Chapter - II

HISTORICAL DEVELOPMENT, MEANING AND DEFINITION OF COMPENSATORY JURISPRUDENCE

I. Introduction

Historically, the Indian legal system can be divided into the ancient period, medieval period and the modern period. During the ancient period the Hindu law was dominated by religious principles mostly derived from Vedas, Smritis, Dharamsastra and texts of various law givers who interpreted the verses of the Vedas in the contemporary social conditions. Development of Hindu law over a period of time has shown continuity atleast in one respect that is the influence of religion. However, this influence was maximum in the ancient period and as we move from ancient period to medieval period and the modern period, the role of religion went on decreasing. The reason for this perhaps lies in the fact that during the medieval period the Hindu society was mostly influenced by non-Hindu cultures particularly the Muslim and Britisher's culture.

Welfare and development of human personalities are the ultimate ends of all organised society. The
recognition of individual rights as an inherent right of human being is essential for the development of human dignity and personality. Human beings are rational being. They by virtue of their human being possesses certain basic and inalienable right which are commonly known as human rights and compensation is one of such right. The human beings are beginning and end of all civilized society within the State and in the international society. Man lives in a State but with his people. The racial, religious, linguistic and cultural kinship of the individual with his people is natural and permanent. The legal and political bonds between individual and the State are artificial and transitory. State is merely an instrument to realize the needs and aspirations of the individual in the society.

The equality of all human beings and duty of each individual is to strive for the happiness of other individuals as also the equal right over food, water and other natural sources are incorporated in many of the declarations made in the Vedas. No individual can claim to be superior to or having more right than others. One of the basic duty of the king as incorporated in Rajdharma (constitutional law) of ancient India was to protect every individual in every respect and to ensure his happiness. Kautilya in the Arthashastra lay down that
the happiness of his subject lies in the happiness of the ruler in their welfare; whatever pleases him the ruler shall not consider as good but whatever pleases his subjects, the ruler shall consider as good. He was responsible for the well being of his subjects in all respect. Administration of Justice amongst his subjects was one of the foremost duty of the King.

To throw more light on the historical development of compensatory jurisprudence, the chapter has been further divided into three heads. An effort has been made to trace the development in each period.

II. Development of Compensatory Jurisprudence During Ancient Period

Under the Ancient Hindu Law, it is established beyond doubt that the Vedas constitute the earlier source of the laws which governs ancient society.¹ According to the sages, the Vedas is regarded as the first and foremost source of Dharma which are, therefore, frequently quoted especially in the Dharmasastra which generally follow the Vedas very closely and may, as a whole be regarded as the oldest source of Law.² The Smritis or Dharmasastras constitute

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² Ibid.
the second source of Hindu Law and with numerous commentaries of later which are helpful in the understanding of the *smritis*, they form the entire fabric upon which the Hindu system of jurisprudence was built. The Hindu law has a gradual growth varying from time to time according to the needs and exigencies of the society, whose conduct it was intended to regulate. Hindu jurists laid down 18 divisions of subject and treated the law under what are called 18 topics of litigation. These 18 topics are further sub-divided into 132 sub-divisions and included every possible form of legal relations that arose in Hindu society. The division which have direct bearing on the subject of the present study being debt, deposit, breach of contract, trespass, personal violence including assault, deceit, adultery, theft and dispute between owners of cattle and herdsmen. In all the above action at law, payment of damages and compensation among the recognized form of remedy was available to the injured party.

The King was under the *Dharma*. It was the duty of the King to punish those who deserve to be punished. In general, the Criminal Law laid much stress on the

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3 Ibid. at p. 2.
4 Id.
imposition of punishment rather than asking the offender to pay compensation. Manu said:

"A King who punishes those who do not deserve to be condemned and fails to punish those who deserve punishment, becomes infamous and is ultimately doomed to hell."\(^5\)

The Hindu Legal philosophy paid much importance to the imposition of punishment which could expiate the criminal of his sins. Manu in his Manusamriti observed that:

"Men who are guilty of crimes and who have been punished by the King, go to heaven becoming pure like those who performed meritorious deeds."\(^6\)

On the other hand, the ancient Hindu law givers had not rejected the concept of payment of Compensation to Victims. Dr. P. V. Kane has observed:

"It is however, remarkable that in as much it was conceived to be the duty of the King to protect the property of his people. If the King could not restore the stolen articles or recover their price for the owner by apprehending the thief, it was deemed to be his duty to pay the

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price to the owner out of his own treasury and in his return he could recover the same from the village officers who by reason of his negligence, were accountable from the thief's escape.\(^7\)

Thus, the idea of paying compensation to the victim for the loss suffered by him either from the offender or from the State treasury was in vogue during the ancient period. The crime used to be regarded as a breach of King's peace and thus, the duty came to lie upon the King that the King should select such punishment for the offender which satisfies the urge of revenge in the injured person, after the commission of the crime against him. The ancient jurists also suggested that to enable the victim to overcome the effects of crime, he must also be paid some compensation. The obligation to pay compensation for every kind of injury is recognized in the fullest extent and the evidence for it may be found in what has been said by contemporary jurists. Thus, the owner must be compensated for the killed household animals, felled trees, torn injured plants, expenses of treatment must be paid for wounded men or household animals, destroyed or injured walls, dike's houses must

be reconstructed and defiled roads shall be wiped clean. Accordingly, the contemporary jurists suggested the idea of paying compensation to the victim in all situations where loss was suffered by any individual. It can be seen from the following discussion that the distinction between different types of wrongs/crimes was not prevalent during ancient period. The King used to settle the issue of compensation in all matter in accordance with Raj Dharma.

In texts of Samriti of Katyayana, it has been found that it provided punishment for causing pain or loss of a limb and in addition to this, the victim was to be given expenses incurred by him in getting the injury cured and some solatium.8

Apradhadharamsutra, also lay down that slayer of Kshtriya should give 1000 cows for removing the enmity i.e. as compensation to the relatives and one bull in addition for expiration.9 The ancient Hindu law also provided for payment of compensation for the loss caused to the owner of the property by reason of an offence against the property.10 According to ancient text whoever caused, hurt to a domestic animal belonging to another, becomes liable to compensate the owner for the

8 Ibid.
9 Id.
loss suffered.\textsuperscript{11} In all the cases of hurting a limb, wounding or fetching blood, the assailant shall pay the expenses of perfect cure, on his failure, both full damages and a fine to the same amount to be paid.\textsuperscript{12} According to Manu:

\begin{quote}
"He who damages the goods of another, be it intentionally or unintentionally, shall give satisfaction to the (owner) and pay to the King a fine equal to the damages.\textsuperscript{13}\"
\end{quote}

Manu provides for direct reparation to the victim of the crime apart from payment of fine to the King (the State).\textsuperscript{14} According to Narada payment of damages and compensation were among the recognized forms of remedies available to the injured party.\textsuperscript{15} Narada recommended compensation to the victims by the offender in order to expiate his sin. Under the Hindu jurisprudence reference is made to the Smriti for prescribing corporal punishment and compensation to the victim or family members against theft, assault, battery, adultery, rape and manslaughter.\textsuperscript{16}

\begin{enumerate}
\item \textsuperscript{11} Id.
\item \textsuperscript{12} VIII, Manu Vol. 25 at p. 287, for more details see Sarkar, U. C., Epochs in Hindu Legal History, \textsuperscript{1\textsuperscript{st} ed.}, (1958), pp. 104-106.
\item \textsuperscript{13} Ibid; p.288.
\item \textsuperscript{14} See, Bakshi, P.M., Compensation to Victim of Crime, KULJ (1979), Vol. 5, p. 83.
\item \textsuperscript{15} See, supra note 1 at p. 2.
\item \textsuperscript{16} Ibid.
\end{enumerate}
In ancient Hindu law, Brihaspati has also laid down emphasis on the compensation and impose fine on the offender, the fine goes to the State which provides the compensation to the Victims. Brihaspati further says that:

"He who injures a limb, or divides it, or cuts it off, shall be compelled to pay the expenses of curing it, and who forcibly took an article in a quarrel restore) his plunder."\(^{17}\)

Kautilya has made an advancement in \textit{Manusmriti}, because, here the offender is given the additional punishment in cases where he was unable to pay compensation to the victim under some justified situations. \textit{Manusmriti}, takes into account a situation where criminal may not be in a position to compensate the victims due to certain reasons which will be acceptable. In '\textit{Arthashastra}', Kautilya anticipated many things which not only improves \textit{Manusmriti}, but many \textit{shlokas} are based on damage and restitution.\(^{18}\) If any person destroys the cloths, minor articles or such other things of another person, the offender is liable to pay the victim, the sum equal to that, which is destroyed by

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the offender and despite, either equal money to that which is damaged or in some cases double its amount has to be deposited with the King by way of penalty.

Kautilya further observed in his book that when a citizen suffers in the hands of a predator both the ruler and the community were supposed to rally to help the victim. Necessary funds were paid to those who have suffered owing to the violation of law. Yajnavalkya and Kautilya while discussing the importance of compensation said:

"Anybody who causes injury to some one as a result of assault or betray he is liable to defray the expenses incurred on the treatment and food of the injured victim. Further he should be awarded with punishment as visualized in the provision for the purpose."¹⁹

It is crystal clear from the above discussion that the jurists of ancient Hindu legal system took enough cognizance of the interest of the victims. They recognized the concept of compensatory jurisprudence and further stressed that justice will remain incomplete unless the victim got some monetary or proprietary help to overcome the consequences of the injury suffered by

him and that mere imposition of punishment upon the offender will not suffice. During Hindu period, the punishment of crime occupied a more prominent place rather than compensation for wrongs and the mere payment of compensation to the injured person, when injury inflicted was all serious in its character, was seldom regarded as sufficient to meet the ends of justice.\textsuperscript{20} Under certain circumstances, the wrongdoer was compelled to compensate the person aggrieved, but the compensation was to be generally levied in addition to and not in substitution of the penalty, which it was considered to be the duty of the King to impose.\textsuperscript{21} The King could \textit{sou-motto} take cognizance of many wrongs called, \textit{chalas, padas} and \textit{apradhas}, and it is clear that in such crimes as theft, assault, adultery, rape and manslaughter, the \textit{smriti} texts not only prescribed monetary compensation to the person wronged, but corporal punishment in the first instance and monetary compensation in the second.\textsuperscript{22}

From the stated observations, it becomes clear that with the passage of time the idea of providing punishment to the criminal gained precedence and the concept of paying compensation was pushed to the

\textsuperscript{20} See, supra note 1.
\textsuperscript{21} \textit{Ibid.}
\textsuperscript{22} See, supra note 5 at 264-66.
background. Many Indian jurists have also endorsed the similar view when they stated that ancient Indian law was strictly a criminal law as distinguished from the law of torts.

III. Development of Compensatory Jurisprudence During Medieval Period

Invasion by Muslims ends the golden period of Hindu philosophy of law. They adopted the Islamic system which was given by the Prophet Mohammad. The juristic system of Muslims had its origin in Arabia and has been developed by Arab jurists. The original source of Arabic law or usages and customs of the people and their laws which governed their society bear the distinct impress of their nomadic habits. It was Mohammad the great Prophet of God who begin to promulgate the principles of Islam and preached them not merely for the municipal governments of Arab but for the guidance of men's life generally. It must have been immense difficult to the Prophet to inculcate into the minds of such people, the ideas of right or wrong as adumbrated in his teachings. Subsequent to the death of Prophet, two schools of Mohammedan law known as Sunni and Shia came into existence, and former became in course of time into four different schools. But, so far as the
principles of law and jurisprudence are concerned, there doesn't appear to be much difference among these subdivision or even between the two original schools.23

Muslim jurists divided rights under two head, public and private. But chiefly distinguished the public right, or the right of God, from the private right, the right of man was that the enforcement of the public right was the duty of the State, while in the case of an infringement of a private right its enforcement is left to the option of the individual affected.24

The judicial system of Muslims was based on their religion Islam which may be described as reformist version of old Arabian practice. The Muslim followed the principle of equality for men and they had no faith in graded or sanctified inequality of caste system. Muslim religion places every man on an equality before God.25 The main idea of Muslim rule in India was its own self preservation and political domination over Hindus. In early days, no doubt the Muslim who came from Persia, Turkey and Afghanistan as invaders kept themselves aloof from the Indians, but in due course the old barriers were lifted and process of indianisation began.

23 See, supra note 1, p. 3.
24 Ibid.
which reached its climax during Mugal period. The Muslims adopted many habits, customs, manner and ways of Hindus and vice-versa.²⁶

The political theory of Muslims was governed by their religion - Islam. It was based on the teaching of Quran, the traditions of Prophet and precedents. The teaching lay down only the fundamental principles on which the Islamic policy was based. No well defined political institution was specifically created by the Quran.²⁷

The Muslim law basically consist of the Quran (Revelation, which contain the world of God), the Sunna (tradition, as the precepts and usages of the Prophet Mohammad), *Ijma* (the consensus of the jurists) and lastly the *Qiyas* (analogical deduction based on customs and justice, equality and good conscience).²⁸

In the late 10th and 11th century Mohammad of Gazni, a Muslim of Turkish race attacked India from north-west. Subsequently, led a series of raids on north-west India, plundered, destroyed the temples and each time returned with huge wealth. In 1191 and 1192 Mohd. Ghori attacked India and finally marched to Delhi and established a Muslim sultanate at Delhi conquering

²⁶ Ibid.
²⁷ Id.
most of the northern India. From 1206 to 1526 not less then 33 Turkish kings belonging to five dynasties occupied the throne of Delhi. In 1398, Timur Mongol, conquered, captured Delhi and ended the sultnat of Delhi. The sultnat was revived in the middle of 15th century. In 1526, a descendant of Tamur and Changhis Khan defeated Ibrahim Lodhi at Panipat and captured Delhi.

During the Muslim period, Islamic law or Shara was followed by all the Mughal emperors. The Shara was based on the principles enunciated by the Quran. Under the Muslim criminal law, which was mostly based on their religion, any violation of public rights was an offence against the State. Islam provides that the State belongs to god; therefore, it was the primary duty of any Muslim ruler to punish the criminals and maintain law and order. Offences against individuals were also punishable as they infringed private rights.

Three forms of punishments as recognized by the Muslim law, were – Hadd, Tazir and Qisas.

(a) Hadd provided a fixed punishment as laid down in Shara, the Islamic law, for crimes like theft, robbery, whoredom (Zina), apostasy (Ijtidad), defamation (Itteham-
e-Zina) and drunkenness (Shrub). It was equally applicable to Muslims and non-Muslims. The State was under a duty to prosecute all those persons who were guilty under ‘Hadd’. No compensation was granted under it.

(b) Tazir was another form of punishment which meant prohibition and it was applicable to all the crimes which were not classified under ‘Hadd’. It included crimes like counterfeiting coins, gambling, causing injury, minor theft, etc. Under ‘Tazir’, the courts exercised their discretion in awarding suitable punishment to the criminal. The courts were free to invent new methods of punishing the criminals e.g. cutting out the tongue, impalement, etc.\(^3^2\)

(c) ‘Qisas’ or a blood-fine was imposed in cases relating to homicide. It was a sort of blood-money paid by the man who killed another man if the murderer was convicted but not sentenced to death for his offence. Muslim jurists supported Qisas on the basis that the right of God’s creatures should prevail and only when the aggrieved party had expressed his desire, the State should intervene. The court exercised its discretion to compound the homicide cases. Qisas may be compared with the Weregild of the contemporary English period.

\(^3^2\) Id. also see Sarkar, U. P., *Epochs in Hindu Legal History*, (1958), pp. 229-230.
The State was authorized to punish the criminals for grave offences although the injured party might initiate his private claim to compensation or redress. From the above discussion it may be concluded that the idea of compensation to the victim was also in existence in Muslim period.

IV. Development of Compensatory Jurisprudence During British Period

At the end of 15th century some European nationals came to India as trading merchants. In 1498, Vasco De Gama, a Portuguese, discovered the passage of India round the Cape of Good Hope. He landed at Calicut on the Malabar Coast. During the second half of 16th century the western countries began to compete for trade with India. The Dutch were the first in the field and English followed them. On 31st December, 1600 Queen Elizabeth-I granted a Charter to Company which incorporated the London East Indian Company to trade into and from the East Indies. Thus, the company became the juristic person with exclusive privilege of trade with the East Indies. The same Charter further granted legislative power to the company to make by-laws, ordinances, etc., for the good governance of the

Ibid.
company and its servants and to punish offences against them by fine or imprisonment according to laws, statutes and customs of the land.\textsuperscript{34}

In 1609, James-I granted the fresh Charter to the company which continued its privileges in perpetuity, subject to the proviso that they could be withdrawn after three years notice. The company was also authorized to continue the enjoyment of all its privileges, powers and rights which were earlier granted by Queen Elizabeth.

Britishers came to India during the regime of Emperor Jahangir and settled at Surat in 1612. The Mughal Emperor granted the right of self-government by issuing a \textit{farman} (order) and this proved a turning point in the legal history of India as the English company secured various privileges from the Muslim Emperor.\textsuperscript{35}

It provided:

(i) That the disputes amongst the Company's servants will be regulated by their own tribunals.

(ii) That the English people will enjoy their own religion and laws in the administration of the Company.

\textsuperscript{34} Ibid, pp. 32-33.

\textsuperscript{35} Id.
(iii) That the local native authorities will settle such disputed cases in which Englishmen and Hindus or Muslims were the parties.

(iv) That the Mughal Governor or Kazi of the relevant place will protect the English people from all sorts of oppression and injury.\textsuperscript{36}

After the death of Emperor Aurangzeb in 1707, when the Mughal empire begun to disintegrate, the English company got an opportunity to lay down its foundation very strongly in England as well as in India.\textsuperscript{37} In India it was in possession of three factories and settlement at Bombay, Madras and Calcutta. Gradually, the company exercised wider authority at Bombay, Madras and Calcutta in the changing conditions.\textsuperscript{38}

Various Charters were granted to the company in order to administer the justice in civil and criminal matters, the company decided to adopt the existing Mughal pattern.\textsuperscript{39} However, Muslim law was subjected to several changes from time to time. During the end of 18th century an amendment was made in the institution of \textit{diya}. The relatives of the deceased were debarred from

\textsuperscript{36} Ibid; p. 34.
\textsuperscript{37} Ibid; p. 36.
\textsuperscript{38} Id.
\textsuperscript{39} Ibid; p. 55.
pardon the offender and the murderer was made to be tried by *Sadar Nizamat Adalats*.

In order to improve the law and order situation and punish the criminals severely Corn Wallis introduced vital reforms in 1790. He was very doubtful about the honesty of Muslim officers and therefore, as a matter of principle he decided not to give any important judicial administrative office of responsibility to any Indian.\(^4^0\)

He found that the Muslim criminal law was in many respect defective and some of its provisions were contrary to natural justice and in certain cases punishment prescribed was too cruel.\(^4^1\) Corn Wallis introduced very important reforms in Mohammaden criminal law and all *Nizamat Adalats* were instructed to decide cases according to the modified rules of Muslim law. It was laid down that while determining the punishment to be given for the crime of murder the intention of the party rather than the manner or instrument employed should be taken into consideration. The relatives of the murdered person were now deprived of their right to pardon the criminal. Imprisonment and hard labour for 14 years were substituted where the punishment prescribed was the

\(^{40}\) *Ibid*, at p. 149.

\(^{41}\) *Id.*
loss of two limbs and that of one limb respectively. The judicial reforms of Cornwallis were aimed at improving the criminal courts and criminal law. These reforms not only granted security to life and property of the people, but also improved the law and order situation in general.42

The situation remained unchanged till 1833 when a Charter was passed which appointed the First Law Commission in India. On the recommendations of the Law Commission various important enactments were made such as Indian Penal Code.43 This starts the codification of various statutes, which brought a drastic change in the concept of compensation to the victims.

V. Position after Independence

Before independence only the Criminal Procedure Code, 1898 and Workmen’s Compensation Act, 1923 were having the provisions for compensation. But after 1982, the Apex Court and various High Courts have started using the writ jurisdiction under Article 32 and Article 226 of the Constitution to pay compensation to the victim of crime. After the independence, India adopted its own Constitution and during the course of

42 Ibid., at 150.
43 See, Criminal Procedure Code, 1898; Indian Evidence Act, 1872, Transfer of Property Act, 1882, Indian Contract Act, 1872, Indian Penal Code, 1860, etc.
time many enactments have been made for the detailed provisions to provide compensation to the victims. A detailed discussion about the existing laws and their applicability will be made in the following chapters 3 and 4.

VI. Meaning and Definition of Compensation

The payment of damages and compensation were among the recognized forms of remedies available to the injured party, in addition to the punishment given to the wrong-doer. It is thus clear that the obligation to pay compensation for every kind of injury has been recognized to the fullest extent under the Indian legal system from ancient time to the modern period. The term ‘compensation’ has been used in a variety of manners to recover pecuniary benefits for loss of property or bodily injury suffered by a person from the hands of the wrongdoer. In other words the term compensation implies that which is necessary to restore an injured party to its original position and which compensates for loss or privation. More specifically, the term compensation implies something which is received by person from another in satisfaction of a claim forming a basis of legal action.
The term ‘Compensation’ is derived from the Latin word ‘Compensatio’ which means as thing given in recompense. In other words the word ‘compensation’ means amends for the loss sustained. In the legal context it applies primarily, to a transaction between unilateral transaction, purpose or undertaking.

*Encyclopedia Britannica* describes compensation as “*Something, typically money, awarded to someone as a recompense for loss, injury or suffering*”.\(^4^4\)

Further, Wahtrons Law Lexicon defines compensation as making things equivalent, satisfying or making amends, a reward for apprehension of criminals; also that equivalent in money which is paid to the owner and occupies of land taken or injuriously affected for public purposes and under the Act of Parliament.

The Oxford Dictionary\(^4^5\) signifies properly the word ‘compensation’ as is given in recompense, an equivalent rendered and that damages, on the other hand constitute the sum of money claimed or adjusted to be paid in compensation for injury for or loss sustained; the value judges or estimated in money of something lost or withheld. The word ‘compensation’ etymologically indicates the image of balancing one thing against

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another, the primary importance of the word 'compensation' is equivalence, and the secondary and more common is meant something obtained or something given as an equivalent. Thus it may be called the term 'compensation' is a more comprehensive term and the claim for compensation includes a claim for damages.\textsuperscript{46}

Further the Black's Law Dictionary,\textsuperscript{47} defines the word 'compensation' as, "an act which a Court order to be done, or money which a Court or other Tribunal orders to be paid, by a person whose acts or omissions have caused loss or injury to another, in order that thereby the person demnified may receive equal value for his loss, or be made whole in respect of his injury. Thus a bundle of facts is necessary to determine compensation."\textsuperscript{48}

Corpus Juris Secondum,\textsuperscript{49} with reference to injury or loss, 'Compensation' has been defined as:

"amends; an equivalent given for property taken or for an injury done to another, or an equivalent in money for loss sustained; reimbursement; remuneration for the injury directly and proximately caused by a breach of

\textsuperscript{46} Polavarapu Somarajyam v. A. P. Road Transport Corp., Hyderabad, AIR 1983 AP 407
\textsuperscript{48} Ibid.
contract or duty; remuneration or satisfaction for injury or damage of every description; that which is necessary to restore an injured party to its former position; that which compensates for loss or privation; that which makes good the lack or variation of something else; that which is received by one person from another in extinguishment of a claim forming the basis of a legal demand."  

In *State of Gujrat v. Shantilal*, the Supreme Court of India defined compensation as:

"anything given to make things equivalent, a thing given to make amends for loss, recompense, remuneration or pay".

While construing the word compensation the Supreme Court in *Lucknow Development Authority vs. M. K. Gupta*, pointed out that:

"The word ‘compensation’ is again of very wide connotation. It has not been defined in the Act. As per dictionary, it means compensating or being compensated; things given as recompense. In legal sense it may constitute actual loss or expected loss and may extend to physical,
mental or even emotional suffering, insult or injury or loss. Therefore, when the Commission has been vested with the jurisdiction to award value of goods or services and compensation it has to be construed widely enabling the commission to determine compensation for any loss or damage suffered by a consumer which in law is otherwise included in wide meaning of compensation. The provision enables a consumer to claim and empowers the Commission to redress any injustice done to him. Any other construction would defeat the very purpose of the Act. The Commission or the Forum in the Act is thus entitled to award not only value of the goods or services but also to compensate a consumer for injustice suffered by him. Public administration, no doubt involves a vast amount of administrative discretion which shields the action of administrative authority. But where it is found that exercise of discretion was malafide and the complainant is entitled to compensation for mental and physical harassment then the office can no more claim to be under protective cover. When a citizen seeks to recover compensation from a public
authority in respect of injuries suffered by him for capricious exercise of power and the National Commission finds it duly proved then it has a statutory obligation to award the same. It was never more necessary than today when even social obligations are regulated by grant of statutory powers. The test permissive form of grant are over. It is not comparative and implicit in the exercise of power that it should be for the sake of society. When the court directs payment of damages or compensation against the State the ultimate sufferer is the common man. It is the tax payers money which is paid for inaction of those who are intrusted under the Act to discharge their duties in accordance with law. It is, therefore, necessary that the Commission when it is satisfied that a complainant is entitled to compensation for harassment or mental agony or oppression, which finding of course, should be recorded carefully on material and convincing circumstances and not lightly then it should further direct the department concerned to pay the amount to the complainant from the public fund immediately but to recover the same from
those who are found responsible for such unpardonable behaviour by dividing it proportionately where there are more than one function arises.”

Article 9(5) of the International Covenant on Civil and Political Rights, states, “any one who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

Thus, the expression ‘compensation’ is not ordinarily used as an equivalent to damages, although compensation may often have to be measured by the same rules as damages in an action for a breach. The word ‘compensation’ signified that which is given in recompense, an equivalent rendered damages, on the other hand, constitute the same sum of money claimed or adjusted to be paid in compensation for loss or injury sustained the value estimated in money of something lost or withheld.

In the present legal system it is the duty of the State which is responsible for the protection of its citizens. Victims can hold the State liable for damages

and compensation when it fails to fulfill its obligation to them.55

VII. Concept of Compensatory Jurisprudence

Every violation and infringement of rights created in the injured party a right to recover compensation. This right is, therefore, called by the jurists as a sanctioning right which is of two kinds. The first is the ‘rights to exact and receive a pecuniary’ and the second is ‘right to exact and receive damages and other pecuniary compensation.’56 The second form of right is in present system most important and the relief which this form of right afford also is remedial in nature, i.e. the awarding of compensation to the party injured, whether the wrongdoer is punished by giving penal redress to the injured or simple compensation is given for breach of contract, in either case, the law simply awards the compensation to the sufferer.

VIII. Elements of Compensation

An analysis of the several elements of injury that may result from an act or omission, they fall under seven heads.\(^{57}\)

Firstly, 'the actual pecuniary loss directly sustained' e.g. the actual amount of money wrongfully withheld, the pecuniary value of the property wrongfully detained;

Secondly, 'the indirect pecuniary loss,' e.g. the loss of profile, loss of credit, loss of reputation, loss of business, etc.

Thirdly, 'the value of time' spent in establishing the right violated.

Fourthly, 'the actual expenses or costs of suit.'

Fifthly, 'the mental suffering' e.g. vexation, anxiety and worry.

Sixthly, 'the bodily suffering' produced by personal injuries, e.g. pain and the consequent illness.

Lastly, 'the sense of wrong or insult' felt by the sufferer on account of the act or omission being done with a malicious and deliberate intention.\(^{58}\)

In estimating the amount of compensation that may be awarded to the injured in case of a wrong, the

\(^{57}\) See, supra note 1, at p. 13.

\(^{58}\) Ibid.
pecuniary loss, direct and indirect, the time and expense and the anxiety and worry may be taken into account, element of bodily pain and sufferance superceded in case of personal violence. But when the injury is result of oppression, design, fraud, malice, different consideration arise and the injured party is entitled to claim compensation under the last element for the sense of wrong and insult. The various principles laid down by the courts of law in order to serve as guidance in the matter of compensation.

**IX. Difference between Compensation and Damages**

Sometimes damages have also been used in place of compensation. It needs to be explored whether both carry the same meaning or share some differences. Though there might be some differences between them but both imply a monetary remedy to compensate the loss, suffered by the aggrieved party as victim. Compensation was not a popular remedy in the beginning. The distinction between the terms 'damages' and 'compensation' is not commonly understood and may be told a somewhat subtle difference. However, there is a distinction between compensation and damages. Damages are given for injury suffered but

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59 Id.
compensation is by way of atonement for the injury caused with intention to put either the injured party or those who may suffer on account of the injury in position as if the injury was not caused by making pecuniary atonement. The distinction is fine but is nevertheless there. Therefore when the legislative intend to grant compensation, computation of the same, as if computation is being made for damages would not be a wholly correct approach.⁶¹

Damages as understood in common parlance is injury, loss, disadvantage or diminution sustained. It may be to the person or property or reputation. Damages connote the pecuniary reparation for the damage sustained. Compensation also connotes pecuniary reparation. It is in that sense the words damages and compensation are synonymous terms. But usually the word compensation is used where there is no actionable wrong.⁶²

There is an apparent distinction between the words ‘compensation and damages’. The former i.e. compensation is used by the Indian Courts to denote the monetary redress that they offer to the victims of

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Historical Development, Meaning and Definition of Compensatory Jurisprudence

Constitutional Torts, damages is its equivalent in the Western World.\(^{63}\)

Indian Courts were so anxious to avoid duplicating civil proceedings for damages yet they used the expression compensation rather carefully.\(^{64}\) Most of the judges were careful to state that the sum of money awarded were in the nature of palliative and would not prejudice a claim for damages to be filed in a civil court.\(^{65}\) Besides this, there are several judgements that are an exception to this rule, such as \textbf{Bhim Singh's case}\(^{66}\) where it was held that what has been awarded though only a nominal sum must be taken to represent the equivalent damages in the western world.\(^{67}\)

In Code of Criminal Procedure 1973, there is a provision which provides fine recovered from accused may be paid to the victim as compensation.\(^{68}\) The point may be illustrated with the help of rape cases, where the court awarded compensation to victim finding the existing remedy not effective.\(^{69}\)

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\(^{64}\) \textit{Ibid.}

\(^{65}\) \textit{Id}; see also Unni Krishnan vs. State of A. P., 1993(1) SCC 645


\(^{67}\) \textit{Ibid.}

\(^{68}\) See, Criminal Procedure Code 1973, Sections 357 and 358.

Thus, the remedy of compensation has been made more effective in order to administer justice. An enquiry needs to be made whether the remedy has actually become effective. Award of compensation and actual delivery thereof to the sufferer are entirely two different issues which so far have not been looked into seriously.

X. Significance of Compensation

In the society various means have developed to control the crime. The welfare State is making all efforts to rehabilitate the persons involved in commission of crime in the name of reformation. Victim, is an important link in the commission of crime. But during recent years, the administration of justice has made some remarkable changes in the attitude of those who are connected with administration of justice directly or indirectly. The judiciary is generally busy in protecting the interest of the offender while they are not paying much interest for protecting the interest of the victims.

Frankly speaking, our system is not 'victim oriented' instead it is dogmatically 'accused oriented'. This reflects our concern for the offenders and discrimination is made between the offender and victim. In maximum crimes, most of the victims are from poor families, having no resources for livelihood. The subject
of compensation to the victims has become important because it is the duty of the State to protect the life and property of an individual and victims are also entitled for such proclaim or benefits of welfare State.

In India, we have failed to develop the concept of compensatory jurisprudence to the extent it is required to be developed. The compensation law has not developed at the same rate as other laws have developed. Even the State is not serious and taking any interest to develop and implement the law of compensation. People are not aware to the importance of compensation which can be awarded to the victims. Some of the provisions are found in Constitution of India and in Criminal Procedure Code, but it is unfortunate that they are also not adequate. The most of the people are not aware of such laws because they do not find any place in the statute books. Most of the victims, because of poverty, illiteracy or for any other reason are not aware of their own rights.

**XI. Principles Applicable in Awarding Compensation and Damages**

The main object of an award of damages and the fundamental principles or theory on which the award of damages based is just compensation or indemnity for
the loss or injury sustained by the complainant and not on any other ground. The damages which may be recovered are not necessarily statutory, nor dependent on statutory provisions, unless the provisions relied on deny or abridge the common law right of recovery. Where, the injury is such that it does not admit of definite pecuniary measurement, it is more appropriate to speak of reparation than of compensation. In certain cases, damages may be awarded, not only as a satisfaction to the injured person, but as punishment to the wrongdoer. The right of the injured party to compensation must be considered in connection with the right of the other party to pay only that which he should justly be compelled to pay, although the law does not seek to divide rather than to satisfy the loss, but aims at complete compensation for the injury sustained.

There are three principles governing the grant of damages firstly, the claimant should not himself be guilty of any negligence or other improper conduct. Secondly, the amount of damages to be awarded should never exceed the loss actually suffered by the claimant, or which he is likely to suffer, on account of the defendant wrong provided his act are lawful, just,
reasonable and not contrary to the law, rules or bye-laws duly enacted, except in awards of exemplary damages.\textsuperscript{73} \textit{Lastly}, the amount of damage may be cut down, if his own conduct has constituted contributory negligence, or has rendered some of the damage too remote, or has constituted a failure to mitigate the damage which, may be defined as a failure on his part to take reasonable steps either to reduce the original loss or to avert further loss.\textsuperscript{74}

But damages may be too remote from causes other than the plaintiff's conduct, whether acts of third parties or natural events. Subject to the above, when a contract has been broken or a tort been committed, the injured party is entitled to receive from the wrongdoer, a compensation for any loss or damage caused to him thereby, which may fairly and reasonably be considered to have naturally arisen in the usual course of things from such wrong, or which were foreseeable or foreseen.\textsuperscript{75}

A distinction is always made between intentional act and accidental act in estimating the damages the intention of the wrongdoer is taken into consideration. Where the injury is caused due to an accident an

\begin{footnotes}
\item[73] Ibid.
\item[74] Id.
\item[75] Ibid. p. 6.
\end{footnotes}
exception to the general rule of compensation was recognized. Thus, the basic principle of awarding compensation appears to provide payment of compensation for infringement of rights as well as for injuries arising independently of contract and also to regulate the payment of such compensation by reference to a fixed scale varying according to the nature and extent of the injury and the intention of the wrongdoer.\textsuperscript{76}

After discussing the principles of compensation and different dimensions, it is worthwhile to describe the types of persons/victims for whom such compensation is meant.

\textbf{XII. Classification of Victims Entitled for Compensation}

Victimology, as a separate discipline deals with the study of the problems of victims of crimes and their right to claim compensation which includes rehabilitation and restitution, from the offenders or the authorities of the State. The traditional concept of criminal justice administration which connotes legislation of penal law, enforcement of the law and detection of crime, trial of offenders and execution of sentence passed by a court of law does not comprehend

\textsuperscript{76} Id.
the duty of the State to alleviate the suffering of the innocent victims and/or their families for the loss of life, liberty, property and reputation and for bodily or mental injury in consequence of a crime.\textsuperscript{77}

The necessity of paying compensation to the victims of crime has also engaged the attention of the United Nations. The 7\textsuperscript{th} United Nations Congress on Prevention of Crime and Treatment of Offenders, came out with a declaration of basic principles of justice and victims of crime and abuse of power, which was later adopted by the U. N. General Assembly. In the declaration, the U. N. defined the 'victims of crime;' as follows:

(i) 'Victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal law operative within member States, including those laws prescribing criminal abuse of power.

(ii) A person may be considered a victim, under this Declaration, regardless of whether the

perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation; and

(iii) The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, color, sex, age, language, religion, nationality or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin and disability.78

The loss of life or of support, impairment of health, including physical or psychological injury, pain and suffering both physical and mental, loss of liberty, loss of income or livelihood, loss of property or damage to it which is not subject to restitution and deprivation of the use of property. Due account must also be taken of the special damages or expenses and costs reasonably incurred by the victim or, where appropriate, by the victim's family, dependents or heirs, which resulted from the victimization, including medical costs,

78 Ibid.
transportation costs, funeral and burial costs, legal costs, treatment and rehabilitation costs, and similar and related costs and expenses.\textsuperscript{79}

The victims in general may be broadly classified into twelve categories. They are:

1. Victims of War
2. Victims of accidents that occur -
   (a) on Road
   (b) on Railways
   (c) on the Aircraft
   (d) on Sea
   (e) in the workplace
3. Victims of abuse of power by lawful authority:
   (a) Custodial death
   (b) Death due to Firing
   (c) Groundless arrest and detention
   (d) Unnecessary harassment
4. Victims of Rape
5. Victims of criminal conspiracy, offences of giving or fabricating false evidence, fabricating false document or forgery of records, valuable documents, certificate of causing disappearance of evidence by way of destruction or concealment of the documents,

\textsuperscript{79} Ibid, at p. 3; also see supra note 63 at pp. 111-112.
fraudulent acts with the intention of causing bodily or mental harm to a person, murder, miscarriage, hurt, wrongful restrain and wrongful confinements, assault, use of criminal force, kidnapping, abduction, forced labour, unnatural offences, theft, extortion, robbery and dacoity, chanting, mischief, arson, criminal trespass, adultery, bigamy, defamation, criminal intimidation, insult and annoyance.

6. Victims of offences relating to manufacture and role of adulterated, substandard and prohibited drugs, liquor and food.

7. Victims of offences of smuggling, black-marketing, unfair trade practice and evasion of tax.

8. Victims of offences committed by public servants, such as negligence and inefficiency in discharging their duties, corruption bribery and misappropriation of public funds.


10. Victims of offences committed in the election.
11. Victims who are also offenders as perpetrators of crime such as drunkenness, consumption of narcotic drugs, gambling, attempt to commit suicide and prosecution, which are otherwise known as victimless crime.

12. Victims who create a compelling situation in which the offender reacts violently by committing a criminal act. Sometimes, the victim provokes the offender to commit the crime. Victims of affray, free fight and rioting may also be included in this category.80

The concept of compensation existed form the ancient to early 20th century in one or another way. This concept find a place in statute books after enactments of Indian Penal Code 1860, and Criminal Procedure Code, 1898 and later in many other legislations.81

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80 Id.
81 See, Environmental Protection Act, 1986; Consumer Protection Act, 1986; Probation of Offenders Act, 1958; Human Rights Protection Act, 1993; Public Liability Insurance Act, 1948; etc.