CHAPTER 2
HISTORICAL PERSPECTIVE OF COMPENSATORY JURISPRUDENCE

INTRODUCTION

The idea of compensation to victims of crime is gaining much importance, now a days. Though, the compensation for the victim of crime is an old institution. It existed in same form or the other in old Germanic law, Code of Hammurabi and Law of Moses. In England in the Anglo-Saxon period the compensation took the form of wer or bot. And in India, the old Hindu Law required restitution and atonement. Setting of compensation during the sutra period in ancient India was treated as a Royal Right. The Laws of Manu required that compensation be paid by the offender, where bodily injuries have been caused the compensation was in the form of expenses for cure and case of injury to prosperity the damages were to paid to satisfy the owner, however, in both cases the offender was also liable to pay a fine to the king. And the concept of penalty being adjusted to the level of the understanding of the culprit also comes through in the precept of Manu that whereas penalty of theft by Shudra should be 8 times (the value of the stolen goods) those higher in the social hierarchy should be more severely punished: the Vaishya 16 times, the Kshatrya 32 times and Brahmin 64 times and may even a hundred or a hundred and twenty-eight times on the ground that he was educated to know the consequences of actions. The main emphasis in the old system was to punish the offender and seek his reformation, rehabilitation as well as compensation to victim. Broadly, this chapter is divided into three parts viz: Ancient Era, Middle Ages and Modern times.

A- ANCIENT ERA

There were numerous laws in the ancient times, and each state had its own unique system of administration of justice and modes of punishments. Many of these laws were just an enhancement or an improvement upon existing social customs in the society. Crime and punishment naturally were the focus of these early statutes.

2 Sethna M.J., Jurisprudence 340, II Ed. (1959) for murder the offender was obliged by the king to compensate the relatives of the deceased or the king or both.
3 Laws of Manu VIII, 287, vol. V
4 Batra T.S., Criminal Law in India 2, Metropolitan Co. Pvt. Ltd., New Delhi (1981)
Emperor Hammurabi evolved a code of laws to govern Babylon, and this was one of the earliest recorded legal codes. When it comes to the aspect of punishment, the code is simple but precise— an eye for an eye,\textsuperscript{6} and a tooth for a tooth.\textsuperscript{7} An unduly heavy emphasis was placed on the death penalty\textsuperscript{8} and mutilation of body parts as a means of punishment. The ancient Egyptians and Greeks too practiced barbaric forms of punishment such as amputation of body parts, stoning to death, burning alive, etc. The reaction of these early legal systems to crime was a knee jerk one. The state took it upon itself to satisfy the blood lust and the vengeance of the victim’s relatives and friends by punishing the offender in a swift and brutal manner. With the gradual evolution in systems of administration of just during the Greek and Roman era, the theories of crime and punishment, though still at an incipient stage, began to make their presence felt. While Plato advanced retributive justice, his disciple Aristotle sought to mitigate the harshness of the punishments imposed and sought a more rational approach. In Rome, Seneca sought to develop his own theory of punishment that was primarily grounded in the concept of mercy. These issues shall be dealt with in detail in subsequent parts. It is also noteworthy that Mosaic code which embodied the \textit{lex talionis} as well (Exodus 21: 23-25), was still over 1000 years in the future when the Code of Hammurabi was written.\textsuperscript{9}

It would be worthwhile to explore the ancient Indian legal system at this juncture. The Hindu political, legal and economic thought is included in the \textit{Mahabharata}, \textit{Dharamshastras} (of which \textit{Manu-Simirti} is the most important), \textit{Niti-shastra} of the science of state-craft (of which the \textit{Shukranitisara}, is the most elaborate), and \textit{Arthashastras} (of which \textit{Kautilya’s Arthashastra} is the most popular version that is easily and most recognised and frequently refereed work to this day). The concept of \textit{dharma} governed Hindu life since the \textit{vedic} times, and everyone from the king down to the commoner was expected to follow it. The king had to ensure that all his laws were in conformity with the \textit{dharma} and it was said, “Hunger, sleep, fear and sex are common to all animals, human and sub-human. It is the additional attribute of \textit{dharma} that differentiates man from the beast.”\textsuperscript{10} The great statesman \textit{Kautilya} left his imprint on this nation’s thought with his work, the \textit{Arthashastra}, a

\begin{itemize}
\item[6] \textit{Code of Hammurabi}, Law no. 196
\item[7] \textit{Id}, Law no. 200
\item[8] Approximately 37 specific offences were punishable by death according to the code.
\item[10] \textit{Supra} note 5 at 27
\end{itemize}
treatise on economic, political and legal administration, in the 4th century before Christ.\textsuperscript{11}

In age when vast swathe of Europe was still emerging from the primitive age, and the ‘civilised’ Roman Empire rapidly disintegrating, Kautilya’s Arthashhashtra provides a valuable insight into the legal system in the ancient India. The Arthashashtra gives directions as to the treatment of petitioners in courts, behaviour of the judges, methods of identifying witnesses indulging in falsehood,\textsuperscript{12} and punishment of offenders. Kautilya constantly rejects the rule of thumb, advocating instead a judgement based on the specifics of a particular situation and punishments to an appropriate scale.\textsuperscript{13} There was an intimate relationship between the sin and sinner, the kings (and judges) were expected to decide upon the nature of punishment after seeing if the offending party showed any repentance for having committed by the king when the offender acknowledged his mistake and it was felt that he could be rehabilitated in society. Thus, the concept of separation of the crime from the criminal was wholly in tune with the Hindu philosophy and appears to have been prevalent in ancient times. Having fully considered the time and the place (of the offence), the strength and knowledge (of the offender), the king had to justly inflict that punishment on men who acted unjustly.\textsuperscript{14} The death penalty was not used very often, except in serious cases. Minors (in those days, any one under the age of 15 was not punished) were sent to reformatory homes.\textsuperscript{15}

The award of punishment was governed by considerations of status of the accused. Rank played a very important role in determining the nature and punishment for most offences especially those related to defamation and assault. What is thus most revealing is that punishment varied according to the person’s caste or position in the social order and the penalty for the crime was increasingly severe the higher the

\textsuperscript{11} The Arthashashtra consists of 15 chapters, 380 shlokas, and 4968 sutras and deals with a wide variety of subjects like administration, law and order, taxation, revenue, foreign policy, defence, war.

\textsuperscript{12} For instance, a person charging an innocent man with theft or any other crime was to be punished as though he had committed the said crime himself.

\textsuperscript{13} Different kinds of punishments were inflicted based upon all the relevant facts and circumstances involved in the commission of offence. The judge was expected to look at the social status of the offender and victim, the antecedents of the offender, the families involved, the occasion, place and time of the offence and all other mitigating or extenuating factors wherever found to be so present.

\textsuperscript{14} Underwood F. B., “Aspects of Justice in Ancient India” 5 Journal of Chinese Philosophy (1978)

varna of the victim. In ancient times, caste violations were often the crimes that attracted the severest of punishment for those were issues closest to the people’s hearts. It is striking to note the fact that crimes such as theft of cattle and destruction of property did not meet with barbaric executions, as was the case in the ‘enlightened’ western world. There was, therefore, a highly developed concept of monetary fines that were frequently imposed as an alternative to physical punishments.\textsuperscript{16}

**Tale of Two Rishis**

An anecdote in the *Mahabharata* throws light on the concept of criminal law in pre-historic Hindu India. It tells of two Rishes (Seers) Shankh and Likhit. One of them on his way to the other’s Ashram (Home) saw some temptingly ripe fruit in latter’s orchard. He took some without the owner’s permission. When he met the owner he confessed his lapse and asked to be punished. The owner made light of it and assured him that he did not mind the plucking of some ripe fruits. The culprit insisted on being punished. Thereupon he was directed to appear before the king. In view of the honourable standing of the culprit, the king first offered to pardon him and on this being refused, to compensate the owner from the royal treasury. This too was not accepted. Finally the king imposed the prescribed penalty of severing the right hand of the culprit.

Thus a number of notable law codes were introduced before the Common Era (B.C.E.), most significantly the Code of Hammurabi in Babylon, the Mosaic Law of the Hebrews, the Draconian Law of Greeks, the Twelve Tables of the Romans, the Law Code of Gortyn in Crete.

**Code of Hammurabi**

The earliest written law Codes were produced in Babylon. The ruler Hammurabi (1728-1686 B.C.), considered there great sovereign of his dynasty, organised the administrative system of the empire. The chief monument of his reign was the Code of laws, commonly called the ‘Code of Hammurabi’ or the ‘judgements of the Righteousness’.\textsuperscript{17} In typical Mesopotamia fashion, Hammurabi claimed that these laws rested on the authority of the God. Any violation would therefore

\textsuperscript{16} Kautilya’s *Arthashastra* mentions an exhaustive list of offences and the fines charged for committing them. The amount varied based upon the gravity of the offence, the person who was affected, and the nature of the accused.

contravene the divine order. The discovery of the Code of Hammurabi (1700 B.C.) was a significant archaeological find. Uncovered by French archaeologists in 1901 at Susa, the extremely large black stone slab contained 4,000 lines of inscription. At the uppermost edge of the slab was a depiction of Hammurabi facing the sun God. Underneath was documented both civil and criminal law, which attempted to regulate essentially every aspect of the lives of Mesopotamians.

The Code of Hammurabi contemplated the whole population as falling into three classes. The ‘Amelu’ was a patrician who had aristocratic privileges. The ‘Muskinu’ was a free person who may have been landless. The ‘Ardu’ was a slave. The significance of defining the social status of the offender and the victim was made clear in the outlined punishment. Punishments were more severe if the perpetrator was from the lower classes. It was a collection of 282 laws that were written down and put on display for everyone to see. It not only described what was against the law but also what punishments would be given to lawbreakers. For example, the code stated that stealing property from temples was illegal. Fine is also one of the punishments.

The death penalty was also commonly imposed for such infractions as theft, for poor architecture that lead to death, for maternal incest, for adultery, for rape, for false accusation and many other specific acts. Exile and corporeal punishment were also imposed, but probably the most interesting were those dealing with penal

---

21 Supra note 19 at 59
22 Supra note 6, Law no. 4. If he satisfy the elders to impose a fine of grain or money, he shall receive the fine that the action produces.
Law no. 5. If a judge try a case, reach a decision, and present his judgment in writing; if later error shall appear in his decision, and it be through his own fault, then he shall pay twelve times the fine set by him in the case, and he shall be publicly removed from the judge's bench, and never again shall he sit there to render judgement.
Law no. 12. If the witnesses be not at hand, then shall the judge set a limit, at the expiration of six months. If his witnesses have not appeared within the six months, he is an evil-doer, and shall bear the fine of the pending case.
Law no. 232. If it ruin goods, he shall make compensation for all that has been ruined, and inasmuch as he did not construct properly this house which he built and it fell, he shall re-erect the house from his own means.
Law no. 236. If a man rent his boat to a sailor, and the sailor is careless, and the boat is wrecked or goes a ground, the sailor shall give the owner of the boat another boat as compensation.
retaliation, such as the cutting off the hand of a son who struck his father, the loss of an eye that ‘pried into forbidden secrets,’ and the loss of surgeon’s hand that caused the loss of life or limb. However, the most common penalty was a fine, particularly if the offender was from the upper class. In addition, the concepts of culpability and suspicion were addressed, as penalties were less severe if the offence was conducted unintentionally, and the offender could often only be prosecuted if caught in the act or in possession of stolen goods. The Code of Hammurabi was so complete that it outlined a method of appeal that would first be heard by a superior court and ultimately by the King himself.23

The Laws of Draco and Solon in Greece

In 621 B.C., Draco was asked by the rulers of Athens to develop document legislation to promote public order and deter the practice of blood feuds. However, in this case, the was not intended to carry out the will of a tyrannical ruler nor the direction of God, but rather to improve the lives of ordinary citizens and thus enhance the quality of life and maintain order for the polis’s citizenry. With this goal in mind, Draco designated severe punishments, often death or enslavement, to deter disorder. It was written that the laws created by Draco were recorded on pillars of wood for religious matters and on bronze for other aspects of law. However, no fragments of Draco’s law have survived and we must rely on the writings of early Greek historians for insight into this important legislation.24 Draco’s legislation did have a negative impact on the lower classes, and severe financial penalties often placed them in economic distress.

The Twelve Decemviral Tables of Rome

While significant in legal history, the laws outlined on the twelve tables dealt mainly with private disputes between individuals. The concept of ‘lex talionis’ was also emphasised as it related to criminal matters, but this could often be avoided with payment of a fine of 300 pounds of copper. As per the twelve tables, capital punishment was an appropriate penalty for murder, treason, nocturnal meetings, arson, judicial perjury, libel and slander, vandalism to a farm and magical incantation. However, again the sentence of death could routinely be evaded by payment of fine.25

23 Supra note 20
24 Supra note 19
25 Gibson E., “The idea of Roman Jurisprudence” in The Decline and Fall of the Roman Empire (1999) located in the Ancient History Source book, Supra note 20
B- MIDDLE AGES (about 1200 to 17th century A.D.)

The payment of compensation to the victims also existed in a well developed form in Mohammedan Law. The Mohammedan Law had its origin in the Quran, which is said to have been revealed by God to the Prophet Mohammad. In Muslim law, the concept of sin, crime, religion, moral and social obligation is blended in the concept of duty, which varied according to the relative importance of the subject matter. The Mohammedan criminal law classified all offences as incurring of one of these classes of punishments namely:

1. **Kisas** or retaliation;
2. **Diya** or blood money - the price of blood homicide;
3. **Hud** or fixed punishment - specific penalties - theft and robbery etc;
4. **Tazeer** or discretionary or exemplary punishment.

However, the notions of Kazis about crime were not fixed, and differed according to the purse and power of the culprits. As a result, there was no uniformity in the administration of criminal justice during the Muslim rule in India, and it was in a most chaotic state.27

**Diya**

**Diya** or **Aql** was compensation paid by one who had committed homicide or wounded another.28 In case the legal conditions necessary to render the **Qisas** possible were not present, or when the heirs of murdered person entered into a composition with the murdered for certain sum retaliation was remitted for **diya** or blood money.29

The indemnity for murder of a man was fixed by the Sunna at a hundred she-camels.30 The camels were to be of definite condition and age, ranging from one to four years.31 The **Diya** of a Jew or a Christian was one-third of a Muslim’s.32

There was no **diya** for a minor or an insane person. The law of retaliation held good between slaves as between free persons.33 A Muslim was not to be put to death for an unbeliever unless he had killed him treacherously.34 Women and children were

---

28 *Encyclopedia of Islam*, I, 980
29 *Dictionary of Islam*, 153
30 Supra note 28 at 900
31 Id at 980
32 Supra note 29, According to Encyclopedia of Islam, it was one-half, Supra note 28
33 Supra note 28
34 Ibid
not liable to pay diya.\textsuperscript{35} There was a complete fine for the destruction of a nose, or a tongue, or a virile member for tearing out the beard, for eyes and lips, and for destroying the beauty of a man’s person.

**Law of Wrongs: No distinction between tort and crime**

Sir Henry Maine in his book *Ancient Law* has stated that the penal law of ancient communities was not the law of crimes; but was the law of wrongs. The person injured proceeded against the wrongdoer by an ordinary civil action and recovered compensation in the shape of money, if he succeeded. In support of this view, we may cite the ancient practice of compounding murder by payment of ‘blood money’ to the heirs of the person killed. In England, Alfred’s *Criminal Law* said thus:

If the great toe be struck off, let 20sh be paid as *bot*.

If it be the second toe let 15sh be paid as *bot*.

\[\ldots\text{middle most toe 9sh}\ldots\]

\[\ldots\text{4th toe 6sh}\ldots\]

\[\ldots\text{little toe 5sh}\ldots\]

*Wer* was a price set upon a man according to his rank in life. If such a person was killed, the *wer* was to be paid to his relations. *Bot* was the compensation paid to a person who was merely injured. *Wite* was the fine paid to the king or other lords in respect of an offence.\textsuperscript{36}

Thus, the early societies recognized no distinction between the law of crime and torts, but only knew of law of wrongs. Murders and other homicides were regarded as private wrongs. The right to claim compensation was the rule of the day. A distinction was, however, drawn between casual offenders and hardened criminals. Also commented by Pollock and Maitland,(mundhrathi) the English society prior to 10th century confused crimes with torts, because the bond of family was far stronger as that of community, the injured party and his kindred would avenge the wrong by private vengeance and self-redress. It was a period when recourse to legal remedy was considered nearly as an optional alternative to self-redress. The wrong-doer was supposed to offer compensation to the person wronged, the quantum of which depended on the extent of the wrong caused and the status of the sufferers. The payment of compensation known as “*bot*”, paid to a person injured by the criminal, was either at a fixed rate (an gild), or at the marketing price of the stolen goods (ceaf-\textsuperscript{35} *Id* at 981

\textsuperscript{36} *Supra* note 27 at 11
gild), washed away the guilt of the wrong-doers and brought him to a position as if he had done no wrong. The early Anglo-Saxon Laws contained the minutest details of the compensation (‘bot’) which was payable for different wrongs with a view to help the person wronged in seeking redress.  

However, if the “bot” (compensation) was refused, the law had no provision to enforce its payment. In that event it was for the victim or his kindred to prosecute a ‘blood-fued,’ against the wrongdoer and the law could help him only by declaring the wrong-doers as an ‘out-law’ who could be chased and killed by any one like a wild beast. A human being ‘under a legal obligation to act’ and ‘capable of being punished’ would, by the first restriction, exclude an out-law who is placed outside the prosecution and restriction of law. Happily, outlawry as an institution has ceased to exist.

Besides the offences which could be atoned for by ‘bot’ (payment of compensation to the sufferer), there were certain other wrongs which entail additional fine known as ‘wite’ was payable to the king, for a crime committed by the accused. Further the ‘wer’ was a price set upon a person according to his position in life. If a man was killed, the relations were paid the value fixed on his life. If a man was convicted of theft, he had to pay his ‘wer’ to his feudal lord, or to the king; or, if he was outlawed, his sureties had to pay his ‘wer’. Moreover there were certain ‘botless’ offences for which no amount of compensation could wipe out the guilt and wrongdoer had to be punished. Such cases were punishable with death, mutilation, or forfeiture of property to the king. Imprisonment as a punishment was not known. house-breaking, harbouring the the out-laws, refusing to serve the army and breach of peace, etc; were some of the early “botless” offences which entailed compulsory punishment under the law of the state. as a matter of fact, it is from these “botless” offences that the modern concept of crime has immerged.

After 12th century the number of “botless” offences increased considerably. Thus, a distinct line of demarcation could withdrawn between the wrongs which could be redressable by the payment of compensation (‘bot’) and those which were not so redressable by money compensation (‘botless’) and for which the wrongdoers were to be punished by the King. In course, of time the former came to be known as Civil

---

38 Ibid
39 Ibid
Wrongs, i.e., ‘torts’, while the later as ‘Crime’. It can therefore be observed that the law did not play that compelling part in regulating the social relation in early days as it does today. So in Anglo-Saxon England the criminal had to mark two compensatory payments the ‘Wer’ or ‘Bot’ to the victims or his relative and the writ to the King, or the Feudal Lord.

**At The Time of Jehangir**

Before the Anglo-Saxon system of criminal justice was introduced in India, the victim was not completely neglected.

A story is told how Emperor Jehangir was faced with a problem in one of his daily “darbars” and how he solved it. One day the Empress in a fit of anger hit her Launderer whose work was not satisfactory. The washer man fell down dead. Somebody persuaded the widow to attend the Jehangir “darbar” the next morning.

The laundress waited trembling till all the others had mentioned their grievances and received redress from Emperor. Finally, Jehangir looked at her and said, “Who are you? What do you want?”

In great trepidation she replied that she was the court laundress and recapitulated the previous day’s calamity. “Your husband was killed? By whom? “queried Jehangir.

“By the Empress”, replied the woman. It is said that Jehangir was stunned and leaned back on his throne, but only for a moment. He then came down the steps of his throne and faced the laundress. Drawing his sword from gilded holster, he held it out to her and said, “Hold it”. The woman did not know what she was being led up to. But she obeyed the command of Emperor. Then he spoke to her along the following lines. “The Empress killed your husband. Now, with that sword, you kill the Empress’s husband. I command you to do it.”

The laundress was non plussed. She fell at the Emperor’s feet, recovered her equanimity soon enough, and said, “Sire, I have suffered, but I do not want either the Empress or the country to suffer by my obeying Your Majesty’s command. I am prepared to take any punishment for this disobedience.”

The story goes that Jehangir was so touched by the words of the washer woman that he made her a baroness and showered her with riches beyond measure. It

---

40 *Ibid*
is perhaps one of the earliest known cases of victim compensation in modern Indian history.  

C- MODERN TIMES

Towards the end of the middle ages, however the institution of compensation began to lose its force, due to the simultaneous growth of Royal and Ecclesiastical power which had a sharp distinction between torts and crimes. The concept of compensation was closely related to that of punishment and it was merged to some extent in the Penal Law, but at the same time, a number of offences like murder, robbery and rape were no longer regarded as torts which could be settled by compensation, but were regarded as crimes against society and were punishable as such. Gradually, as the State monopolized the institutions of punishment, the rights of the injured were separated from the Penal Law and the obligations to pay damages or compensation became a part of the Civil Procedure.

The demand for compensation for the victims of crimes was revised during the Penal reforms movement of the 19th Century. It was discussed at fifth International Prison Congress in the later half of the century. Despite the strong advocacy of Jermy Bentham and a number of leading Penologists, the acceptance of the principles of the state liability to pay compensation for the victims of crime remained as distant as ever. Among many other suggestions One was that public Tribunals, while passing sentences in respect of offences prepondering Civil element viz. in Petty Larceny, breach of trust and swindling etc. should be empowered to compel solvent offenders to make financial restitutions to the victims. Another suggestion was that if the offenders were insolvent they should be made to work for the State till they earned enough to compensate their victims.

Pre-Independence: British Period

India was rules by the British up to 1947 in which year we achieved in dependence. In England the concept of State liability for the acts of the employees and officials is influenced by the doctrine of ‘King can do no wrong’. The East India Company (referred as EIC) began its career in India as a commercial corporation but in course of time due to historical reasons it acquired sovereign powers and it is only after gaining such power a distinction is drawn between sovereign and non-sovereign

---

43 *Supra note 41*
44 *Ibid*
functions which it exercised. In the case of Bank of Bengal v. United Company, the Supreme Court (at Calcutta) rejected the plea of sovereign immunity in a matter involving the recovery of interest by the Bank of Bengal due on the promissory notes from the EIC for the prosecution of War.

In Pennisular & Oriental Steam Navigation Co. v. Secretary of State of Bom., the Court accepted on action against the Secretary of State for the negligent act of the government workers. In this case, Sri Barnes Peacock, C.J., held that though the EIC is invested with sovereign functions, it does not make it sovereign authority and the liability of EIC for the negligent act of its officers would be same as that of an employer for acts of its employee. In this judgment two important legal terms were used, namely, ‘Sovereign and non-sovereign’ Peacock, C.J. clearly mentioned that the EIC is not liable in the matters involving an act done by any of its officers or soldiers in carrying on hostilities, act of naval officers in seizing prize property on the supposition that it is property of enemy, act done by military or naval soldier or sailor while engaged in military or naval duty, and also acts done by its officials in the exercise of judicial functions. This passage was interpreted in a way that immunity is available only in respect of matter involving ‘acts of State’. The doctrine of ‘acts of State’ and ‘sovereign immunity’ are not synonymous. The former flows from the nature of power exercised by the State for which no action lies in Civil Court and the latter was developed by the theory of the divine right of kings. Under what circumstances the EIC is not liable for the acts of its officials the court observed in Nobin Chunder Dey v. Secretary of State, that the action of ganja licence was a method of raising revenue and it is a sovereign function which no private individual could undertake, therefore no action is maintainable against the EIC in this regard.

The Madras High Court in the Secretary of State for India v. Hari Bhanji, dissented from the ruling in Nobin Chunder Dey and opined that the defence of sovereign immunity is available only in the matters relating where the State could not be used for its acts (war, peace, etc.) in Municipal courts. The same view was confirmed also in Salaman v. Secretary of State in Council for India.

45 (1831) 1 BR 87
46 (1861) 5 Bom. HCR
47 1876 ILR 1 Cal 11
48 1882 ILR 5 Mad 273
49 (1906) 1 KB 813
Genesis of the concept of State liability

It is a recognized principle of both the civil and criminal jurisprudence to punish any individual who infringes the right of the other individual and also to award monetary compensation under some circumstances to the victim, who was adversely effected by such infringement. Similarly, the State Government which performs its assigned powers and functions through its machinery consisting huge number of employees is also liable to pay monetary compensation like any other individual whenever its employees cause infringement of the rights of the individual. Though the State enjoys certain privileges in comparison with the ordinary citizen in some matters it cannot escape from the basic and fundamental liabilities. This is more so in any country governed by the rule of law and democracy.

The State is liable for the actions of its employees in many areas of administrative functions. With the tremendous increase in the functions of the State, the extent of State liability for the acts of its employees is becoming complex day by day. All over the globe now-a-days the aim of any Government is to establish a welfare State. This has resulted in the expansion of powers and functions of the State in all spheres of the administration. Not only the concept of welfare State but also other functions of the State require its officials to implement various statutory provisions, regulations etc. Sometimes these administrative actions may effect the statutory and fundamental rights of the individuals and then only the question of State liability will arise. In India the common law governed the State liability in tort during the British Rule. And after independence, the provisions in the Constitution of India, 1950 govern the State liability.

Post independence

The first case after independence involving the tortuous liability of State was, State of Rajasthan v. Vidyawati,\(^{50}\) in which the Supreme Court of Indian maintained that the State is vicariously liable for the torts committed by its officials. The issue involved in this case is, a governmental jeep driver knocked down a person which act resulted in the death of the respondent’s husband. In a suit brought out by the widow of the deceased, the trial court decreed against the driver but not against the State, but the High Court decreed the suit also against the State. The contentions of the State Government is that the State is not liable for the act of driver because in similar

\(^{50}\) AIR 1962 SC 933
circumstances would not have been liable for such an act of the said driver, and thereby State claimed sovereign immunity. In this context the observation of B.P. Sinha, C.J., in Vidyawati case\textsuperscript{51} that since the times of EIC, in tort or contract, common law remedy never operated in India, is noteworthy. His lordship has signified further that when India has been constituted into a socialistic State with various welfare activities employing a large army’s of servants, it is not justified in principle or in public interest that State would not be held vicariously liable for the tortuous acts of servants. The ratio of this ruling seems to be that the distinction between sovereign and non-sovereign functions is discarded, and the State would not be liable for the ‘acts of State’ only.

The distinction between sovereign and non-sovereign functions has disappeared for some time but the same distinction came again to be recognized by Gajendragadkar, C.J. of Supreme Court in Kasturilal Ralia Ram Jain v. State of U.P.,\textsuperscript{52} wherein there is a clear finding regarding the gross negligence on the part of the police authorities in the same matter of safe custody of gold as could be seen in the records. It is opined among the legal circles that his case had not correctly interpreted the concept of sovereign function and it is also commented that this case wrongly interpreted the ‘act of State’ as defined by Sir Barnes Peacock. The Supreme Court did not use the vague concept of sovereign and non-sovereign function in deciding the ambit of s.244 (1) of U.P. Municipalities Act and held that State is liable for the damages for the illegal acts of its servants. sovereign function due to the change in social-economic context in India. In Basava Kom Dyamogouda Patil v. State of Mysore,\textsuperscript{53} absence of due care to protect the property the Lala Bishambare Nath v. Agra Nagar Mahapalika,\textsuperscript{54} in Shyam Sunder v. State of Rajasthan,\textsuperscript{55} K.K. Mathew, J., pleaded for discarding the feudalistic doctrine of court can order the payment of the value of the property in order to meet the ends of justice.

The scintillating statement of Bhagwati. J., that as to why the courts should not be prepared to forge new tools and devise new remedies for the purpose of vindicating the precious fundamental rights to life and personal liability. Khatri v. State of

\textsuperscript{51} Ibid
\textsuperscript{52} AIR 1965 SC 1039
\textsuperscript{53} AIR 1977 SC 1749
\textsuperscript{54} AIR 1973 SC 1289
\textsuperscript{55} AIR 1974 SC 890
Bihar,\textsuperscript{56} has inspired the legal thought paving way for awarding compensation and it provided compensation for illegal detention in \textit{Rudal Sah v. State of Bihar}.\textsuperscript{57} The ever increasing abuses of power by the public authorities and arbitrary interference with life and liberty of the citizen came to be recognized by the court and held such violations and infringements to be wrong in public law and state was held liable to compensate the victims, observed in \textit{Bhim Singh v. State of J & K}.\textsuperscript{58} Thus the courts under Arts. 32, 226 forge new remedies and fashion new strategies designed to enforce rule of law for doing complete justice to the victims.

\textbf{Conflict between sovereign and non-sovereign}

The conflict between the concepts of sovereign immunity and personal liberty was considered by the Andhra Pradesh High Court in detail in \textit{C.R. Reddy v. State}.\textsuperscript{59} In this case the compensation was claimed for the death of an under trial prisoner in jail, who had informed the prison officers about the risk to his life and the threats received by him. In spite of that, the prison administration didn't bother to take steps to increase his security. It was found that even on the day when some outsiders attacked on the jail and this prisoner, some of the regular guards were on leave or absent from duty. The hon'ble high court treated it as a failure or negligence to guard the prison properly and ensure safety to the prisoners on the part of the jail officials.

The court opined that personal liberty should be given supremacy over sovereign immunity. It held that when a citizen is deprived of his life or liberty, otherwise than in accordance with the procedure established by lay, it is not answer to say that the said deprivation was done by the employees of the state in the due discharge of their sovereign functions.\textsuperscript{60} \textit{Kasturilal}\textsuperscript{61} was decided following the stand taken by the apex court in the \textit{Rudul Sah}\textsuperscript{62} and the \textit{Bhim Singh}\textsuperscript{63} cases. The high court was thus right in directing the state of Andhra Pradesh to pay Rs. 1,44,000/- as compensation so that personal liberty under Article 21 is upheld and the defence of sovereign immunity is negative.

\begin{itemize}
\item \textsuperscript{56} AIR 1981 SC 928
\item \textsuperscript{57} AIR 1983 SC 1086
\item \textsuperscript{58} 1984 Supp SCC 504
\item \textsuperscript{59} AIR 1989 SC 494
\item \textsuperscript{60} \textit{Id} at 247
\item \textsuperscript{61} \textit{Supra} note 52
\item \textsuperscript{62} \textit{Supra} note 57
\item \textsuperscript{63} \textit{Supra} note 58
\end{itemize}
It was unfortunate on the part of the state of Andhra Pradesh that instead of paying the above compensation, its officers decided to make an appeal to the Supreme Court. The high court verdict was upheld and the civil appeal of the state was dismissed in State of Andhra Pradesh v. C.R. Reddy, by the apex court saying that the fundamental rights include basic human rights. Right to life is one such right available to a prisoner, whether he be a convict or under trial or a detenue. Such rights cannot be defeated by pleading the old and archaic defence of sovereign immunity which has been rejected several times by the Supreme Court.

Another case in which the question of sovereign immunity was considered is that of Saheli, where the illegal acts of Delhi policemen were brought to the notice of the court by a women organization. A lady tenant was harassed by a landlord in conspiracy with the police so that she vacates his house. She was attacked and molested with the help of police officials. She was implicated in false cases and called to police station where her nine years old son was slapped and beaten for intervening in between them. After a few days this boy died, for which exemplary damages were claimed to compensate the poor lady by a Delhi women organization in public interest. The court rejected the defence of sovereign immunity laid down in Kasturilal and directed the state to pay Rs. 75,000/- to the mother of the deceased child. The court clearly stated that it is now well settled that the state is liable for all the tortuous acts of its employees, whether done in the exercise of sovereign function or non-sovereign function. There will also be no distinction between the cases violating the fundamental rights or ordinary legal rights.

Nilabati Behera v. State of Orissa is yet another case of police atrocity, where the deceased was caught by police and kept in custody for a day and next day his dead body was found on the railway track with multiple injuries. The police tried to make a story that he ran away from the prison and committed suicide. The court did not believe on the police enquiry and observed that it must have been independently conducted by the District Magistrate himself or through some independent agency. In

---

64 AIR 2000 SC 2083
65 Id at 2091
66 AIR 1990 SC 513; See also P.U.D.R. v. Police Commissioner,(1989) 4 SCC 730, where Delhi Police Commissioner was directed to pay Rs. 75,000/- to family of deceased labourer who was beaten to death by policeman on demanding wages.
67 Supra note 52
68 Supra note 66 at 516
69 AIR 1993 SC 1960
such circumstances the burden lies on the state to show how the death was caused invoking its judicial activism, the apex court observed that it could evolve new tools and provide remedy in cases of the violation of the fundamental rights, especially of have nots. Since the state could not prove its innocence, the death was presumed to be caused by the state employees. The defence of sovereign immunity was not allowed and a compensation of Rs. 1,50,000/- was awarded rightly as per the trend developed through the case law.

**Change in the concept of sovereignty-A new approach**

The Supreme Court considered the changes which occurred in the concept of sovereignty, as well as discussed the meaning and concept of sovereignty in *N. Nagendra Rao & Co. v. State of A.P.*, and the Supreme Court declared that after the commencement of the Constitution of India or prior to it the distinction between sovereign and non-sovereign underwent a drastic change and sovereign immunity has no relevance to-day, further in the opinion of the Supreme Court, the doctrine of sovereignty as propounded by the theorists in the mediaeval period underwent radical changes and which doctrine in earlier days was outcome of old thought based on social set up then prevailed and at which time the monarch was omnipotent. In later days the concept of sovereignty underwent gradual changes and recently sovereignty vests in the people. Justice Duglas in his book ‘Marshall to Mukherji’ observed that India and United State both recognize that people are the basis of all sovereignty. Thus the old and archaic concept of sovereignty does not survive in this tradition four corner and now people are real sovereign in a set-up where the legislation, Executive and Judiciary have been entrusted with their respective functions to serve the people.

The above notes and discussions reveal that, in India there is no uniform test to decide whether a particular act is sovereign or non-sovereign. The court has to decide each on its own facts. This problem, to some extent can be rectified by enacting a comprehensive legislation governing the liability of State for the torts committed by its officials. However, the recent two historical decisions of Supreme Court as *Nilabati Behera alias Laita Behera v. State of Orissa*, have created new trends in the field of State liability and these decisions are intended to protect the precious fundamental and human rights of individual and thereby upholding the Rule of Law in India which is the largest democratic nation in the globe.

---

70 AIR 1994 SC 2663 at 2681
71 Supra note 69
No distinction between sovereign and non-sovereign

In *N Nagendra Rao & Co. v. State of Andhra Pradesh*, the Supreme Court has held that when a citizen suffers any damage due to the negligence of the employees of the state, the latter is liable to pay damages and the defence of sovereign immunity will not absolve it from this liability. It was held that in the modern context, the concept of sovereign immunity stands diluted and the distinction between sovereign and non-sovereign functions no longer exists.

The appellant in the above case was carrying on business in fertilizers and food grains legally. His premises were inspected and goods were seized under Essential Commodities Act. On 29.6.1976, the proceedings terminated in his favour and confiscation order was quashed. The collector directed the release of the stock, but the subordinates delayed it due to which goods were spoilt both in quality and quantity. The appellant then asked for the value by way of compensation. His demand was rejected. Therefore, he filed suit and the state claimed sovereign immunity. The trial court did not allow this defence and decreed the suit. The state appealed to the high court did not allow this defence and decreed the suit. The state appealed to the high court, which set aside the decree relying on *Kasturilal* and the appellant came in appeal to the Supreme Court. The apex court reversed the high court decision and disallowing the contention of the sate held that the state is vicariously liable for negligent act of its employees in discharge of their public duty. The court rightly observed that the traditional concept of sovereignty has undergone a drastic change in the modern times. No legal system can place the state above law, as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent acts of state's officers without remedy. The need of the state to have extraordinary powers is not doubted. But at the same time, the state cannot claim sovereign immunity for the sufferings caused to the common man by its officers acting illegally or negligently.

The above view also finds support in *Hazur Singh v. Bihari Lal*, where justice B.R. Arora has observed that ours is a democratic country following the rule of law and the state cannot claim any immunity from payment of compensation for the wrongs done by pleading sovereign immunity. This defence has become outdated in the context of modern development and the time has come for us to say a good-bye to

---

72 Supra note 70
73 Supra note 52
74 AIR 1993 Raj 51
it. In our nation, the people are sovereign and the government, which is elected by the people, cannot seek sovereign immunity against them.

The whole question was again examined by our Supreme Court in Common Cause, a **Registered Society v. Union of India**\(^75\) and the doctrine of sovereign immunity was rejected. The state liability rule as laid down in **P&O Steam Navigation case**\(^76\) is very outmoded. In the modern times when the state activities have been largely increased, it is very difficult to draw a line between its sovereign and non-sovereign functions. The increased activities of the state have made a deep impact on all facts of citizen's life, and therefore, the liability of the state must be made co-extensive with the modern concept of a welfare state. The state must be held liable for all tortuous acts of its employees, whether done in exercise of sovereign or non-sovereign powers. The apex court rightly observed that in this process of judicial advancement, **Kasturilal case**\(^77\) has paled into insignificance and is now no longer of binding value. Aptly in **Sube Singh v. State of Haryana**,\(^78\) the Supreme Court held:

“It is now well settled that award of compensation against the state is an appropriate and effective remedy for redressal of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of compensation (by way of public remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under section 357 of Cr. P.C. Award of compensation as a public law remedy for violation of the fundamental rights enshrined in Article 21 of the Constitution, in addition to the private law remedy under the law of torts, was evolved in the last two- and-a-half decades.”

**REVIEW**

Thus historically, the concept of crime seems to have always been changing with the change in social policies during the evolutionary stages of human society. This can be illustrated by the fact that the earliest crime in England in 12th and 13th century included only crimes against the State and religion. Thus treason, rape and

\(^{75}\) AIR 1999 SC 2979  
\(^{76}\) Supra note 46  
\(^{77}\) Supra note 52  
\(^{78}\) AIR 2006 SC 1177
blasphemy were enlisted as crimes, but murder was not a crime.\textsuperscript{79} It reveals that in the course of history of civil and criminal administration of justice system, the payment of compensation to the victims of crime irrespective of civil and criminal dichotomy has come to stay. Over the years several doctrinal principles have been developed concerning the need and justification for payment of compensation to the victims of crime be it a civil law case like torts or be it a criminal law case.\textsuperscript{80}

In the changed scenario, the state playing a predominant role in the socio-economic justice programmes for the peoples’ development, incidentally has also made the state often an agency encroaching upon the constitutional protection extended to the citizens in the matter of life, liberty and property. In the ultimate analysis not only the wrongful acts of private individuals but also the wrongful acts of the state are becoming the cause of worry of the victims. It is in this back-drop that the activist judiciary through its reasoned decisions and the efforts of various criminologists, scholars, etc. over the years that new vistas have been opened up in the annals of jurisprudence, concerning compensation to the victims of crime and abuse of power, who has been hitherto a neglected lot in criminal justice system.\textsuperscript{81}

And the modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government at par with any other juristic legal entity. Any water-tight compartmentalization of the functions of the State as ‘sovereign and non-sovereign’ or ‘governmental or non-governmental’ was not on sound footing. It is contrary to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being a statutory duty for the sake of society and the people, the claim of a common man or ordinary citizen cannot be thrown but merely because it was done by an officer of the State even though it was against law and negligently done. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law is a welfare State is not shaken.\textsuperscript{82}

\textsuperscript{79} Supra note 38
\textsuperscript{81} Ibid