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Abstract

Respecting and protecting all parties have always been the objective of every criminal proceeding, aiming to achieve justice at every stage of the criminal trial. This protection becomes of utmost importance when dealing with victims who have suffered injuries because of crime. For this reason, both India and Ukraine have given special protection to victims' rights throughout the criminal process. This paper aims to analyze the role and degree of protection offered by these criminal procedure codes in respecting the rights of victims. Despite all the procedures put in place, the condition of the victim is still questionable, which has considerably affected the credibility of these countries' criminal procedure codes. To determine whether they really ensure the respect of victims' rights, a comparative methodology was used to establish the expectations of the two criminal law systems in this matter. The findings suggest that even though the criminal procedure codes of both countries have relevant provisions to protect the victims' rights, their criminal procedure systems are still marred with issues regarding this aspect. Consequently, there is a need to revisit these codes to ensure that the rights of parties, especially those of the victims, are respected.

Keywords: victims, criminal process, India, Ukraine, comparative analysis.

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EVALUACIÓN DEL ESTADO ACTUAL DE LA REALIZACIÓN DE LOS DERECHOS DE LAS VÍCTIMAS EN EL PROCESO PENAL: UNA EXPLICACIÓN SEGÚN LOS CÓDIGOS DE PROCEDIMIENTO PENAL DE UCRANIA Y LA INDIA

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Resumen

Respetar y proteger a todas las partes ha sido siempre el objetivo de todo proceso penal, buscando que se haga justicia en todas las fases del juicio. Esta protección es de mayor importancia al tratarse de víctimas que han sufrido daños como consecuencia de delitos. Por esta razón, tanto la India como Ucrania han dado una protección especial a los derechos de las víctimas a lo largo del proceso penal. Este artículo tiene como objetivo analizar el papel y el grado de protección que ofrecen estos códigos de procedimiento penal respecto de los derechos de las víctimas. A pesar de los ordenamientos establecidos, la condición de la víctima sigue siendo cuestionable, afectando considerablemente la credibilidad de los códigos de procedimiento penal de estos países. Para determinar si realmente garantizan el respeto de los derechos de las víctimas, se utilizó una metodología comparativa, con el fin de establecer las expectativas de los dos sistemas de derecho penal en esta materia. Los resultados sugieren que, aunque los códigos de procedimiento penal de ambos países cuentan con disposiciones relevantes para proteger los derechos de las víctimas; en la realidad, sus sistemas procesales penales siguen adoleciendo de problemas en este aspecto. En consecuencia, es necesario revisar estos códigos para garantizar el respeto de los derechos de las partes, especialmente los de las víctimas.

Palabras clave: víctimas, proceso penal, India, Ucrania, análisis comparativo.

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AVALIAÇÃO DO ESTADO ATUAL DA REALIZAÇÃO DOS DIREITOS DAS VÍTIMAS NO PROCESSO PENAL: UMA EXPLICAÇÃO SEGUNDO OS CÓDIGOS DE PROCEDIMENTO PENAL DA UCRÂNIA E DA ÍNDIA

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Resumo

Respeitar e proteger a todas as partes sempre foi o objetivo de todo o processo penal, o qual busca que a justiça seja feita em todas as fases do julgamento. Essa proteção é de maior importância ao se tratar de vítimas que vêm sofrendo danos como consequência de delitos. Por essa razão, tanto a Índia quanto a Ucrânia têm dado proteção especial aos direitos das vítimas ao longo do processo penal. Este artigo tem como objetivo analisar o papel e grau de proteção que esses códigos de procedimento penal oferecem a respeito dos direitos das vítimas. Apesar dos ordenamentos estabelecidos, a condição da vítima continua sendo questionável, afetando consideravelmente a credibilidade dos códigos de procedimento penal desses países. Para determinar se realmente garantem o respeito dos direitos das vítimas, foi utilizada uma metodologia comparativa, a fim de estabelecer as expectativas dos dois sistemas de direito penal nessa matéria. Os resultados sugerem que, embora os códigos de procedimento penal de ambos os países contem com disposições relevantes para proteger os direitos das vítimas, na realidade seus sistemas processuais penais continuam padecendo de problemas nesse aspecto. Em consequência, é necessário conferir esses códigos para garantir o respeito dos direitos das partes, especialmente os das vítimas.

Palavras-chave: vítimas, processo penal, Índia, Ucrânia, análise comparativa.

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Introduction

In 1985, the United Nations General Assembly adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[1] The Declaration is based on the philosophy that victims should be adequately recognised and afforded access to justice and prompt remedies for the harm they have suffered.

It is widely recognised worldwide, for instance, that crime victims should[2]:

1. Be treated with compassion and respect for their dignity, irrespective of characteristics like age, gender, race, religion, etc.

2. Have access to justice, including being allowed to present their views at the appropriate stages of the proceedings.

3. Be informed of the progress of investigation and criminal proceedings, as well as court outcomes.

4. Be afforded measures to protect their privacy, ensure their safety, and minimise inconvenience.

Under UK law, anyone has the right to bring a private prosecution, but cases have previously been rare due to the crippling cost of investigating and pursuing such cases. Legal aid is not available, meaning that they have largely been restricted to private industry or wealthy individuals.[3]

In the United States, some of the states allow private prosecutions with some restrictions, such as the requirement that the defendant is given the opportunity to oppose the charges.

Reforming criminal procedure legislation in each democratic state should aim to improve the basic principles of protection of human rights and freedoms, given that one of the main tasks of criminal proceedings is to protect individual

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1 United Nations, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc A/RES/40/34,* 1985, Art. 6(b).

2 Michael O'Connell, "Victims' Rights: Integrating victims in criminal proceedings", https://aija.org.au/wp-content/uploads/2017/08/OConnell2.pdf

3 Paul Peachey, "Two-tier justice: Private prosecution revolution", *The Independent,* 16 August 2014.

and human rights, freedoms, and legitimate interests. Particular attention should be paid to the implementation of victims' rights, who hope that the damage caused to them because of a criminal offense will be compensated and their rights and freedoms restored. Unfortunately, this rarely happens, as the pre-trial investigation and the prosecutor offices sometimes fall short of protecting them. In this regard, lawyers have repeatedly stated that the level and quality of crime-counteracting and prompt pre-trial investigation occupy the most important place in this system.

In pre-occupation Ukraine, the above statements are clearly confirmed by statistical data on registered criminal offenses, with growing numbers every year, which indicates an increase in the level of crime in our state: in 2017, 374 238; in 2018, 344 780; in 2019, 301 792; in 2020, 234 816; and in 2021, 197 274.[4] In addition, in practice, there is no clear interaction, assistance, and coherence among law enforcement officers in their criminal proceedings. This, in turn, leads to negative phenomena that become an obstacle to the effective implementation of the tasks of criminal proceedings. Such negative phenomena result in a significant formalism in the activities of law enforcement agencies regarding the protection of the rights, freedoms, and legitimate interests of victims. On the other hand, the current number of the investigative body of the National Police of Ukraine does not contribute to an effective realization of the victim's rights and, in general, to the implementation of a high-quality pre-trial investigation. Even despite an increase in the number of investigators by 1,200 people in 2013 (+ 16.7%), over the past few years, the workload per investigator has quadrupled; in particular, during 2018-2020, on average, 350 criminal proceedings were led by one investigator.

Analysis of the Legal and Normative Framework

Legal and regulatory preconditions to regulate the protection of victims' rights

At present, rulemaking and the improvement of criminal procedure legislation are one of the most acute problems of the judicial and legal reform, which has been present since Ukraine's proclamation of independence and the adoption of the country's Constitution in 1996. The process of its humanization and alignment with

[4] Prosecutor General's Office of Ukraine, *Statistical Information for the period 2015-2021,* https://gp.gov.ua/ua/posts/pro-zareyestrovani-kriminalni-pravoporushennya-ta-rezultati-yih-dosudovogo-rozsliduvannya-2.

international legal standards has proven to be complex and contradictory. Despite the rather thorny path of development of the Ukrainian state, the bureaucratic legal mechanisms adopted during the Soviet era have negatively affected the implementation of democratic European values. In addition, the difficult socio-economic times expereinced by the country are an additional negative factor for the convergence of its national legal system with European standards.

In the Constitution of 1996, for the first time in its history of state formation, Ukraine was proclaimed a legal and democratic state, and human rights and freedoms were recognized as the highest social value. In the modern sense, one of the fundamental principles of a legal and democratic society is the full implementation of the rule of law and legality; otherwise, it makes no sense to talk about ensuring human rights and freedoms. In view of this, today, constitutional provisions related to this aspect are becoming a benchmark for balancing public and private interests, since the possibility of restricting these rights and freedoms is very important in the field of criminal justice.

Even though Ukraine has chosen a democratic path toward the protection of human rights and freedoms, the recognition of victims' rights is insufficient. In this regard, an introduction to international experience, by examining national peculiarities, is certainly useful for the development of the concept of protection of the rights and legitimate interests of victims, as well as for their implementation in the legislative practice of the state. Recently, in legal literature, more and more studies are conducted that highlight the need to improve the legal status of victims, expand their procedural rights and real security, and guarantee compensation for the damage or loss caused by crime. Unfortunately, the procedural status of victims, according to current legislation, remains imperfect, which has been repeatedly pointed out; similarly, the scope of their rights, compared to the rights of the accused and the defendant, is much narrower.

In this regard, Strokov noted that this category of participants in the criminal process needs the most careful attention and care from the state, given that it failed to provide them with protection from criminal encroachment. In addition, the existing mechanisms do not ensure the restoration of their rights and property.[5] The same position is supported by Prysiazhniuk, who believes that the criminal-legal

[5] I. V. Strokov, "Organizational and legal measures to ensure the rights of victims of crime", *Scientific Bulletin of the National Academy of Internal Affairs of Ukraine,* 1 (2004): 81.

protection of victims of crime is carried out in Ukraine at a low level,[6] which we fully support. In this context, the opinion of Fedorchuk is also relevant, who notes that while other states have an extensive and multi-level system of guaranteeing and protecting the rights and interests of victims of crime, Ukraine still does not have a special law in this respect, and the current regulations are reduced mainly to being procedural.[7]

The legal status of the victim under the 2012 Criminal Procedure Code and problems with the realization of victims' rights

The introduction of the Criminal Procedure Code of Ukraine (CPC) in 2012 was due to conceptual changes in society, which occurred because of the constant influence of public and international organizations. In general, the formation and approval of the basic principles of the criminal process (inviolability of the person, their housing and other possessions, the presumption of innocence, competition, and equality of parties, ensuring the right to protection and others) has a long history. However, in the context of modern transformations, they acquire special significance. Thus, the application of certain provisions of the CPC has caused new complications, which, on the one hand, hinder the effective exercise of justice mechanisms by law enforcement agents and, on the other, lead to a violation of the rights, freedoms, and legitimate interests of a person.

In the current CPC, the normative regulation of the legal status of the victim is lower than the relevant institutions of protection of the rights of the suspect or accused. According to several studies on this topic, only from time to time the legislator tries to overcome the problem of restoring the balance between the rights of the suspect or accused and the interests of the victim, by gradually increasing the rights of the latter. However, this is not the main problem with the protection of victims; rather, there is a need to introduce a truly effective legal mechanism to strenghten the legislative protection of already enshrined rights.[8]

Mainly, during the pre-trial investigation, the investigator and the prosecutor's explanation of the victim's rights is reduced to a formal approach, without

[6] . I. Prysiazhniuk, *Victim of crime: problems of legal protection* (Kyiv: Educational Literature Center, 2007).

[7] N. B. Fedorchuk, "Restorative proceedings as an alternative to criminal: an overview of it in the UK and other countries of the case law system". *Bulletin of Lviv University. The series: legal,* 42, (2006): 360-65.

[8] O. Tyschenko and I. Titko, "Guaranteeing victim's rights at the pretrial investigation stage," *Bulletin of the National academy of the prosecutor's office of Ukraine,* 1 (2012): 61.

interpreting procedural norms, particularly seeking to obtain the victim's signature on such acquaintance. Instead, the victim's rights should not only be read out but also explained. In this regard, it is worth recalling the recommendations of the Supreme Court of Ukraine, which noted that the investigator should explain to the victim the special terminology used (civil action, petition, recusal, evidence, etc.), the consequences of the late implementation of rights, etc.[9] At the same time, the general educational and cultural level of the person, their age, or other individual characteristics that may affect the perception and understanding of information should be considered. This is essential because the interest of the victim during the pre-trial investigation depends, above all, on their understanding the essence of the rights and responsibilities granted to them by the law. The awareness of victims of these rights allows them in a particular situation to choose the most effective means to defend and protect their rights violated by the crime. However, without exaggeration, in 80% of cases, the victims are not familiar with their rights granted by the legislator.

A systematic analysis of the provisions of Articles 55, 56, 57 of the CPC, which regulate victim's rights and responsibilities, allows us to note that the emergence of a rule on giving to the victim a documented memo on procedural rights and responsibilities deserves attention. However, wordings such as "to be informed of one's rights and responsibilities" or "to know the nature of suspicion and accusation" in no way contribute to a clear understanding, and simply handing over a "paper" with an alleged explanation will not improve the situation. In addition, in accordance with paragraph 2 of Part 3 of Article 42 of the CPC, the suspect (accused) is given the right to be clearly and timely informed about their rights and receive detailed explanations.

The analysis of the content of paragraph 3 of Part 1 of Article 56 of the CPC makes it possible to note that the victim is also a participant in criminal proceedings and has the right to collect and submit evidence to the investigator, prosecutor, investigating judge, or court. At the same time, a study of the provisions of criminal procedure law shows that most of the victim's rights are declarative. Specificaly, victims often complain that the investigator and the prosecutor did not explain their procedural rights, which is necessary to actively assist in collecting evidence at the stage of pre-trial investigation. The victim has the right to request and receive

9 "Practice of application by courts of the legislation which provides the victim's rights of crimes [generalization]: the letter of the Supreme Court of Ukraine from January 1, 2005," *Bulletin of the Supreme Court of Ukraine*, n.° 1 (2005): 25-31.

from public authorities, local governments, enterprises, institutions, organizations, officials and individual's things, copies of documents, information, expert opinions, audit reports, and inspection reports (Part 3 of Article 93); in addition, the victim has the right to receive explanations from the participants in criminal proceedings and other persons with their consent (Part 8 of Article 95). Finally, it should be borne in mind that the provisions of the CPC do not define the mechanism for exercising these rights.

In this regard, the inadmissibility of a surveillance video voluntarily issued by the victim to the detective is an interesting example. In a specific case, the panel of judges of the Third Judicial Chamber of the Criminal Court of Cassation has considered that the receipt of the video by the operative contradicts the requirements of Parts 1 and 2 of Article 41 of the CPC, because the operative, without the instructions of the investigator, is not authorized to conduct procedural actions on their own initiative. The investigator, not the operative, is empowered to demand from any person the necessary things, documents, information, etc., and only in criminal proceedings. Thus, in this case, the surveillance video received from the victim by an unauthorized official has been invalidated as inadmissible evidence.[10] We fully agree with the judges' position, as the receipt by the operative of things and documents, in accordance with Article 93 of the CPC, is not possible at all. Otherwise, it is carried out in a manner not provided for by criminal procedure law.

The study of the materials of criminal proceedings highlights the existence of problematic issues, such as determining the status of things and documents that are voluntarily provided by the participants in criminal proceedings. In this case, there exists the practice of drawing up an inspection report and a decree to attach the provided material evidence to the materials of criminal proceedings; in others, the property is temporarily seized, and a request is made to the investigating judge to officially seize the property. This solution is debatable because Article 168 of the CPC, which regulates the procedure for temporary seizure of property, states that it is carried out when the seizure occurs during detention, search, and inspection. However, according to Article 170,

> seizure of property is temporary, until it is canceled in accordance with the procedure established by the CPC, deprivation by decision of the investigating judge or court of the right to alienate, dispose and/or use property in respect

[10] Unified State Register of Judgments, *Resolution of the Board of Judges of the Third Judicial Chamber of the Criminal Court of Cassation of the Supreme Court of 07.08.2019 (case Nº 607/14707/17).*

> of which there is a set of grounds or reasonable suspicions to believe that it is evidence of a criminal offense, subject to special confiscation from the suspect, accused, convicted person, third parties, confiscation from a legal entity, to secure a civil lawsuit, recovery from the legal entity of the illegal benefit, possible confiscation of property.[11]

Instead, the witness or the victim provides material evidence in criminal proceedings voluntarily and at their own discretion, so there is no need to seize such evidence.

In case *Nº* 607/14707/17, the Supreme Court of Ukraine declared as inadmissible evidence a video recording from a CCTV camera voluntarily issued by the victims before the information was entered into the ERDR. The judgement in this case states that

> in accordance with Part 2 of Article 56 of the CPC, the victim has the right during the pre-trial investigation to submit evidence to support their application. Based on the content of this rule, the victim also has the right to present evidence, but only within criminal proceedings during the pre-trial investigation, which did not happen in this case. Thus, the implementation of the procedural action to collect evidence and obtain such evidence as video recording from the store's CCTV cameras by the operative took place beyond the scope of the criminal proceeding, that is, before the information was entered into the ERDR, as well as before the inspection of the scene, which was carried out by the investigator.[12]

However, in another case, the Supreme Court took the opposite position. According to the materials of criminal proceedings, on April 7, 2014, the accused in the premises of the Kharkiv Regional State Administration made public calls to change the territorial organization of Ukraine in violation of the order established by the Constitution of Ukraine, the video materials of which are freely available on the Internet. In addition, on April 22, 2014, the accused's speech was posted on the Internet. Two DVD-RWs and a CD-R with video recording were added to the report. After receiving the report of a wrongful act in accordance with the requirements of Article 214 of the CPC, based on the criminal offenses under Part 1 and Part 2 of Article 101 of the Criminal Code of Ukraine, the investigator

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[11] *Criminal Procedure Code of Ukraine of 13.04.2012,* https://zakon.rada.gov.ua/laws/show/4651-17#Text

[12] Resolution of the Board of Judges of the Third Judicial Chamber of the Criminal Court of Cassation of the Supreme Court of 07.08.2019 (case *Nº* 607/14707/17), http://www.reyestr.court.gov.ua/Review/83589933

entered the information into the ERDR. Later, in accordance with Article 237, the investigator reviewed the video discs and drew up a report based on the results of the review, which reflected the detailed content of the recordings. This protocol met the requirements of Part 3 of Article 104 of the CPC. As for the admissibility of said video discs, the Court stated:

> In accordance with Part 2 of Article 60 of the CPC, the applicant should submit things and documents to confirm their application both before entering information into the Unified Register of Pre-Trial Investigations and at the pre-trial investigation. Thus, these discs were added by the applicant to the report of the criminal offense, which is consistent with the requirements of Article 60 of the CPC. After entering the information into the ERDR, these discs were reviewed by the investigator and recognized as documents (evidence), so there is no reason to consider this evidence inadmissible in the panel of judges."[13]

The Court considered that "the evidence thus received was obtained in a lawful manner, as its collection and consolidation took place in compliance with the human rights guaranteed by the Constitution of Ukraine, established by criminal procedure law by an authorized person and by actions provided by procedural rules."[14]

The above demonstrates that different legal positions of the Supreme Court on similar situations lead to the formation of ambiguous law enforcement practices, plagued with contradictions when considering materials of criminal proceedings and determining the admissibility of evidence. Moreover, in accordance with Article 90 of the CPC, "a decision made by a national court, which has taken legal effect, holds that a violation of human rights and fundamental freedoms set forth in the Constitution of Ukraine and international treaties that the Verkhovna Rada of Ukraine is bound by shall have prejudicial significance for the court that decides on evidence admissibility."

Thus, in the context of the adversarial process, it is advisable to grant victims the right to present evidence at any stage to ensure the protection of their civil liberties. In addition, in most cases, the victim is the applicant who, in accordance with paragraph 2 of Part 2 of Article 60 of the CPC, has the right "to submit evidence

[13] *Resolution of the Second Judicial Chamber of the Criminal Court of Cassation of the Supreme Court of 30.04.2020 (case Nº 640/19897/16-к),* https://zakon.cc/court/document/read/89034985_941cc39b

[14] Resolution of the Second Judicial Chamber of the Criminal Court of Cassation.

to confirm their statement," i.e., evidence that may contain information relevant to establish all circumstances of the criminal offense.

One of the unsolved problems in the current CPC is compensation to victims for the harm caused because of a crime. The state provides an opportunity for a person who has suffered property and/or moral damage by a criminal offense to restore their position by means of filing a civil claim, the form and content of which must comply with the requirements established by civil legal proceedings. This procedure is complicated and, as a rule, requires the application of an ordinary citizen to the appropriate specialist. This means that a person who has suffered as a result of wrongful acts committed against them should bear the appropriate material expenses for the assertion of their property and/or moral rights. Considering the dire financial situation of a large number of Ukranian citizens, this demand made by the state is extremely inappropriate.[15]

There are many inconsistencies, gaps, and shortcomings of the current criminal, criminal procedural, and civil legislation on the specified issues, in particular considering the existing new legal market relations in society, which prevent effective and reliable compensation for damage to both individuals and legal entities.[16] Of particular importance is the unresolved problem of determining the amount (volume) of harm caused by a criminal offense, which is subject to compensation to the aggrieved person. In addition, the legislator does not give the possibility of compensation for physical harm caused to the aggrieved person and does not provide the aggravated person nor their representative with the right to bring a civil suit parallel to the criminal case. In addition, the right of the aggrieved person to refuse to file a civil suit is not established. Such legislative gaps violate the rights of the victim and therefore must be addressed in Article 129 of the CPC to identify: 1. the necessity to determine the amount of moral, physical, and property damage; 2. cases when it is impossible to settle the claim; and 3. measures to be taken by the court on confiscation of property if this was not provided at the stage of pre-trial investigation.[17]

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15 G. I. Globenko, "On the issue of reimbursement (compensation of the caused harm to the victim in the criminal procedure of Ukraine," *Law and Safety,* 65, n.° 2 (2018): 71-75. http://pb.univd.edu.ua/index.php/PB/article/view/81

16 O. O. Yukhno, "Problematic Issues of Guaranteeing Property and Personal Non-Property Rights of Victims within Criminal Proceedings," *Law and Safety,* 80, n.° 1 (20219: 180-87, https://doi.org/10.32631/pb.2021.1.25

17 Serhii Ablamskyi, Hennadii Hlobenko, Ruslan Chycha, Olena Martovytska, and Iryna Burlaka, "Ensuring Protection of the Rights of the Aggrieved Person in Criminal Proceedings through the Prism of Requirements of International Law Acts," *Journal of Legal, Ethical and Regulatory Issues,* 23, Special Issue (2020): 1-7.

The situation in India with respect to the victims' rights and private prosecution is statutorily better but practically the same. Next, we will examine the case of India for comparative purposes.

Analysis of existing provisions that try to ensure private prosecution in India

In India, the Code of Criminal Procedure, commonly called CrPC, contains certain provisions that talk about private prosecution of criminal cases. The provisions include Section 301 and Section 302 of the CrPC.

Section 302 of the CrPC—Permission to conduct prosecution—states:

> (1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than police officer below the rank of Inspector; but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission: Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.
> (2) Any person conducting the prosecution may do so personally or by a pleader.

It is to be noted here that this section allows private prosecution if permitted by the magistrate on an application filed by a complainant, but the same is restricted to the Magistrates' Court only. The above section of the CrPC enables the magistrate to permit any person to conduct the prosecution. The only rider is that the magistrate cannot give such permission to a police officer below the rank of inspector. Such person does not necessarily need to be a public prosecutor. In the Magistrates' Court, anybody (except a police officer below the rank of inspector) can prosecute a case if allowed by the magistrate. Once the permission is granted, the person concerned can appoint any counsel to conduct the prosecution on their behalf in the Magistrates' Court.[18]

https://www.abacademies.org/articles/Ensuring-protection-of-the-rights-of-the-aggrieved-person-1544-0044-25-SI-540.pdf.

[18] Shiv Kumar v. Hukam Chand and another, (1999) 7 SCC 467.

In J.K. International v. State (Govt. of NCT of Delhi) and others,[19] a three-judge bench was adverting in detail to Section 302 of the CrPC. In that context, it has been opined that the private person who is permitted to conduct prosecution in the Magistrates' Court can engage a counsel to do the needful in the court on their behalf. If a private person is aggrieved by an offence committed against them or against anyone in whom they are interested, they can approach the magistrate and seek permission to conduct the prosecution by themselves. This court further proceeded to state that it is open to the court to consider the private person's request and if the court thinks that the cause of justice would be served better by granting such permission, the court will generally grant such permission. Clarifying further, it has been held that the said wider amplitude is limited to the Magistrates' Court, as the right of such private individual to participate in the conduct of prosecution in the Sessions Court is very much restricted and is made subject to the control of the public prosecutor.

In Dhariwal Industries Ltd. v. Kishore Wadhwani & Ors,[20] regarding Section 302, it was indicated that "the said provision applies to every stage including arraignment, inasmuch as the complainant is permitted by the magistrate to conduct the prosecution. This is to clarify the position of law. If an application in this regard is filed, it shall be dealt with on its own merits."

As per Section 225 of the CrPC, it is exclusively restricted in the case of trial before the Sessions Court. Section 225 states that the trial has to be conducted by a public prosecutor. In every trial before a Sessions Court, the prosecution shall be conducted by a public prosecutor.

The reasoning given by the Court in Shiv Kumar v. Hukam Chand and another[21] is that "the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other than the public prosecutor. Due to this fact, the legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in Sessions Court." The Court has further observed that a public prosecutor is not expected to show thirst to reach the case in the conviction of the accused somehow irrespective of the true facts involved in the case.

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19 (2001) 3 SCC 462.

20 Supreme Court of India, Criminal Appeal No. 859 OF 2016.

21 (1999) 7 SCC 467.

Considering the present scenario and disposal of cases in practice, the mentioned "thirst" for a conviction should not exist. However, there should be at least some interest in achieving a conviction, which is currently lacking, since prosecutors have no direct concern about victims. There have been many cases where public prosecutors have been bribed, and the expectation is that since private prosecutors have a direct interest in achieving justice for victims, the chances of this occurrence should be much lower.

There are no specific guidelines that lead the magistrate in exercising this power, given that the power is exclusively in their hands. The Indian Supreme Court has made it clear that it has to be granted on the merit of the case, but even then, there is no transparency in this regard and the magistrates hardly exercise this power.

Apart from this, Section 301 of the CrPC reads as follows:

> Appearance by Public Prosecutors. (1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any court in which that case is under inquiry, trial or appeal. (2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.

In Shiv Kumar v. Hukam Chand and another,[22] the Court clearly held that said provision applies to the trials before the magistrate as well as the Sessions Court.

Unlike its succeeding provision in the CrPC (i.e., Section 302), the application of which is confined to the Magistrates' Courts, this specific section is applicable to all criminal jurisdiction courts. In view of the provision made in the succeeding section for the Magistrates' Courts, the insistence contained in Section 301(2) must be understood as applicable to all other courts without exception. The first sub-section empowers the public prosecutor to plead in the court without any written authority, provided they oversee the case. The second sub-section, which is sought to be invoked by the appellant, imposes the restriction on a counsel engaged by any

[22] (1999) 7 SCC 467.

private party. It limits their role to act in the court during such prosecution under the directions of the public prosecutor. The only other liberty they can possibly exercise is to submit written arguments after the closure of evidence in the trial, but that too can be done only if the court permits them to do so.

Thus, there again, a conflict arises between the two analyzed sections, as Section 301, which limits the role of private prosecutor up to assisting the public prosecutor, also applies to the Magistrates' Court. On the one hand, private prosecution is allowed if the magistrate permits so, while, on the other, the role of private prosecutors is limited to assisting public prosecutors and it remains under their direction.

Although private prosecution is allowed in the Magistrates' Court if the magistrate permits it, but even then, the written law is silent as to the circumstances in which such an extraordinary power could be exercised by the magistrate. In case of the Sessions Court, the law expressly bars private prosecution.

A difficult scenario to allow private prosecution

The principle disadvantages of not allowing private prosecution are noteworthy. The biggest drawback of blindly following public prosecution in criminal cases is that there is no direct link between the public prosecutor and the victim, who is the first informant and, invariably, the eyewitness of any criminal case. The financial crunch of the state also impacts the quality of the investigation, which hinders the interests of the victim. The large number of cases cause an overburdening of public prosecutors, making them uninterested in the conviction of the accused. In case the investigation is not carried out in an efficient manner by the public investigation agency, the victim becomes helpless, with their hands tied, given that they cannot begin their own private investigation in the case, as it is restricted by law. It is the victim and their relatives who would not let the perpetrators escape; nevertheless, the lack of proper investigation, unwillingness of public prosecutors, inefficiency of the police, and corruption in the public administration, accompanied by lengthy procedures, altogether hamper the interests of the victims. Moreover, private investigators in the present scenario have the disadvantage of not being able to arrest suspects, apply for search warrants, or have access to the defendant's criminal records, leading in some cases to controversial joint inquiries with police forces.

Future perspective and the way forward

The best solution for ensuring that justice will extend to the victim is allowing private prosecution. The first change that should be implemented is the substantial easing of the rigid and impractical norms established for the judicial process to be carried out. Victims should ideally have a *locus standi* to represent themselves directly either by themselves or their private pleader in the court of law.

There are a considerable number of occasions where the victim stands a better chance of presenting their case instead of a public prosecutor. This, however, does not take away any statutory rights of the public prosecutor. The principle behind this idea is that allowing private prosecution by the victims does not *ipso facto* mean that a public prosecutor is barred altogether from participating with the victim in the process of getting justice. The victim is always free to accept the assistance of a public prosecutor at any stage of the case if they choose to do so.

Victim can also represent themselves in the court of law. Apart from the *locus standi* point, other procedural norms also need a makeover in this regard. It cannot be expected that a common person will suddenly present their case in the same manner as a lawyer in the court of law. This implies that the basic structure and process described in the 1973 CrPC should not be eliminated. However, at the same time, the most important point for the judiciary should be ensuring that the criminal justice system facilitates justice to the victim and not make it even tougher.

Allowing the vicitm to have private prosecution for their own case will invariably help in the administration of justice. The reason behind this is that the victim can be more familiar with the facts of the case than any public prosecutor, who is massively overburdened with the sheer amount of cases they handle. The victim is the eyewitness of the crime. This clearly implies that they are in a better position to carry out extremely important stages of a criminal trial like cross examination. They can present their questions in a more comprehensive manner during the time of cross examination, which in turn may help them establish their case more strongly in the court of law.

This approach, however, should not be followed blindly. Sometimes the crime involved may not be easy to understand for a layperson as it seems *prima facie*. In cases of cyber or tech-related crimes, regular people may not logically understand the legal aspects behind such offenses. A lack of education among a large section

of society is also a major hindrance. In such situations, the victim will certainly need the services of an expert, i.e., a lawyer.

On more occasions than not, the victim is bound to know and put forward their arguments in court. Therefore, allowing the private prosecution of victims, in one way or another, will help the cause of justice rather than tarnishing it. If the success rate of this step were to be tested, it would have positive results. This small decision can help a large portion of Indian society who either cannot seek justice because of overburdened public prosecutors or the financial crunch that such a process entails. A separate statute needs to be passed by the parliament in this regard so that there are no grey areas or ambiguity about the *locus standi* of a person representing themselves in a court of law. This implies that even bureaucrats should exercise their expertise in this regard and assist legislators in forming a comprehensive legislation.

Apart from directly benefitting the victim, this small step of allowing private prosecution by the victim can go a long way in benefitting the efficiency of the criminal justice system in India. If a sizeable number of victims decides to undertake private prosecution, this will automatically reduce the overburdening of cases of public prosecutors. For example, if we presume that a large portion of educated victims decide to underatake private prosecution for their cases, it will leave prosecutors with the cases of victims who are not very educated or who cannot fight directly for their rights. This, in turn, will help public prosecutors to be more efficient toward the weaker and less educated section of victims who are the most vulnerable when it comes to getting justice from the Indian legal system.

The faith of the people in the judicial system

One of the biggest indicators of the success or failure of the judicial system in any country is the amount of faith people of that country have for that judicial system. Therefore, the faith of the people in the judiciary is of utmost importance to determine the effectiveness of any judicial system. Hence, if we connect the legalization of private prosecution of criminal cases by victims to the idea of the faith of the people in the judiciary, there are great reawards to be enjoyed.

It is a fact that most of the population of India falls in the poor and the middle classes. Indeed, they are the people who are the most vulnerable in getting their rights enforced and seeking justice. Most of the victims belonging to these two socioeconomic sectors do not want to get involved in legal trials to seek justice because

of the time and expense this route entails. Some of the victims do not want to get involved in the court trial either because they are not satisfied with the handling of the cases by their respective public prosecutors and/or with prosecution advocates. For such category of victims, the legalization of the private prosecution of criminal cases by victims backed by a solid statute can turn out to be a masterstroke. All such victims would then be able to try their own cases in the court of law without worrying about whether the advocate or public prosecutor will be able to efficiently carry out their case. This will also relax the undue financial burden sufferred by victims during the court trial.

In case the legalization of private prosecution of criminal cases by victims becomes a reality in India, its results will surely be visible in a short span of time. Apart from the official passing of this statute by the legislature, the real benefits will be visible when people will start to experience this change in practice. If a victim can get justice by trying their case by themselves, this information will spread among people very quickly by the positive word of mouth. Firstly, the victim's relatives and friends will hear about the practical benefits of such a legislation. Then they will pass on this information to their relatives and friends. This, in turn, will act as a triggering point, which brings us back to the point of ensuring popular trust in the efficiency of India's criminal justice system. When so many people reap the benefits of this legislation, faith in the efficiency of the judiciary will automatically increase in the minds of the people. There will be a positive atmosphere related to the judiciary in the entire country.

As an after-effect of this legislation coming into force, there is a good chance for the reduction of crime rates. The main reason would be a better implementation of the deterrent theory of justice after the passing of this legislation. People who dare to commit any kind of crimes today because they believe that they might get away with it may not be so confident about committing the same crime after the enactment of such a legislation. This is because it would always be at the back of their mind that victims themselves can carry out the trial of their own case and that the accused can be convicted on a regular basis.

Conclusions

Considering the above, it can be concluded that not even recently have been established effective procedures to facilitate the victim's access to justice. It seems that the presumption of priority in the protection of the victim's rights should give

the reform processes of criminal proceedings a new direction, to properly ensure the rights violated by criminal offenses. Indeed, the analysis of law enforcement practice and the application of current criminal procedural legislation in Ukraine and India regarding the implementation of the victims' rights evidences the need to increase the requirements for a strict implementation of the law by relevant state bodies and officials, as well as for the feasibility of adjusting the normative regulation of this issue.

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