necessary to analyze the phenomenon of victim participation and its relation with the process and values of sentencing. The present paper is an attempt to understand the concept of victim participation and its possible models for criminal trial with a particular focus on Victim Impact Statement as an example. It maintains the hypothesis that substantial participation of victim in a criminal trial contributes to higher level of confidence in criminal justice and Victim Impact Statement unravels the pathway for it. The paper seeks to relate such models of victim participation with the aims and values of sentencing with a view to understand that how victim participation can aid in the shaping of sentencing.*

**Keywords:** Victim Participation, Criminal Trial, Sentencing, Punishment, Victim Impact Statement, Restorative Justice, Therapeutic justice

## 1. Introduction

The discourse of victim participation in the criminal justice system is generally linked with consequence of stricter punishment for the accused. Such punishment is perceived as justified when the miseries of victim are focused upon. Due to this possible perception, victims were insinuated from the criminal trial and relegated to the silent space of a witness (Sarkar, 2010). However, such silencing had taken its toll on the existence and quality of justice which is promised to be delivered to the victim. Consequentially, it led to the emergence of victim rights movement in many nations, having the pioneer example of United States of America. Such movement sought to question the treatment afforded to victim in the criminal justice system, extent of victim participation, and the nature of justice claimed to be delivered to victim.

The participation of victim was sledged earlier on the ground that victim cannot be expected to contribute anything substantial to the criminal trial except emotions which have no guidance for the trial. This was purely the legalist way of quantifying the justice which failed to consider the psychological effect of public expression of an individual victim's grief. The expression by a victim of its experience and the impact of crime may build the coping strategy which translates the pain into verbal expression of impact of crime upon victim (Manikis, 2015). Such expression may very well contribute to maintaining the close proximity among nature of crime, its severity and the appropriate length of a sentence. Thus, understanding the meaning of victimhood and realizing the potential role of victim participation in the healthy sentencing for a case, the concept of victim participation must be analyzed first.

### Concept of Victim

Within the framework of the victims' rights movement, the designation of "victim" is a status that is sought after, as it confers specific legal rights and requires qualification. Robert Elias observes that the state recognizes an individual

as a victim only when their harm or loss can be acknowledged without challenging existing societal structures (National Crime Victim Law Institute, 2014). Consequently, victims' rights movements and associated programs tend to focus on individuals who can demonstrate clear and immediate harm resulting from recognized crimes. This approach underscores the emphasis on visible and legally defined harm within the movement's scope (Erez & Tontodonato, 1992).

Thus, a victim is defined as an individual or the family of an individual who has been targeted by a crime that has resulted in a criminal conviction. These individuals have experienced harm through no fault of their own, solely due to the wrongful actions of the offender. To the extent that the victim is innocent and undeserving of the suffering they have endured, the offender warrants condemnation, and both the crime and its repercussions merit significant attention (Ruparelia, 2012).

This framework serves multiple purposes. First, it associates the notion of victimhood with the concept of crime—a notion that is tightly regulated by the prevailing power structures. Second, it diverts attention from state actions or inactions that lead to harm or loss among marginalized groups (Maguire, 1991). Consequently, individuals are not officially recognized as victims of state violence, war, patriarchy, racism, colonialism, inequality, or poverty, as acknowledging these wrongs would implicate the state itself. By limiting the definition of victimhood in this manner, state actors such as the military, police, or other officials within the criminal justice system can evade identification as sources of injury and loss. This focus on individual "deviant" offenders provides a secure means to address victims' rights without confronting significant contributors to criminality (Ruparelia, 2012).

The term "victim" has been legally defined as a person who has suffered harm or injury due to the act or omission for which an accused individual has been charged. This definition also extends to include the guardian or legal

representative of the victim. Furthermore, the Declaration of Basic Principles provides a broader perspective by addressing not only the physical, emotional, and psychological trauma experienced by victims but also the substantial impairment of their fundamental rights following a crime. It differentiates between victims of crime and victims of abuse of power, reflecting the international community's recognition of the unique challenges faced by these two categories (Handbook on Justice for Victims, 1999). Notably, it accords victims of abuse of power—often marginalized—a formal status as "victims," underscoring their distinct vulnerabilities and ensuring their inclusion within justice frameworks (The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985).

To align with the standards set forth in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), often referred to as the "Magna Carta of victimology," and the comprehensive recommendations of the Malimath Committee report, significant advancements have been made in victimology within India. These developments have granted victims a distinct legal identity and introduced victim-centric provisions across the spectrum of Indian criminal laws (Mishra, 2022).

Despite the achievement of a standardized definition of 'Victim' within the Indian legal framework, which contrasts sharply with the European Union's lack of a precise definition and the considerable variation in terminology across its member states, the field of victimology in India still has significant progress to make. The Indian criminal justice system must address and rectify the historical legal non-recognition experienced by victims over the years. This necessitates amendments aimed at ensuring comprehensive reparative measures for victims, thereby enhancing their status and rights within the judicial process (Mishra, 2022).

The conceptualization of victims has undergone significant transformation over the years, with victims now regarded as independent and integral stakeholders in the criminal justice system rather than merely serving as witnesses for the prosecution (Maguire, 1991). Garvin asserts that employing alternative terminology, such as "complainant," to refer to victims diminishes their legal status and undermines the constitutional and statutory rights afforded to them. He further highlights concerns raised by critics who argue that designating an individual as a "victim" may compromise the court's fact-finding role (History and Theory – The Role of the Victim in the Criminal Process: A Literature Review – 1989 to 1999). This critique suggests that labeling someone as a victim presupposes the validity of their allegations and implies the guilt of the accused, potentially infringing upon the rights of defendants.

In *State v. Cortes* (84 Conn. App.70, 851 A.2d 1230, 2004), the court concluded that using the term "victim" could indeed interfere with the jury's impartial fact-finding responsibilities and should therefore be avoided. However, claims that such terminology undermines defendants' rights are viewed as exaggerated and detract from recognizing the critical role victims play in criminal proceedings. This

perspective emphasizes the need for a balanced approach that respects both the rights of defendants and the significance of victims within the justice system (Daigle Victimology, 2020).

### The Idea of Victim Participation

In response to those who contended against actively involving victim in a trial as it may vitiate the process and outcome of sentencing with the assertions of victims, it may be noted that it is necessarily not the case always. The nature and desirability of victim involvement must not be viewed from subjective approach. The standard to assess the nature and extent of victim involvement must be an objective one, i. e. how a reasonable prudent person would have responded to the crime as a victim. Such objective assessment of the crime would undoubtedly contribute to the rational determination of the gravity of the crime (Erez & Tontodonato, 1992). Thus, involvement of victim in a criminal trial has great potential to be an essential component of fair sentencing.

Further, such claim can find its natural support in the theory of just desert which relates the severity of a sentence with the severity of a crime. Consequentially, those who do not support such notion explain the ideal sentencing in terms of possible benefits to the criminal or society and not in terms of severity of crime and thus not the victim.

It is often assumed that the participation of victim would result in greater severity of sanction. Such assumption is based on the general perception that victim would always insist upon greater punitiveness in the sentencing. However, such perception conveniently overlooks the normative role of victim's participation which may rationalize the sentencing by making it principled (Hörnle, 1999).

The victim participation may offer a principled protection to the offender against personal biasness and irrational prejudices in a case. It fulfills the blaming feature of the sentencing by expressing the culpability of the offender. It must be noted again that such blaming encompasses not just the public but also the victim and thus, victim's perspective would matter for such censure (Edwards, 2004). Moreover, such blaming is one of the foundational pillars of sentencing policy. The nature of crime can be better assessed through its impact on the life of victim than simply by its intuitive assessment by a third party. Victim's participation also shapes the aggravating and mitigating factors taken into consideration for the sentencing. For example, the manner of committing the crime, state of mind of victim at the time of crime, dependency of victim's family on victim would exert equal influence on the blaming feature of sentencing as factors, like prior conviction, status of offender, health of offender, do on the realigning feature of sentencing (Hörnle, 1999).

**Victim Participation and the Rise of Restitution:** The idea of restitution expected the victim to be restored to its position prior to commission of crime. As it is the victim whose interest is primarily violated by the criminal, the victim was allowed to prosecute the offender earlier. Victims can engage their own attorneys who will be as fierce as any modern defence attorney in proving their case and getting

what victim lost due to the crime (Edwards, 2004). The higher participation of the victim was natural corollary of the requirement of the restitution. As victim is supposed to be restored to its earlier position, it is logically essential to know and understand the nature of earlier position from the victim itself (Mc Donald, 1976).

Such inextricable link between the restitution and victim participation was allowed to wither away with the carving of the civil wrong out of criminal wrong. The latter witnessed the replacement of victim with that of state which will be represented by the public prosecutor. The victim participation was confined to the civil wrongs which are perceived to be committed against an individual. Such relegation of victim ultimately vanished the victim from the criminal justice system (Davis, Smith and Hillenbrand, 1992).

The criminal justice system was reshaped to focus upon its deterrent and punitive aspects. In order to sharpen such focus effectively, the concept of penitentiaries was developed which absolutely catered to the needs of deterrence and punitiveness. Such development soon replaced the ideal of restitution with the ideal of Incarceration as default manner to impose sanctions. The idea of restitution was confined to the correctional purpose than for serving the purpose of justice (Davis, Smith and Hillenbrand, 1992). Such replacement of the ideals gradually led to dissatisfaction of victim with the court procedure and its outcome as well. Such dissatisfaction was clearly discernible in the rise of victim rights movement in the 1970s which highlighted the neglect faced by the victim and its impact on the justice (Reddi, 2006).

Such movements renewed the discourse on role of victim in the criminal justice system. Various field studies were conducted in order to quell the academic and political unrest for finding out the concerns of victims. Most of the studies, surprisingly, disproved the perceived association between victims and retributive expectations. Such studies contrasted the experience of victims against their expectations of seeking justice Davis, Smith and Hillenbrand, 1992). A study of victims in Brooklyn Criminal Court reported that only a quarter of victims sought punishment of defendants; the remainder was primarily interested in protection for themselves or their families, in restitution, in rehabilitation or in other goals" (Davis and Smith, 1994). Thus, the only thing victims were most afraid of was to be completely discarded from the court procedure and being denied the opportunity to express about effects of crime.

Series of such studies along with victim rights movements resulted in shaking up the docile political leaders and they legislated a bit favorable changes. Such change in the approach was reflective of the rediscovering the role of victim and its impact on the quality of justice delivered to the victim (Bandes, 1996). Such quality is supposed to be measured in terms of level of satisfaction of the victim with the court procedure and its sentencing. Victims expected the chance to contribute to the sentencing by being heard by the judge and informed about the developments of the case. The journey of such sweeping changes started during 1980s (Davis, Smith and Hillenbrand, 1992).

### **Victim, Victim Impact Statement and the Sentencing**

A significant initiative addressing the rights of victims, while remaining consistent with established legal principles, is the implementation of Victim Impact Statements (VIS). VIS provides a structured and organized mechanism to ensure that courts are informed about the effects of crime on victims, including physical, emotional, financial, and psychological impacts (Bandes, 1996). The impact of the crime would be best explained by stepping into the shoes of victim itself. The assessment of the crime would be left incomplete logically if the victim itself is not allowed to describe the impact of such crime. In order to fulfill the inclusive and meaningful justice for victim, it is necessary to empower the victims and protect their interest during the trial. This can be achieved with the help of instrument of Victim Impact Statement ('VIS') which has been adopted and implemented in many of the countries already (Bandes, 1996). India has not started treading on that path yet and currently confined to the limited ways to voice the victims during criminal process.

This approach has been adopted in South Australia as well as in numerous jurisdictions across the United States and Canada. By offering victims an opportunity to articulate their experiences, VIS serves as a straightforward method to integrate victims into the criminal justice process. Its adoption across all Australian jurisdictions should be seriously considered to enhance victim participation and ensure their voices are adequately represented in legal proceedings (Erez, 1991).

The integration of Victim Impact Statements (VIS) into the American legal system can be attributed to the Task Force established by President Reagan. In its report, the Task Force asserted that victims, akin to defendants, are entitled to have their presence acknowledged in legal proceedings. Consequently, it proposed the introduction of Victim Impact Statements, which would encompass information regarding the financial, social, psychological, and medical effects of the crime on the victim (Maguire, 1991).

Paul G. Cassell, in his defense of the multifaceted utility of VIS, posits that these statements provide crucial information about the victim's circumstances. Cassell argues that as the direct recipient of the criminal act, the victim possesses firsthand experience of the crime. Without the opportunity for victims to express their burdens, judges may not fully comprehend the gravity of the defendant's actions. Furthermore, Cassell contends that VIS facilitates 'therapeutic justice' by allowing victims to align with their emotions and reclaim their dignity, rather than feeling powerless and helpless. This perspective underscores the potential psychological benefits of VIS for crime victims, extending beyond its role in informing judicial decision - making (Maguire, 1991).

Countries which have witnessed the victim rights movements and felt the wrath of ignoring the needs of victim did their balancing of rights and paved the way for accommodation of VIS. Presently, India is at such a stage wherein its comparison with such countries will not be unwise. The development of criminal justice system and the phenomenon of crime prevention can be refined if the victim

input is incorporated. In this regard, Malimath Committee has categorically focuses upon the fateful position of victims. Among its various recommendations, the most notable one was the implementation of VIS.

The Malimath Committee report highlighted the dire situation of victims in the criminal justice system and proposed several groundbreaking recommendations. One such recommendation was the appointment of Victim Support Service Co-ordinators to work in conjunction with the police and courts, ensuring proper monitoring, coordination, and delivery of justice (Malimath Committee, 2003).

The report emphasized the need for comprehensive victim relief beyond mere monetary compensation. It cited the landmark case of *Nilabati Behera v. State of Orissa* (1993 SCR (2) 581), where the Supreme Court of India awarded Rs.1, 50, 000 as compensation to the mother of a custodial death victim. The court's decision underscored the importance of expanding remedies beyond those available in civil law, emphasizing the judiciary's proactive role in fulfilling citizens' social aspirations. Furthermore, the report acknowledged the growing significance of Victim Impact Statements (VIS) in the United States, particularly in plea bargains and parole hearings. This recognition highlights the increasing focus on victim-oriented approaches in criminal justice systems globally (Times of India, 2021). The efficacy of VIS is measured in terms of not just monetary support to victim but more than that it enables the victim to secure emotional and psychological relief. Ability to make such statement can enable the victim to overcome the impact of crime and restore the normal life (Reddi, 2006).

The term "impact" in "Victim Impact Statement" extends beyond a narrow understanding limited to the physical, emotional, and psychological harm experienced by the victim. It encompasses economic disadvantages and the damage to reputation and social standing that victims often face in the aftermath of a crime (Roberts, 2009). This broader interpretation ensures that our understanding of impact is inclusive rather than exhaustive. Victim Impact Statements thus provide comprehensive information regarding the full extent of harm suffered by victims as a direct result of the defendant's criminal actions.

Victim Impact Statements are intended to provide the sentencing judge with insights into the harm endured by the victim, presenting an assessment of the physical, financial, and psychological repercussions of the crime. Judges are mandated to take these statements into account when determining the appropriate sentence for an offender (Roberts, 2009). This provision is widely regarded as one of the most notable accomplishments of the victims' rights movement.

#### ***Purpose of Sentencing for victim***

Blaming feature of a punishment is perceived as a weapon to reintegrate the offender by reflecting on the severity of the crime committed which is explained by the level of culpability. Such blaming will pave the way for condemnation of the offender and resultant social shame

which will emotionally motivate the offender to win back the lost societal value (Bickenbach, 1986).

In this attempt to emotionally motivate the offender, sentencing also signifies the formal acknowledgment of the wrong done to the victim by the offender and publically conveys the same. For this purpose, the sentence would reiterate the rights of the victim and the extent to which such rights have been infringed due to the crime by offender. It validates the wrongful and unlawful nature of such infringement of victim's rights and blames the offender by conveying the culpability (Raje, 2022). Such purpose of the sentencing makes it clear that the person who is most fundamentally affected by the crime gets to participate in such blaming and reintegration of offender.

However, such fundamental role of the victim has been overshadowed by splitting the punitive sanction from restorative function of sentencing. Such divide has been instrumental in conveniently insinuating the participation of victim in the criminal trial (Schünemann, 1999). The desirability of the divide between restoration and punitive sanction can be determined on the basis of nature of the function of the punishment. For example, if the punishment is meant to be communicative in nature then it will not be desirable to disregard the voice of victim.

The communicative function of sentencing serves the purpose for both the offender and the victim. Such communication is built upon the wise distribution between collective and individual victim's perspectives of assessing the crime. Presently, such distribution is heavily tilted towards collective assessment as offender is exclusively in focus. Such a distribution distorts the communicative feature of the punishment for the victim. Victim's perspective in the crime assessment reinforces and validates the role of the victim in the function of the sentencing (Manikis, 2015). Therefore, participation of victim is crucial for widening the foundation of sentencing.

When injustices occur, individuals seek justice to restore the moral equilibrium disrupted by the offense. People may adopt various approaches to address such wrongs, all aimed at reestablishing balance. Specifically, individuals often desire that offenders face consequences for their actions and that those affected by the crime experience healing and get restored to their pre-offense state (Hörnle, 1999). Such approach corresponds to two distinct frameworks of justice: retributive justice, that emphasizes punishment proportional to the offense, and restorative justice, which focuses on repairing harm and fostering reconciliation (Gromet, Okimoto, Wenzel and Darley, 2012). Such dichotomy must be further analyzed in order to investigate the possible placement of either framework in the victim rights discourse and feasibility of employing VIS.

#### ***Crime Assessment for Sentencing***

The process of sentencing is conditioned by the nature of crime and that is determined by level of its severity. The severity of a crime, in turn, is determined by grading the crimes as more heinous or less heinous (Hörnle, 1999). Such determination can be based on the assessment of crime either individually by victim or collectively by society.



Choice between an individual and collective assessment can be considered to be dependent upon the category of crime which is committed. For example, if the crime is harming the public interest, such as corruption, espionage, environmental crimes, then collective assessment of severity of the crime by society is relevant. On the other hand, if the crime committed is harming an individual interest, such as robbery of a person, then individual assessment of severity of the crime by the victim is equally relevant (Hörnle, 1999).

The problem arises when the collective assessment overshadows an individual assessment in cases of crimes which harm an individual interest. Criminal trial is vitiated by the presence of such eclipse of individual assessment. This segment of the paper aims to unfold this problem along with the support for victim participation which can ameliorate such problem.

Such distinction between an individual and collective assessment of crime is relevant because it will impact the nature of assessment of the severity of crime. A crime may not be graded as severe by the individual assessment but it may be considered as severe due to the cumulative effects of the crime on society as a whole. For example, loud music due to public parties may not be assessed as more severe by an individual assessment but its cumulative effects on the residents of the area would make it severe under collective assessment (Erez & Rogers, 1999). Therefore, for assessment of such kind of crime a judge must apply collective assessment of the severity of crime. Similarly, when a case is related to stealing of objects from the house of an individual, a judge must apply the individual assessment of the severity of that theft as the personal value of that object and impact of crime may grade the theft as more severe than collective assessment would do (Erez & Tontodonato, 1992).

Additionally, the difference between an individual and collective assessment may be more visible in cases of differential value of the offender to the society and the victim. Thus, if the offender had contributed significantly to the social growth, collective assessment of the society might approve lesser severity in the punishment than an individual assessment of the victim who does not bother about such contribution but only concerns with the impact of crime (Maguire, 1991).

One may also find that sometimes the crimes are graded irrespective of such difference in the crime assessment. For example, certain crimes such as murder, rape, robbery are graded as crimes with highest heinousness and punished more severely than homicide, assault, theft. As physical integrity is universally valued, crime of robbery is considered graver than the theft even if the monetary loss is found to be same in both.

Such universal and rational grading may find its just and legal foundation if it can be located in specific assessment and therefore, the participation of victim in crime assessment may play equally important role as collective assessment of the crime by society does. The relative degree of the stage of the living standard will condition the assessment of the crime and resultantly its severity. The

nature of harm will be gravest in the first degree, serious harm in second degree, upper - intermediate in third degree and lower - intermediate or minor harm in the fourth degree. Victim's assessment of the crime would enable the rational analysis of the degree to which standard living has been impacted (Davis, Smith & Hillenbrand, 1992).

Furthermore, the punitive aspect of punishment is often justified through various theoretical frameworks, such as deterrence, retribution, or rehabilitation. However, when crimes are viewed through a collective lens, these theories may become diluted or misapplied. The focus shifts from understanding the individual offender and their specific context to a broader societal response, which can undermine the effectiveness of punishment as a tool for achieving justice and promoting social order (Maguire, 1991).

Moreover, the challenge of defining community becomes even more complex when considering the perspectives of various stakeholders. This concern does not arise when examining the perspective of the victim, as their experiences and needs often take precedence in discussions surrounding justice and support. Victims typically represent a clear and compelling narrative that can unify community members around a common cause—namely, the need for healing, justice, and support (Edwards, 2024). However, when the focus shifts to broader community dynamics, the nuances of individual experiences and the diversity of viewpoints can lead to contention and disagreement.

In summary, the criticisms of analyzing crimes in a collective way using the societal perspectives highlight both practical challenges and theoretical shortcomings. The difficulty in quantifying the impact of crime on social order, coupled with the complexities of individual accountability in the context of punishment, suggests that a more nuanced approach is required. Individual assessment of crime using victim inputs may contribute significantly to the development of such approach.

## 2. Conclusion

The perspective of the victim is not merely an ancillary consideration; it plays a vital role in evaluating the severity of the wrongdoing. The assessment of wrongdoing is inherently social, as it involves delineating the boundaries between competing interests: on one hand, the victim's right to have their rights upheld and to seek justice for the harm they have suffered, and on the other hand, the offender's desire to maintain their freedom and avoid punitive measures. While the formal differentiation between wrongful and legitimate actions is crucial for establishing legal accountability, the assessment of the extent of wrongdoing provides deeper insight into how profoundly the victim's rights have been infringed upon. It can reveal the emotional, psychological, and social ramifications of the crime, which are often as significant as the legal violations themselves (Davis & Smith, 1994). By considering the victim's experience and the broader societal implications of the crime, legal practitioners can better gauge the true nature of the wrongdoing.

By recognizing the interplay between external judgments of wrongdoing and internal assessments of culpability, legal practitioners can navigate the complexities of each case with greater clarity and sensitivity. This dual perspective allows for a more thorough examination of the factors at play, ensuring that both the legal and moral dimensions of the sentencing.

In this context, Victim Impact Statements (VIS) play a vital role by providing insight into the nature and extent of the harm caused by the offender's actions. Although these statements serve to inform the severity of the wrongdoing, they do not directly influence the assessment of culpability. Rather, they help to contextualize the offense and highlight the implications of the perpetrator's actions, which can, in turn, inform the judge's understanding of the offense's gravity (Erez & Tontodonato, 1992).

The discussion surrounding the victim's perspective in evaluating the seriousness of an offense reveals an important rationale: taking into account the viewpoint of those harmed by the actions may lead to more nuanced and accurate assessments of the severity of the crime. By integrating the victim's experience into the analysis, the legal system can foster a more principled evaluation of the inflicted harm and the surrounding circumstances that led to the offense (Reddi, 2006). This approach not only fulfills a moral obligation to recognize the victims' perspectives but also enhances the overall integrity of the legal process by ensuring that the seriousness of an offense is viewed through a comprehensive lens that includes both offender accountability and victim impact.

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