

Crime victims ' access to justice: bridging the gap – independent legal representation.

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Introduction

In any society, the well-being of its citizens depends not only on preventing crime, but also on ensuring that those who become victims of crime receive justice. Victims play a pivotal role in the criminal justice system, yet their rights and participation are often overshadowed by the focus on the accused and legal procedures. Hence, victims face significant challenges in accessing justice despite the attention they deserve and are entitled to.

This chapter explores the concept of access to justice, the foundations of crime victims' right to access justice, and the barriers victims encounter in pursuing it. This chapter also explores the significance of independent legal representation for victims during criminal proceedings, and it concludes that providing independent legal representation is one of the most effective ways to empower victims, so that they can choose whether, when, and how to exercise their rights. Moreover, independent legal representation improves victims' access to justice.

In addition, this chapter is dedicated to Professor Dr Chockalingham who, for decades, has written and lectured on crime victims' rights in international law and domestic law in India. Given his strong, long-term advocacy for crime victims' rights, the chapter includes a section on crime victims' participatory rights in India.

Access to Justice

Lord Diplock in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 at 977, stated that a justice system "can only command the respect of a society's members if they trust that it is an impartial, equal, transparent and principled system that gives effect to the rule of law". Access to justice is a fundamental principle of the rule of law that calls for the implementation of "legal guarantees of formal equality before the law". (Derrington 2018) It also calls for the elimination of barriers in justice systems that impede access to justice. However, reforms must be fair and just because to do otherwise challenges the concept of justice itself.

Access to justice is impossible in a criminal justice system that is "intentionally designed for provoking symptoms of traumatic stress" (Herman 1997; see also Cousins 2020). It is impossible when people (especially marginalised groups, such as crime victims) lack confidence in, or even fear, the system, or cannot access it. Often people lack knowledge about their rights, role and responsibility, and (except those accused of committing crime) they do not have a lawyer to assist them. Access to justice is enhanced when there are appropriate legal protections and legal aid. (Mullen 2016)

For victims, access to justice means something different for different people (McDonald 2021). For some, it could simply be able to report a crime to police; being able to access information; or being able to access support services. For some it could also mean being able to participate in decisions that affect them; or being able to participate in a process to address the harm caused by the offender. However, for some victims – and therefore the focus of this chapter – having independent legal representation is a fundamental element.

Access to justice provides for rights that they can claim, and if claimed should be fulfilled on equal terms. Furthermore, there should be effective remedies to uphold his or her rights and advance his or her legally recognised interests. Conversely, in the absence of access to justice, crime victims are unable to have their voice heard, exercise their rights, or hold decision-makers accountable.

Hence, access to justice is about amplifying victims' voices, such as guaranteeing them legal representation, fulfilling their rights and holding others accountable for violations of these rights, as well as providing for remedies through 'institutions of justice' (United Nations Development Programme 2004, 2005). Before examining the barriers to access to justice, it is important to understand the foundations of the concept from the victims' perspective.

[Understanding the foundations for crime victims' right to access to justice.](#)

Humans have been subject of laws since the emergence of society. For example, the Babylonian *Code of Hammurabi* (i.e., a collection of 282 rules and the *Pentateuch* of the Jewish Old Testament (i.e., the first five books including law bequeathed by God) were proclaimed thousands of years ago; and the Roman *Corpus Iuris Civilis* (i.e., collections of laws and legal interpretations) was proclaimed about 1500 years ago. The authors of these early laws understood that, to make "justice visible" (USHistory.org 2022), they needed a universal set of laws for all under their control. The laws provided means to settle disputes as well as showed some compassion for victims and, despite inherent bias and discrimination, variously obliged the wrong doer to restore the wronged. Similarly, 1200 years ago, Aethelbert's Anglo-Saxon law, which placed an emphasis on preserving the peace, provided for wrong-doers and the wronged to negotiate monetary payments rather than resort to feuding. Some commentators claim these early laws prevailed in a 'golden age' for victims of crime because victims played a direct role in determining the punishment for wrongs perpetrated against them or their property (Schafer 1967).

Magna Carta, which is over eight hundred years old (UK Parliament 2024), is one of the, if not the, most famous documents in British legal history. In approximately 3,500 medieval Latin words on a single page, it sets out "the foundation of the freedom of the individual against arbitrary authority of the despot". Though the 'great charter' was revised and reissued several times, and much of its content today of little relevance, it still resonates with many. The original text had sections on law and legal procedure that were intended to guarantee inexpensive and open access to justice. Importantly, *Magna Carta* specified that all free 'men' should have access to justice.

In the 17th century, Sir Edward Coke reinvigorated interest in *Magna Carta*'s constitutional significance. Coke saw the charter as laying the foundations of then modern British law and the basis of the 'rule of law'. He and others, such as John Wilkes, championed *Magna Carta* as comprising a set of principles associated with liberty, freedom and resistance to oppression by the state and to corruption.

There have been efforts also to add human rights to the conceptions of *Magna Carta*. It condemns abuse of power and stipulates that there should be remedies for the abrogation of basic rights. *Magna Carta* might therefore be considered the first charter on victims' rights.

The *Universal Declaration of Human Rights*, endorsed by the international community in 1948, proclaims unalienable rights and freedoms of every individual across the globe. Although the Declaration does not mention crime victims specifically, it comprises several rights that can be seen from the victim's perspective (Wemmers 2013). Articles 1–2 set-out the concepts of dignity, liberty, and equality. Articles 3–5 proclaim additional rights, such as the right to life and the right to security of the person; and articles 6–11 provide for the legality of human rights and remedies when these rights are violated.

In the 1980s, proponents for international law on crime victims' rights argued that affording rights to victims was a desirable means of improving their position in the administration of justice. Rights were necessary to ensure victims were treated with respect and dignity (Fenwick 1997). In 1985, the United Nations General Assembly agreed and endorsed the *Declaration of Basic Principles of*

Justice for Victims of Crime and Abuse of Power, which emphasises the rights of crime victims. It states that victims should be treated with compassion and respect for their dignity, which is vital to prevent secondary victimisation. Furthermore, victims are entitled to access mechanisms of justice and prompt redress as provided by national legislation (Article 4 & 6). The Declaration recognises that victims should have access to justice. For this purpose, among other entitlements, victims should participate in legal proceedings and present their views at appropriate stages (Article 6). This procedural right seeks to mitigate the decision-making power of the state by allowing the private interests of victims to influence the criminal justice process. Hence, this procedural right places victims in a stronger position – pathing the way for victims to be at least a genuine participant and give effect to the legal triangulation of interests. In addition, victims should be provided proper assistance throughout the legal process, which could be legal representation (see, for example, the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2013)).

Other international law

Victims' right to access to justice is also replicated in other international law. For example, Part VIII, article 12 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2006). These principles are, proffered Cherif Bassiouni (2006, p.205), "an international bill of rights of victims". Parallel to this significant advancement is the development of the International Criminal Court.

Victims' procedural rights are a notable feature of the *Rome Statute* (see, for example, articles 68) and the *Rules of Procedure and Evidence* (see, for example, rule 89) that govern the International Criminal Court. These rights, however, do not go as far as those provided for in the Extraordinary Chambers in the Court of Cambodia (see rule 23 of the *Internal Rules* (2011)). In the former, victims are participants whereas in the latter they are a party to the proceedings. Notwithstanding, victims have faced hurdles in both legal entities (McAsey 2011).

Other international victims' rights law, such as the *Declaration on the Protection of All Persons from Enforced Disappearance* (1992) and the *International Convention for the Protection of All Persons from Enforced Disappearance* (2006), and the Convention against Transnational Organized Crime (2000) and its Protocols, recognise victims right to justice. More recently, article 24 of the model legislative provisions to support the needs and protect the rights of victims of terrorism provides for victims' access to justice.

Likewise, the United Nations Sustainable Development Goals (<https://sdgs.un.org/goals/goal16>), Goal 16 focuses on promoting peace, justice, and strong institutions. Ensuring access to justice for victims aligns with this goal³.

Barriers to and measures to enhance access to justice.

Contrary to the expansion of victims' rights in international and domestic laws, adversarial criminal justice systems typically continue to view victims as witnesses to a crime against the state, thus excluding them from the criminal justice process, except when they are needed to testify. This is a major source of dissatisfaction for victims who seek validation in the criminal justice system (Wemmers 2013).

The barriers to victims' access to justice are many and varied. They include:

Legal Complexity:

- Legal processes can be daunting for victims. Understanding legal jargon, procedures, and evidentiary matters pose challenges. Hence, simplifying legal language and providing clear information can empower victims. Additionally, educating victims about their rights, legal processes, and available resources, which could be done by workshops, pamphlets, and online user-friendly platforms for legal information and services (see, for example, the US Office for Victims of Crime web-based resources, free online training and technical assistance, and an international directory of services; the Australia-based With You We Can website; Commissioner for Victims' Rights South Australia website).

Fear and Intimidation:

- Victims may fear retaliation or intimidation from perpetrators or their associates, which can be alleviated by protective measures, such as restraining orders and safe spaces (e.g., remote witness rooms for giving testimony). Virtual court hearings can reduce the risks victims fear and improve accessibility.
- Some victims fear dealing with the police. In some places in the USA, trained social workers have been embedded in police stations as an alternative to particularly women and children (such as those from patriarchal cultures) dealing with uniformed police officers. This has proven useful in alleviating victims' fears about 'the police' and enhancing female victims' experiences when reporting crimes. (Lord 2015)

Emotional Trauma:

- Victims often suffer emotional distress, affecting their ability to engage in legal processes (Laxminarayan 2014), so trauma-informed support services are vital. In India, for example, authorities have applied a women-centred viewpoint to re-engineer the policing of victims of gender-based violence and introduced Women's Police Stations. In so doing, the police have tackled the masculinised symbols, norms, and values that have dominated formal and informal structures in policing. Research in India (Jassal 2020; Amaral, Bhalotra, & Prakash 2021), Argentina (Carrington et al 2020a, Carrington et al 2020b) and Brazil (Carrington et al 2020b; Ostermann 2003) indicates that Women's Police Stations improve and increase access to justice and are a positive development in the prevention of gender violence.
- The focus on improving responses to victims is not confined to the police. Victim support services have been professionalised in many countries. These support services are staffed with trained professionals, who are accessible for emotional support, counselling and guidance throughout legal proceedings, and if victims need.

Of relevance to this chapter, are the failure to treat victims as genuine participants in criminal proceedings; and the omission of independent legal representation for victims. Furthermore, and where there is provision for independent legal counsel, the prohibitive expense, which begs for accessible legal aid services. In some countries lawyers offer pro bono services to victims and there are legal clinics (e.g., USA) and partnerships with law schools (e.g., National Law University,

Dwarka, Delhi India to which Professor K. Chockalingham contributed). The remainder of this chapter is dedicated to independent legal representation for crime victims who choose to report offences.

Victims' right to independent legal representation

In most criminal justice systems, crime victims play a critical role beyond being mere witnesses. Their experiences, emotions, and perspectives are essential for understanding the impact of the offence. One crucial aspect of victim participation is their right to be heard during key stages of the process, such as bail hearings, charge (plea) decisions, and sentencing. There are various arguments for and against victims having independent legal representation to advance their participatory rights.

Providing legal representation, for example, is said to ensure that victims have a level playing field. Accused persons have legal counsel to protect their rights, so victims should also have access to legal support. Conversely, some fear that victim lawyers may become emotionally invested in their client-victim's interests, which potentially could affect their objectivity, and bias could impact the overall fairness of the trial. In adversarial criminal justice systems, criminal trials primarily focus on the accused's rights and the state's case against them. In this context, over several centuries, victims' role and responsibilities has evolved to be primarily witnesses, not parties to the proceedings. Some argue that this traditional role should be maintained.

Notwithstanding the opposition to victims having independent legal representation, balancing victims' rights with practical considerations is essential. While legal representation can empower victims, it must be implemented thoughtfully to ensure fairness, efficiency, and the overall integrity of the criminal justice system, and as this chapter reveals, this is not only possible, but also happening.

International Criminal Justice Systems

As mentioned above, the *Rome Statute* (1998) and the *Rules and Procedures* (2002) governing the International Criminal Court provide for victim participation at all stages of the proceedings, which according to case law, should be determined case-by-case. Although the Rome Statute provides for the protection and consideration of the victim, it is the Rules and Procedures that provide for victim participation in person or via legal counsel.

The purpose of the victim participation via independent legal representation at the Extraordinary Chambers in the Court of Cambodia is to support the prosecution during the criminal proceedings, and to seek collective and moral reparations. The proceedings were to "be fair and adversarial and preserve a balance between the rights of the parties [which included victims]." (Internal Rule 21(1)(a)). The participation of the victims at the Extraordinary Chamber served an important function "in terms of assisting in unearthing the truth" (Khan & Rudy 2010) – for all.

Inquisitorial Criminal Justice Systems

Articles 13 and 14 of the European Union Victims' Rights Directive 2012/29/EU give victims a right to legal assistance, but it is only applicable where they have the status of parties to the criminal proceedings. Article 57 of the Council of Europe Convention on preventing and combating violence against women and domestic also states that victims have the right to legal assistance and free legal aid under conditions provided by the respective domestic law. As well, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse states that child victims are entitled to access legal assistance, including where they have status in criminal proceedings. These provisions correspond with European criminal justice systems that have traditionally granted victims substantial access to the mechanisms of justice. Although at least two

countries -Germany and France – have maintained in the main inquisitorial systems, most countries have shifted to hybrid systems that blend inquisitorial and adversarial approaches.

German law affords victims the status of ‘secondary (or accessory) prosecutor’ (Kury & Kilchling 2011). Victims, therefore, have similar trial participatory rights as other legal counsel, including access to evidentiary documentation, the ability to make submissions, the right to cross-examine the accused, and the entitlement to make a closing argument (Pizzi & Perron 1996; Braun 2014; Kirchengast 2017). They can also make a claim for restitution (Kirchengast 2017).

In France, the Code of Criminal Procedure requires a ‘judicial authority [ensure] that victims are informed and that their rights are respected throughout the criminal process’. It also authorises victims ‘under the conditions’ in the Code to initiate a prosecution, including having the accused summonsed. Victims have the right to be assisted by an ‘advocate’ (not necessarily legal counsel) during criminal proceedings. The advocate is entitled to have access to evidentiary documents and can make submissions. These procedural rights, however, are more extensive if the victim has applied for *partie civile* status. The *partie civile* has standing as a party before the court who is able to present evidence, being able to challenge court decisions, and to tender information to the court about their injuries and/or losses resulting from the crime (Hodgson 2005; Kirchengast 2017; see also *Perez v France*).

Hybrid Criminal Justice Systems

Belgium law affords victims similar status and rights (Symons 2014). Finland, Italy, Luxembourg, Portugal, and Spain also provide extensive independent legal presentation for victims (Symons 2014). Victims’ representatives can access evidence, make submissions, in some circumstances examine witnesses (including cross-examining the accused), apply for restitution and comment on sentence (Bacik, Maunsell & Gogan 1996; Symons 2014).

The Swedish criminal justice system blends an adversarial approach with an inquisitorial approach. The law distinguishes three types of victims. The ‘aggrieved person’ who seeks formal standing becomes an ‘aggrieved party’ and may apply to the court to become an ‘auxiliary prosecutor’. An aggrieved party may make submissions and question witnesses. If the state prosecutor declines to prosecute, the aggrieved party may commence a private prosecution with the assistance of private counsel. The *Code of Judicial Procedure* also provides for publicly funded advisor, who may be legal counsel. The trial features elements of the inquisitorial and adversarial systems but the engagement of victims is rooted in the traditions of the inquisitorial system.

Reforms have also been made in Austria. Like ‘common law - adversarial’ English criminal justice, the victim was ‘re-directed’ from criminal to civil procedure. Reform, however, re-introduced the victim as a ‘participant’ in criminal proceedings. Since 2006, persons who are victims of violence (including serious threat), victims of sexual assault, stalking victims and family members (parents, spouses, domestic partners, children, grandchildren, siblings) of a person killed as the result of an offence, as well as other kin (nieces/nephews, cousins) who witnessed the offence, are eligible to claim assistance in court proceedings (*Code of Criminal Procedure*). In addition to psychological assistance, these victims can ask for ‘legal assistance’, (i.e., legal advice and representation in court by lawyers). The legal assistance supports, advises and substitutes for the victim who may participate ‘actively’ in investigations and criminal proceedings. In some circumstances, if the prosecutor ‘drops the case’ the victim has the right to apply to continue with the prosecution as a subsidiary prosecutor, as well as the right to appeal passages in ‘court verdicts’ that refer to him/her. Irrespective of the outcome of the criminal proceedings, for victims’ legal assistance is usually free of charge.

In the Netherlands, victims of a serious criminal offence and their next of kin have the right to be treated with respect, to be given the assistance of an interpreter and/or lawyer. In certain cases, victims of serious offences can also exercise the right to address the court. (*Victims' Status (Legal Proceedings) Act*)

In Ireland, the *Criminal Justice (Victims of Crime) Act 2017* puts the European laws regarding victims' rights into Irish law. The Irish Legal Aid Board provides legal aid (i.e., representation in court) to victims in certain cases of sexual assault. Legal advice is available to a victim in a prosecution of such cases who want advice about the matter, and this assistance is free. Legal aid is also available to a victim of certain sex offences¹ where his or her prior sexual history is being raised by the accused, or his or her defence counsel. This assistance is also free.

Adversarial Criminal Justice Systems

Victims' interests have not been historically prioritised in adversarial criminal justice systems. As Doak (2005) expounds,

Although many victims may feel as though they are 'owed' a right to exercise a voice in decision-making processes, such as prosecution, reparation and sentencing, the criminal justice system places such rights or interests in a firmly subservient position to the collective interests of society in prosecuting the crime and imposing a denunciatory punishment (Doak, 2005: 299–300)

Doak's explanation is echoed by Gillen (2018),

The main principled argument against according [victims] the rights to independent legal representation during the criminal trial is that it is difficult to see how such a scheme can fit easily into the adversarial system in which, in a criminal trial, there are only two parties: the prosecution representing the public interest in the name of the Crown on whose behalf the proceedings are brought, and the accused (Gillen, 2018: 126).

Almost a decade before the Gillen Review, the Stern Review (2010) urged further exploration of the potential benefits of independent legal representation to support victims during the trial process. Aptly, the Stern Review commented, "it seemed to us that the contribution they made to the victim's experience was an important one." (Stern 2010, p.98)

Despite a raft of law reform, policy measures and procedural changes intended to improve the experience of victims and integrate their interests in recent years, victims still are dismayed when they discover that the prosecutor does not represent them (Hunter, Jacobsen & Kirby 2013). The Commissioner for Victims and Witnesses in England and Wales reported that victims were outraged that were mere witnesses in their own case and that in contrast to the accused person, they did not have their own legal representation (Payne 2009).

Lord Styne in *Attorney General's Reference* (No. 3 of 1999) HL 14 December 2000 recognised that a modern criminal justice system should balance the accused's interests, the state's interests and the victims' interests. She described this as a triangulation of interests. She did not go as far as to hold that victims should be entitled to independent legal representation. Doak (2008, p.147), however, suggests that while "a victims' right to counsel would sit very uncomfortably within the adversarial framework, it may, conceivably, not be so incompatible that it may not function at all".

¹ Rape, aggravated sexual assault, aiding, abetting, counselling and procuring aggravated sexual assault, aiding, abetting, counselling or procuring attempted aggravated sexual assault, incitement to aggravated sexual assault, or conspiring to commit any of the foregoing offence.

Likewise, Killean (2021, p1) argues that the “adversarial process does not pose an insurmountable barrier to legal representation”, which, as this chapter shows, is not unprecedented (see also Pizzi 1999).

United States – Federal

The US Federal *Crime Victims’ Rights Act* 2004 provides ten rights afforded to victims of federal crimes, including the right to be heard during a criminal court proceeding involving release (e.g., bail), plea (e.g., charge bargain), sentencing, or parole application (section 3771). A victim, therefore, appears to have a right to be heard before a decision affecting their rights is made (i.e., the right to be consulted, or hearing rule) and the reciprocal obligation to consult before deciding about the outcome, such as a plea bargain (i.e., the no bias rule). This duty to accord procedural fairness requires the decision-maker (e.g., the prosecutor) to give a victim a reasonable opportunity to comment in the circumstances, which might not require a formal hearing of the kind that occurs in a court; however, a court can hear an application for relief when a victim complains they have not been accorded procedural fairness. This right is not an infringement on the state’s “independent prosecutorial discretion” (see in re *Dean*, 527 F.3d 391 (5th Cir. 2008)). Furthermore, victims of certain offences (i.e., violence, including sexual assault) have a right to make an ‘impact statement’ at sentencing. Additionally, these rights can be enforced by independent legal representation via a motion of relief or *writ of mandamus*. Thus, counsel for victims can be critical to the enforcement of victims’ rights (National Crime Victim Law Institute 2023a) – in particular, to ensure procedural fairness.

In 2006, in *Kenna v. U.S. District Court for C.D. Cal.*, the United States Federal Court in the Ninth Circuit, recognised “[t]he criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard. The Crime Victims’ Rights Act sought to change this by making victims independent participants in the criminal justice process.” Two decades later, the National Crime Victim Law Institute (2022) reported that, contrary to the law, too many victims can still struggle to be heard.

One of the reasons for that struggle is prohibitive legal fees. To alleviate this barrier, the US Office for Victims of Crime sponsors legal clinics, in 2023 supported by a financial grant the Equal Justice Works’ Crime Victims’ Advocacy Program (CVAP). This programme is staffed by a cohort of 21 Attorney Fellows based at host organizations across the USA “to increase access to legal services for crime victims and, particularly, for victims who identify as Black, Indigenous, and People of Color”. (National Crime Victim Law Institute 2023b)

Another barrier is the somewhat divided opinions among courts on the ambit of the right to confer. In re *Wild*, 994 F.3d 1244, 1327 (11th Cir. 2021), the majority [rewrote],

“the CVRA to add a blanket post-indictment limitation and [read] out of the statute any ability for crime victims to judicially enforce their conferral rights outside of a preexisting criminal proceeding.”

Conversely, Hull J (dissenting (In re *Wild*, 955 F.3d 1196 (11th Cir. 2020)) held that the majority were incorrect “to leave the victims “emptyhanded”. Hull J observed,

“Given the undisputed facts that the U.S. Attorney’s Office completed its investigation, drafted a 53-page indictment, and negotiated for days with Epstein’s defense team, the Office egregiously violated federal law and the victims’ rights by (1) not conferring one minute with them (or their counsel) before striking the final [deal]; (2) intentionally and unfairly concealing the [deal] from the victims, as well as how the upcoming State Court plea

hearing would directly affect them, and (3) affirmatively misrepresenting the status of the case to the victims after the [deal] was executed.”

A third barrier concerns the writ of mandamus. Courts have determined that a court must find three requirements before a writ will issue,

“(1) the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires; (2) the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable; and (3) even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.” (See *Cheney v. United States District Court for the District of Columbia*, U.S., 124 S.Ct. 2576, 2587, 159 L.Ed.2d 459 (2004); *Will v. United States*, 389 U.S. 90, 95, 88 S.Ct. 269, 274, 19 L.Ed.2d 305 (1967))

Mindful of these requirements, courts have granted the writ on occasions. In re *W.R. Huff Asset Management Co.* 409 F.3d 555 (2d Cir. 2005) the Second Circuit Court applied the “plain language test” then concluded that the US Congress had “chosen [the mandamus remedy] as a mechanism by which a crime victim may appeal” a trial court’s denial of relief under the *Crime Victims’ Rights Act* 2004. Moreover, a *Crime Victims’ Rights Act* mandamus petitioner “need not overcome the hurdles” associated with a traditional mandamus proceeding. Likewise, the Ninth Circuit Court (see *Kenna v. United States District Court for the Central District of California* 435 F.3d 1011 (9th Cir. 2006) @ 1017 stated that the traditional mandamus requirements were not required because the *Crime Victims’ Rights Act*,

“... contemplates active review of orders denying victims’ rights claims even in routine cases. ... The [mandamus provisions create] a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute.”

Contrary, in re *Antrobus* (0519 F.3d 1123, 1125 (10th Cir. 2008) a 1124-25) the 10th Circuit Court commented,

“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.”

Hence, after applying the “plain English test”, the Court applied the “traditional” mandamus requirements. Likewise, in *Dean* 527 F.3d 391 (5th Cir. 2008), the 5th Circuit Court applied the traditional requirements. So divergent were the courts’ opinions that Tobolowsky (2015) has described the status of the law as the ‘mandamus muddle’, that could be resolved by legislative amendment if the US Congress had the will. Until such amendment is made, or the issue is resolved before the United States Supreme Court, “courts will likely continue to construe the timing of the conferral right differently” (Cook 2021, p568) while also independent legal representatives continue to petition for the enforcement of victims’ rights.

Japan

The Japanese criminal justice system operates on adversarial principles but without juries as ‘tribunals of fact’. In 2009, Japan adapted the German law giving victims status as a co-accuser in serious criminal cases (Matsui 2020). As well, the Japanese state funds the victim’s lawyer if he/she cannot afford the legal fees. These reforms are attributed to the lobbying of a defence lawyer whose

family and firsthand experiences revealed to him the ordeals victims face in a system too heavily weight against them.

Ireland

The Gillen Review (2019) in Northern Ireland examined the question of whether the adversarial court processes of that country ought to provide publicly funded legal representation for victims of serious sexual offences. For many victims, Gillen (2018, pp.127-28) observed in a preliminary report, “the absence of a legally trained advocate acting on their behalf is both shocking and upsetting. Complainants are often left feeling vulnerable and exposed, merely seen as ‘collateral damage’ in a process to which they are not a party and have no independent voice.” He continued, “The adversarial focus that underpins cross-examination at trial provides a risk of re-traumatisation for complainants. The use of advocates who are legally trained means that complainants are likely to see less use of the myths and misconceptions that may be invoked currently by defence teams. These are damaging on many levels. (Gillen, 2018: 127–128).

Since the Gillen Review (2019), Northern Ireland has introduced a Sex Offences Legal Officers programme that is cost free for victims of serious sex offences. These legal officers may provide advice before a victim reports the offence, and during proceedings, may make submissions regarding disclosure of medical records and sexual history (for a discussion on pros and cons of this programme see Iliadis, Smith & Doak 2021).

Scotland

In Scotland, to avoid unnecessary intrusions on the privacy and dignity of victims of sex offences there are prohibitions in relation to counselling and medical records, and physical property (e.g., mobile phone). The Scottish Appellate High Court Justiciary considered the existing law in *RR v Her Majesty's Advocate & LV* [2021] HCJAC 21. The Court acknowledged that victims of crime have a right “to respect for private and family life”. The Court held, “In the absence of statutory intervention, the system of criminal prosecution remains an adversarial one between the Crown and the accused. The [victim’s] status is still that of a witness to the facts libelled.” For this and other reasons given, the Court found, “it is the duty of the Crown to ascertain a [a sex offence victim’s] position in relation to a section 275 application [i.e., to elicit evidence of the victim’s bad character or sexual history] and to present that position to the court, irrespective of the Crown’s attitude to it and/or the application.” Thus, until the right to legal representation becomes the law, victims of sex offences must rely on the prosecutor to voice their views – a situation that has proven unsatisfactory (see, for example, Raitt 2010).

Since then, the First Minister announced in March 2023 that her government would introduce a bill that, among other reforms, would provide for free, independent legal representation for victims of sex offences (Scottish Government 2023). Victims would, therefore, counsel when courts are hearing applications (mostly made by the accused) to lead evidence of their sexual history in court or so-called ‘bad character’. The reform follows a recommendation made in a cross-justice review on improving the management of sexual offences. The review emphasised the importance of victims being provided with automatic independent legal representation to better protect their rights.

Victims’ right to independent legal representation in India

There have been many reforms to victim-centred laws in India (Pradeep 2021), but it has often been the criminal courts that have driven change. For example, in the case of *Delhi Domestic Working Women’s Forum v Union of India* 1995 SCC (1) 14 the Court gave specific guidelines on assisting victims of sexual assault access justice. The Court referred to *Modern Legal Studies Rape and the*

Legal Process by Jennifer Temkin (1987), and specifically cited Temkin's assertion that "[c]hanges in the substantive law might also be helpful in producing new ways of thinking about [sexual assault]". Acknowledging the importance of a victim-centric approach, the Court held it is necessary victims of "sexual assault cases [are] provided with legal representation". The Court continued, "Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her." In addition, the Court recommended that a list of legal advocates willing to assist victims of sexual assault should be kept at police stations; and that the police should ask a court to appoint a legal advocate, which should happen expediently, so as not to further burden the victim.

In Indian law, the victims' right to independent legal representation is found in sections 301 and 302 Criminal Procedure Code, which govern the conduct of criminal prosecutions before all courts. Section 301 provides for legal representation for the 'aggrieved person' (i.e., the victim) in a criminal case in any criminal court. The victim's legal representative, however, is required to act on the directions of the Public Prosecutor or Assistant Prosecutor who has the responsibility of conducting the prosecution. There is a further limitation because the victim's legal representative and may "submit written arguments after the evidence is closed in the case" only with the permission of the Court. Hence, a victim cannot initiate a criminal prosecution, introduce evidence or cross examine witnesses. Section 302 provides for an exception in cases before the Magistrates Court. The section authorises a magistrate who is hearing a case to "permit the prosecution to be conducted by any person other than a police officer below the rank of inspector" to conduct the prosecution personally or by a legal representative. Thus, the victim is conceived as a 'third party' in criminal proceedings before a magistrate.

In *J.K. International v. State (Govt. of NCT of Delhi) & Ors.* [(2001) 3 SCC 462], the Supreme Court considered sections 301 and 302. The Court held that the "scheme envisaged in the Code of Criminal procedure" does not preclude the victim (in person or through a legal representative) from "ventilating" their grievance, even if the police conducted the investigation and laid the charge, or the Public Prosecutor has authority over the conduct of the prosecution. ... a private person who is aggrieved by the offence involved in the case is not altogether debarred from participating in the trial." Notable also are the comments of the Supreme Court in *Dhariwal Industries Ltd. v. Kishore Wadhvani* [(2016) 10 SCC 378] that it would be open to a magistrate to consider a victim's request to prosecute criminal cases before the Magistrates Court. Moreover, such permission should be granted if it "serves the ends of justice". The Supreme Court, however, pointed out that whenever a public prosecutor was conducting the prosecution, the victim (or their legal representative) should not be permitted to undermine the public prosecutor's role (see also *Shiv Kumar vs Hukam Chand And Anr* (1999) SC CR R 789), which Hemant Gupta J said is "to assist the Court to do justice rather than to be vindictive and take side with any of the parties" (*Amir Hamza Shaikh & Ors. v. State of Maharashtra & Anr.* [(2019) 8 SCC 387]).

The role of a victim's legal representative has been explored in other cases. Whether a victim's legal representative, for instance, should be given a free and independent hand to conduct prosecution arose in *Amir Hamza Shaikh & Ors. v. State of Maharashtra & Anr.* [(2019) 8 SCC 387]. The Supreme Court observed,

"The rights of victims, and indeed victimology, is an evolving jurisprudence and it is more than appropriate to move forward in a positive direction, rather than stand still or worse, take a step backward. A voice has been given to victims of crime by Parliament and the judiciary

and that voice needs to be heard, and if not already heard, it needs to be raised to a higher decibel so that it is clearly heard.”

In reaching its conclusion, the Court also noted,

“In *Mallikarjun Kodagali*, this Court approved the Justice Malimath Committee, wherein the victim’s right to participate in the criminal proceedings which includes right to be impleaded, right to know, right to be heard and right to assist the court in the pursuit of truth had been recognised.

The Court held,

“... though the Magistrate is not bound to grant permission at the mere asking but the victim has a right to assist the Court in a trial before the Magistrate. The Magistrate may consider as to whether the victim is in a position to assist the Court and as to whether the trial does not involve such complexities which cannot be handled by the victim. On satisfaction of such facts, the Magistrate would be within its jurisdiction to grant of permission to the victim to take over the inquiry of the pendency before the Magistrate.”

To what extent a victim’s legal representative can participate at a criminal trial was considered by the Supreme Court in *Rekha Murarka v. State of West Bengal & Anr.* [(2020) 2 SCC 474]. The Supreme Court’s decision rested on the word “assist” (see section 24(8) Criminal Procedure Code), which the Court determined Parliament intended to mean a victim’s legal representative role was to support the prosecutor rather than be a co-prosecutor. A legal representative can suggest questions of cross-examination to the Public Prosecutor but cannot directly examine or cross-examine witnesses. Furthermore, an independent legal representative could also bring victim’s questions to the court’s attention then the court might invoke its powers in relation to criminal procedure and evidence and put the questions to a witness.

Section 372 of the Code of Criminal Procedure allows victims who are dissatisfied with a judgment or order to seek review by a higher court. Pursuant to this section, only the victim has a right of appeal (see *State of Karnataka v. Malleshnaika*, 5 September, 2023). The section acknowledges the importance for victims of judicial review to ensure access to justice (Shekhar & Ranjani 2023). Victims have recourse if they believe there are errors or injustices in a lower court’s decision. This section indicates victims’ interests and the state’s interests can operate independent of each other without jeopardising the accused’s interests.

In summary, the law provides victims with participatory rights, but these rights have been shaped through the criminal courts. Court rulings have, on the one hand, acknowledged victims’ rights to participate but, on the other hand, confined these rights. Victims are not co-prosecutors. When their interests’ conflict with the Public Prosecutors, the Public Prosecutor’s interests will prevail. Victims can initiate prosecutions in the Magistrates Court but not in any court where the Public Prosecutor is in control of prosecutions. Victims have no right to cross-examine witnesses but can avail themselves of other avenues to pose their questions. Various courts have justified their stances as necessary to ensure that victims’ rights do not unduly compromise accused persons’ rights, and to mitigate the risk that public justice should become *vindictive justice* – both issues that Professor Chockalingham has consistently put forth as paramount, though he also asserts that a better balance than currently exists, can be struck.

Victims' right to independent legal representation in Australia

Australia on colonisation inherited the British common law and the adversarial criminal justice system. Traditionally, therefore Australia's domestic law paid little attention to crime victims (Kirchengast 2011). Since the 1980s, however, there has been a greater focus on victims' rights and their needs, but the implementation of the state and territory based instruments has been patchy, so many victims still do not have their rights fulfilled (O'Connell 2020, 2021).

In 2007, Cummins J observed that a modern criminal justice system should ensure a "fairer balance between the rights of offenders and the rights of victims" (*DPP v Dupas* [2007] VSC 305). Later as the head of the Victorian Law Commission, Cummins J recommended that victims should be acknowledged and treated as genuine participants in the criminal justice system. In a report on victims and criminal justice, the Law Commission noted the progress made to achieve this in South Australia.

Prior to the election in March 2006, the Labor Government in South Australia declared that if re-elected it would introduce law to create a Commissioner for Victims' Rights. The Government did not specify the commissioner's functions, but after being re-elected the Attorney-General introduced amendments to the Victims of Crime Act 2001 that listed the commissioner's functions and authorities. These amendments were enacted and came into operation in July 2018.

Controversially, the commissioner can, in person or through legal counsel, appear in criminal proceedings as provided in the Victims of Crime Act or another Act. A further amendment provided for the victim to approve a representative to exercise his or her rights, and that representative may be the commissioner or legal counsel selected by the commissioner. These laws, coupled with other state laws, have led to victims being represented throughout the criminal justice process.

The first Commissioner for Victims' Rights (O'Connell 2012, 2017, 2020) asserted that independent counsel is warranted out of procedural fairness. He claimed victims should not be bystanders in a system that would collapse without their cooperation. Table 1 presents the distinct stages in the criminal justice process in South Australia, and the issues for which the Commissioner for Victims' Rights engaged legal representatives for victims. Overwhelmingly, feedback from the counsel (who were prominent defence counsel) was positive. None declared any undue infringement of the rights of accused persons. Several reported they gained a better insight into victims' interests, which they valued. Most observed a notable change in prosecutors and defence counsel attitudes towards victims. One lawyer said he had had strong reservations but would now be a strong advocate; and another said lawyers for victims held prosecutors to account and made their decisions more transparent. Overall, most lawyers who had represented victims, accepted the reform as necessarily modernising the adversarial criminal trial consistent with changed public standards.

Victims also reported 'remarkable' changes in how they were treated by prosecutors and others; and importantly, many felt their voices were heard because they had 'their lawyers'. Some judicial officers embraced the 'reform'. In *Steele's case*, for instance, Gray J in the Supreme Court ruled that victims' families were interested persons entitled to be heard on applications to revoke or vary court orders on the detention or conditions of release of mentally incompetent offenders.

Iliadis (2020) studied the role and functions of the Commissioner for Victims' Rights in South Australia, which also cover the commissioner's engagement with independent legal representation for victims. She noted, "Police officers, prosecutors, magistrates and judges, and defence counsel, despite initial wariness, and even opposition, have recognised the potential to improve the administration of justice by having a 'third voice'." (p.120) Most of the respondents in her study said the commissioner's interventions in person and through legal counsel had not undermined the

adversarial process. Though she noted the advantages to those victims who had received funded legal representation, she also pointed to ways the commissioner’s limited budget for legal services restrained interventions through counsel. She observed that the commissioner funding cases ‘ad hoc’ and not being able to offer funded counsel to all victims, risked creating a ‘hierarchy’ of victims. Notwithstanding, Iliadis’ study (2020) favours O’Connell’s (2017, 2020, 2021, 2023) assertions that the inroads made are *prima facie* significant in facilitating a better balance, albeit not a complete balance, of the competing *triangulation of interests*. Kirchengast et al (2019) concluded,

South Australia’s experience rejects the notion that victims ought to be relegated as witnesses for the prosecution and instead suggests a significant step toward victims gaining more comprehensive participatory rights in that state’s criminal justice system. (p19)

Two Australian states – Queensland and New South Wales – already have law that gives victims of sexual assault the right to be legally represented when challenging defence applications for the disclosure of their counselling notes and other confidential therapeutic records. These laws, however, do not extend to legal representation during the criminal trial. Though the impact of these laws victims has not been adequately evaluated, Braun (2014) suggests they make the process less harmful for victims.

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Table 1 – Stages in Criminal Justice Process – Independent Legal Representation

- ▶ **Charge/Plea Bargaining**
 - ▶ Withdrawal of charge
 - ▶ Variation of charge
 - ▶ **Criminal Proceedings**
 - ▶ Stay of Proceedings
 - ▶ Suppression Order
 - ▶ Protected Communications
 - ▶ **Sentencing**
 - ▶ Victim Impact Statements
 - ▶ Mentally Incompetent Offenders
 - ▶ **Post-proceedings / sentence**
 - ▶ Revocation or Variation of ‘Licence’ [Mental Incompetence]
 - ▶ Revocation of Anti-Violence Order [Domestic Violence]

Source: Commissioner for Victims’ Rights (SA) (2008-2018) *Legal Funding*. File Nos. 07/1061; 08/0311; 14/0310; 16/0438; 17/0768 (Individual files confidential)

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In addition, there are three pilot programmes offering specialised and trauma-informed legal services for victims of sexual assault. In Victoria, Legal Aid, Djirra and the Women’s Legal Service

collaborated to provide a state-wide Victims Legal Service that offers legal information for victims of sexual assault through an existing Helpline, and targeted advice and case work for victims seeking to protect confidential communications (which in some cases has led to victims being represented in court). This pilot also provides tailored support for Aboriginal victims to report sexual assault to police. In Western Australia, the Women's Legal Service, Aboriginal Family Legal Services, and Ruah Legal Services collaborated to provide state-wide, integrated, specialised and trauma informed legal services for victims, at known points of victim disengagement and withdrawal from the legal process. And, in the Australian Capital Territory, the Women's Legal Centre and Victim Support ACT established the ACT Sexual Assault Legal Service to provide legal assistance (including legal representation) to support victims to engage with the criminal justice system. The pilot also offers 'wrap-around services' for victims, including financial assistance, counselling, and specialist support. The over-arching aim of the pilots is to identify ways "to provide legal services for sexual violence victims and survivors that do not add to their trauma" (Dreyfus & Rishworth 2023). Although these pilot programmes are a positive development, anecdote indicates that they are under-funded, and there is little funding allocated for a empirically sound evaluation.

Notwithstanding the ongoing pilots, *With You We Can* is among those who continue to campaign for victims of sex offences to be assisted by independent legal representation throughout the criminal justice system. The non-government organisation is calling on governments to fund legal representation to enhance victims' treatment in the legal process and reduce, even prevent, re-traumatisation. Although this would be an important step in the right direction, and one that should be taken, it would leave victims of other offences behind.

In 2016, the Victorian Law Reform Commission opposed permitting victims to be independently represented because, the Commission commented, the police and prosecutors are obliged to keep victims informed about the investigation and prosecution respectively, and introducing independent legal representation for victims could result in "dual representation" (see also on dual representation for the victim Kirchengast et al., 2019). Iliadis and Braun (2021), however, assert that "this fails to recognise victims have legitimate interests that might compete with the interests of the prosecution, who represent the public interest". Contrary to the Victorian Law Reform Commission's view, the Victoria Royal Commission into Family Violence (2016) recommended that all Magistrates Courts and specialist family violence division courts should be equipped with "facilities for access to specialist family violence service providers and legal representation for applicants and respondents". Iliadis and her colleagues (2021) pointed out that the Royal Commission, however, fully enunciate its recommendation but it did identify independent legal representation as an "imperative to make the court experience safer and more accessible for [intimate partner violence] victims". Furthermore, the Royal Commission (2016) suggested that independent legal representation for victims during contested proceedings on family violence protection orders would serve to "alleviate the burden" victims experienced.

Benefits of independent legal representation

Independent legal representation for crime victims offers several crucial benefits, ensuring their rights and well-being throughout the criminal justice process. Several studies have found that victims' satisfaction with the criminal justice system also improves. Alternatively, fear of re-traumatisation can lead to a decrease in the number of victims willing to report crime and fulfill their roles and responsibilities as a witness. Such disengagement is detrimental to the criminal justice system. As Karmen (1994) suggested, the criminal justice system would collapse without the cooperation of victims.

Experiences of trauma can be a barrier to effective victim participation. These experiences can be exacerbated by the criminal trial process, for instance, victims often face aggressive and inappropriate questioning during trials (Symons 2014; Skinner & Smith 2021). In a preliminary report, for example, the Gillen review (2018, p.127), commented,

“Research suggests that providing legal representation to complainants to support them through the criminal justice process can be effective at reducing secondary trauma, reducing attrition and thus may improve low conviction rates. It is the most effective way of supporting complainants during trials.”

In various countries, independent legal representatives provide support, aid, and advice that prevent trauma-inducing experiences. Research confirms that the presence of a victim’s lawyer has “a highly significant effect on victims’ level of confidence when giving evidence and meant that the hostility rating for the defence lawyer was much lower” (Backik, Maunsell & Gogan 1998, p.17-18).

Most victims are lacking legal literacy, so legal representatives can guide victims through process and procedures to ensure, their privacy rights, as well as other rights, are respected and fulfilled. For example, in Canada victims of sexual assault can have independent legal representation to advise them on applications for access to medical and therapy records by invoking their own privacy and equality rights. According to Canadian Crown Counsel, “[in regard to disclosure of medical records for victims of sexual assault] everyone takes it more seriously [when there is independent counsel for the victim]” (Mohr 2002, p.16-17).

Between 2018 and 2020, England ran a Sexual Violence Complainants’ Advocate scheme. This engaged lawyers to provide legal advice and support to victims of sexual violence in Northumbria (a mainly rural county). In their final report, Smith and Daly (2023) identified “a clear legal basis for providing (limited) legal advocacy” to rape victims. The researchers found that victims benefitted from more considered and relevant evidence requests, and that there were over time fewer requests. They also found that the victims who were able to use the scheme had positive experiences and had an increased sense of confidence in the criminal justice process. Furthermore, all participants (i.e., police, Crown Prosecution Services, participating lawyers, support workers and other stakeholders) agreed the scheme had no impact on the accused’s right to a fair trial.

Hence, independent legal representation allows victims to actively participate, ensuring their voices are heard and their interests protected (O’Connell 2017, 2020, 2021). However, victims’ independent legal representation, not only benefits them but also supports the state’s prosecution efforts and leads to better substantive justice outcomes (O’Connell 2021). There is, as the UNODC noted in reference to the rights and needs of victims of human trafficking, “a clear relationship between the victims’ access to legal representation and successful prosecution outcomes.”

Conclusion

Professor Chockalingham said, “Justice is a delicate and complicated task.” (2016, p.3) Crime victims’ access to justice is not a mere aspiration; it is a fundamental right. By addressing barriers, providing support, and promoting legal literacy, societies can bridge the gap between victims and justice. Empowering victims contributes to a fairer and more compassionate legal system that, given the importance of victims in the administration of justice, they deserve.

Despite the dramatic expansion of victims’ rights in international and domestic laws, victims still feel alienated and ignored, as well as revictimised by the criminal justice process. This chapter proposed independent legal representation as a remedy. Independent legal representation for victims is an

existing concept in countries with traditionally inquisitorial justice systems and an evolving concept in international and adversarial justice systems.

Independent legal representation would ensure victims are fully informed about their rights, role and responsibilities in the criminal justice system, ensure they are meaningfully engaged in decision-making that affects them, and advance their participatory rights. Independent legal representatives would not have the constraints or conflicts that oblige prosecutors to be objective and impartial, but rather they would afford greater support for victims' interests throughout the criminal justice process, including pre-trial and during trial.

Although the jurisdictional examples demonstrate the independent legal representation is possible in an adversarial criminal justice system, they also give rise to a crucial question, which is funding for that representation. The Commissioner for Victims' Rights provided funds 'ad hoc' to enforce victims' procedural rights and ensure their voices were heard. If victims are to gain the right to independent legal representation, this issue must be resolved. International guidelines recommend that victims be given access to legal aid, which should be considered.

Independent legal representation for crime victims is not a luxury; it is a necessity that brings benefits as shown by jurisdictions with legal systems that have integrated victims' interests, which can serve as models for others. Learning from successful approaches is essential. Empowering victims, respecting their rights, and providing compassionate support, a more just and inclusive criminal justice system is possible — that is a system where victims are not 'by standers', relegated to witnesses for the state, but rather active participants in seeking equal and equitable access to justice for all.

The jurisdictional examples as well as empirically sound, though limited, research findings and anecdotal measures outlined will be welcomed by many victims, victim support workers and others urging reform. Notwithstanding, whether such reform in adversarial criminal justice systems is, at least in the 'eyes' of traditionalists, yet to be shown to be doctrinally and procedurally sound, especially for those presumed innocent but accused. This chapter, however, suggests this can be achieved without unduly impacting the rights of those presumed to be innocent.

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Universal Declaration on Human Rights (1948)

<https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf>

Regional instruments

Council of Europe Convention on preventing and combating violence against women and domestic

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

European Union Victims' Rights Directive 2012/29/EU

Domestic Instruments

Code of Criminal Procedure (Austria)

Code of Criminal Procedure (India)

Code of Judicial Procedure (Sweden)

Crime Victims' Rights Act 2004 (USA)

Criminal Justice (Victims of Crime) Act 2017 (Ireland)

Victims of Crime Act (South Australia) 2001

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