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**e-Content for Post Graduate Courses**



Paper : **Criminal Justice and Human Rights**

Module : Restitution, Assistance and Compensation



### Component I(A) – Personal Details

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### Component I(B) – Description of Module

<b>Subject</b>	<b>Law</b>
Paper	Criminal Justice and Human Rights Unit - I Criminal Justice and Its Interface with Human Rights
Module Title	Restitution, Assistance and Compensation
Module ID	
Pre Requisites	Basic knowledge of victim, kinds of victim and theories of punishment.
Learning Objectives	<ul style="list-style-type: none"><li>• To understand definition of victim from comparative perspective</li><li>• To understand the historical position of victim.</li><li>• To analyse the international position as well as Indian position on victim rights.</li><li>• To fathom the principles related to restitution, assistance and compensation</li><li>• To make analysis of role of judiciary in strengthening the position of victim.</li></ul>
Key Words	Victim, Victim Rights, Restitution, Assistance, Compensation.

## **RESTITUTION, ASSISTANCE AND COMPENSATION**

**Overview of Module & Structure-** This module deals with rights of the victims. The entire module has been divided into six part. Part – I deal with introduction discussing the place of victim in the criminal law and the necessity of victim centric laws. Part II deals with international legal framework on the victim rights. An overview of victim rights in England, USA and International organisations has been given. Part III, IV and V deals with the Restitution, Compensation and Assistance, respectively. Finally, in part VI summary has been provided.

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## 1. Introduction

For centuries, the criminal law has been seen as concerning State and offenders only. Though, its chief purpose is to protect the society, the person who has suffered in crime has always been overlooked. Victims are the 'bye products of the crime'. Victims cry for justice has often been ignored in the criminal law framework and very little attention has been paid to them. This has resulted in the 'distortions in criminal justice administration'. The presumption that justice to victim is met when offender is convicted, is farce, inequitable and unjust. The inequities of the criminal administration subject the victim to another level of victimization, which is at hands of system i.e. 'secondary victimization'. The dire necessity of victim centric law that ensures the rights of victims at pre-trial, trial and post-trial stage, has been mooted by academicians and activists. The justice to victims is quintessential to restore the balance in the criminal administration. Despite of the provisions in the Indian Constitution and Code of Criminal Procedure, 1973 related to victim compensation, the criminal courts have seldom invoked them. Off late in 1980's, the Constitutional Courts started evolving 'compensatory remedies' to mitigate the plight of the victims of not only traditional crimes but, also crimes committed by State or its instrumentalities. The Report of the Committee on Reforms of Criminal Justice System (Justice V. S. Malimath Committee Report) has given considerable importance to victims of crime and has suggested considerable reforms in sphere of Victimology.

The rights of victims of can be understood at two levels. First is participatory level. It talks about victim's right to participate in the criminal proceedings. This includes right to be impleaded, right to be assisted and represented by their own counsel and right to know. At second level, it concerns the reparative and protective rights of the victims. It includes victims right to receive compensation from the criminal court itself for the losses and injuries suffered. As to the latter rights there is a general consensus across the jurisdiction to confer them through appropriate legislations.

## 2. International Legal Framework on Victim Rights

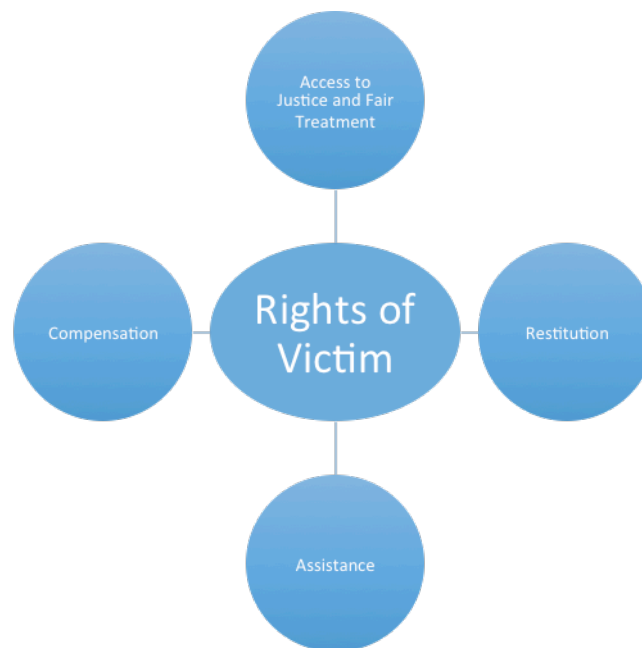
**2.1 England.** England is first one to introduce distinct statute for victims. England in 1964 passed the Criminal Injuries Compensation Scheme to provide for the compensation by the State to the victims. In 1972, Criminal Justice Act was passed. It talked in terms of restitution to victims i.e. payment of money by the offenders. Under 1972 Act the Courts in cases where injury, loss or damage had been caused, were empowered to award compensation as ancillary order in addition to main penalty. The Criminal Justice Act of 1982 took a step further by providing for compensation as a sole penalty and in cases where the courts have made order for payment of both fine and compensation, it was provided that the compensation will take precedence over the fine. Further, Act of 1982 provided for award of compensation by courts in all cases of death, injury, loss or damage. If court choose not to award compensation, it shall give reasons which may be subject to judicial review by the victim. This show the progressive approach of the UK legislature advancing towards the victim rights.

**2.2 United States of America.** In USA the Victim and Witness Protection Act of 1982 authorizes a federal court to award restitution by means of monetary compensation as a part of a convict's sentence. Section 3553(a)(7) of Title 18 of the Act requires Courts to consider in every case "the need to provide restitution to any victims of the offense". Though it is not mandatory for the Court to award restitution in every case, the Act demands that the Court provide its reasons for denying the same. In 1984 the Victims of Crime Act 1984 was enacted by the Congress, which established a Crime Victims Fund within the US Treasury.

**2.3 International Organisations.** In 1985, virtually simultaneously two powerful documents were issued urging the international community to enhance the status of victims. The first

one was the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. It is considered to be the 'magna carta' for victims as this is the first document endorsed by the nations of the world acknowledging the rights of victims and the need to improve their conditions across the world. The Declaration specially ask States to provide by law the above rights for victims of abuse of political or economic power.

The second one was the Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure which was also adopted in 1985. The other international documents of similar nature are, the Statement of Victims' Rights in the Process of Criminal Justice, issued by the European Forum for Victim Services in 1996, and the European Union Framework Decision on the Standing of Victims in Criminal Proceedings. The most recent and most comprehensive example is the Council of Europe Recommendations (2006) on assistance to crime victims, adopted on 14 June 2006.



**Figure1 - The Basic Principles included in the UN Declaration for Victims**

### 3. Restitution

**3.1 Meaning.** Restitution is compensation made by the criminal himself, ordered by the criminal court and accomplished by the offender's efforts as part of his criminal sentence.

Restitution is “full or partial compensation paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation.”

*Black's Law Dictionary, 9th ed. (2009)*

Restitution includes return of property or payment for the harm or loss suffered. Further, in case the criminal laws have been violated by the State or its instrumentalities then State shall make a

compensation to the victim. In broader terms, the term restitution may be regarded to include the return of property by an offender to his or her victim; the payment of money by an offender to his or her victim; the provision of service by an offender to his or her victim; or the provision of service by an offender to a third party.

**3.2 Restitution in primitive era.** Restitution by offender as a practice is not a new phenomenon and is prevalent since ancient times. Throughout the history Restitution has been used as a punitive measure. Ancient law codes like Babylon Code, Hammurabi Code, Roman XII Tables have a mention of Restitution in addition to other remedies. The primary purpose of such restitution was not to compensate the victim, but to protect the offender from violent retaliation by the victim or the community. It was a means by which the offender could buy back the peace he had broken.

As early as the sixteenth century, Sir Thomas More in his work Utopia proposed restitution, “to the owner, and not as elsewhere to the prince; for they reckon that the prince hath no more right to the stolen goods than the thief. But, if that which was stolen be no longer in being, then the thief’s effects are valued, and restitution being made..., and himself condemned to serve in public works...” Herbert Spencer in his influential works has also talked about restitution through prison works.

**3.3 Restitution in legal framework.** The Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 provides for restitution to victims. It states that offenders should make a fair restitution to victims or their families and restitution should be part of the sentencing in criminal cases.

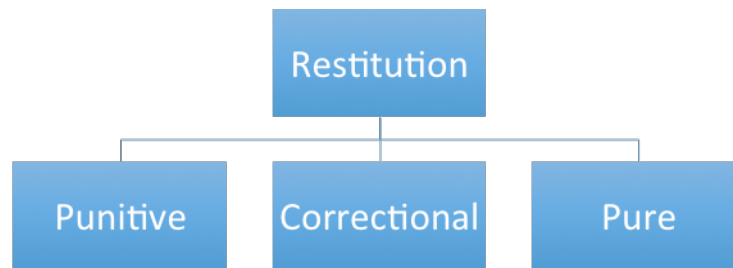
The UN General Assembly passed a resolution titled “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005”, according to which, Restitution shall be provided to reestablish the situation that existed prior to the violations of human rights or international humanitarian law. Restitution requires inter alia, restoration of liberty, family life citizenship, return to one's place of residence, and restoration of employment or property.

Similarly, the conspectus of provisions of Part III, Part IV and Part IV-A of the Indian constitution would reveal a scheme well engrafted to give justice to the victims. Article 38, 41 and 51 A if interpreted empathetically and expanded imaginatively, the constitutional beginnings of the victimology can be found. Further, the guarantee against unjustified deprivation of life and liberty (Article 21) has in it elements obligating the state to compensate victims of criminal violence.

In a very narrow sense there is a provision for Restitution under Sections 451, 452 & 456 of the Code of Criminal Procedure, 1973 by putting an onus on the accused to place the victims back into possession of his property that he was unlawfully deprived of.

The Hon’ble Supreme Court of India in case of Ankush Shivaji Gaikwad v. State of Maharashtra, (2013) 6 SCC 770 while emphasizing on restitution remark that, “clock appears to have come full circle by the law makers and courts going back in a great measure to what was in ancient times common place.”

**3.4 Rationale of restitution.** Restitution has been seen as an alternative paradigm to punishment. Criminologists argue that it has punitive, correctional and pure-restitution functions.



*(Figure 2)*

a. Punitive Restitution – According to Stephen Schafer “Punitive restitution, like punishment, must always be the subject of judicial consideration. Without exception it must be carried out by personal performance by the wrong-doer, and should even then be equally burdensome and just for all criminals, irrespective of their means, whether they be millionaires or labourers.”

The US Supreme Court in *Bradford v. United States* (1913), sanctioned restitution as a condition on a pardon. By providing for restitution in the penal sections of legislations and authorizing it as a sentencing option in addition to fines or imprisonment or as a condition on parole or probation, today’s legislatures have preserved restitution as a criminal penalty.

b. Correctional Restitution - To restore the injured victim to his pre-crime position is primarily the obligation of the offender. The offender should be required and permitted by the penal system to fulfil this obligation. Correctional restitution addresses the crime problem. It does not allow the offender to terminate his relationship with his victim, but rather forces this relationship to be maintained until the victim's original position is restored. If the offender were permitted to be at liberty, either immediately following conviction or after a reduced sentence, on the condition that he use that opportunity to make restitution to the victim, penal rehabilitation goals would be furthered and society would be freed of the double burden of compensating the victim and providing penal shelter to the offender. This is what our modern understanding of the criminal-victim relationship demands. Correctional restitution is the type of compensation that holds the promise of both restitutions to victims of crime and implementation of the reformatory and corrective goals of the criminal law.

The Oregon Supreme Court in *State v. Dillon* (1981) views the rationale for imposing a duty of restitution as “penological: It is intended to serve rehabilitative and deterrent purposes by causing a defendant to appreciate the relationship between his criminal activity and the damage suffered by the victim.”

c. Pure-restitution – Randy Barnett for the first time in 1977 advocated this new paradigm in punishment. He defines it as forced compensation or imposed fine. Pure restitution is accomplished by sentencing an offender to make restitution only. The goal is reparations paid to the victim, which would be ordered, when an offender is sentenced to make restitution to the victim. Pure restitution blurs the distinction between civil law and the criminal law. No longer would the deterrence, reformation, disablement, or rehabilitation of the criminal be the guiding principle of the judicial system. The attainment of these goals would be incidental to, and as a result of, reparations paid to the victim. No longer would the criminal deliberately be made to suffer for his mistake. Making good that mistake is all that would be required.

## 4. Compensation

**4.1 Meaning.** The criminal law has been seen as concerning State and offenders only. Though, its chief purpose is to protect the society, the person who has suffered in crime has always been overlooked. However, the recent notions of justice have brought paradigm shift in this approach in international as well as national laws. . Earlier it was reckoned that punishing the accused by sending him to imprisonment or imposing fine, meets the end of justice. This is now considered as a restrictive approach. Pertinently, Indian Penal Code, 1860 a law which covers most of the substantive offences, prescribe for the offenders, only five kind of punishments viz. Death, Imprisonment for life, Imprisonment (Rigorous or Simple), Fine, Forfeiture of Property, all speaking in language of deterrence or retribution. The person who has actually suffered i.e. victim doesn't get much if these punishments are even awarded to the accused. The grant of compensation to victim of crime though exist since primitive society; it has again revived in the mid of 20<sup>th</sup> century. The Victims have taken a forefront seat whenever there is a discourse on reformation of criminal justice system.

In simple terms 'compensation' means, an amount of money ordered by the court to be paid by the accused or the State to the 'victim'.

'Victim' is defined as "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 laws operative within the member states, including those laws proscribing criminal abuse of power."

- *UN Declaration of Basic Principles of Justice for Victims, 1985*

Victim means "a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression 'victim' includes his or her guardian or legal heir."

- *Section 2(wa), the Code of Criminal Procedure, 1973*

The

UN General Assembly recognized the right of victims of crimes to receive compensation by passing a resolution titled "Declaration on Basic Principles of Justice for Victims and Abuse of Power, 1985". The Resolution contained the following provisions on compensation:

### "Compensation

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

- (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
- (b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm."

The UN General Assembly passed a resolution titled "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005" which deals with the rights of victims of



international crimes and human rights violations. These Principles (while in their Draft form) were quoted with approval by the apex Court in case of State of Gujarat and Anr. v. Hon'ble High Court of Gujarat (1998) 7 SCC 392 in the following words:

“94. In recent years the right to reparation for victims of violation of human rights is gaining ground. United Nations Commission of Human Rights has circulated draft Basic Principles and Guidelines on the Right to Reparation for Victims of Violation of Human Rights, (see Annexure).

13. Compensation shall be provided for any economically Assessable damage resulting from violations of human rights or international humanitarian law, such as:
- (a) Physical or mental harm, including pain, suffering and emotional distress;
  - (b) Lost opportunities including education;
  - (c) Material damages and loss of earnings, including loss of earning potential;
  - (d) Harm to reputation or dignity;
  - (e) Costs required for legal or expert assistance, medicines and medical services.”

Furthermore, Article 9(5) of the International Covenant on Civil and Political Rights states that a victim of unlawful arrest or detention shall have an enforceable right to compensation. In Article 5(5), the European Convention for the Protection of Human Rights and Fundamental Freedoms has a similar provision.

**4.2 Rationale of Compensation.** Compensation can be punitive, reformatory or proportional to the harm done. It depends upon the aim for granting of compensation by the Court. Various justifications for compensation have been used, such as: benefit to the victims, symbolic social recognition for the victims suffering, deterrent effects on the offender as also the reformatory effects on the offender as the paying of compensation has an “intrinsic moral value of its own”. Jeremy Bentham grounded justification for payment of compensation in the social contract theory wherein it is the responsibility of the State to protect the person and property of the citizen. State compensation is further justified because it is the political, economic and social institutions of the state that generate crime by poverty, discriminations, unemployment and insecurity. During the 1950's Margery Fry, an English penal reformer called refocusing on the plight of victims and the bestowing of effective remedies on victims such as state compensation. This heralded the establishment of state compensation programs in the American and European jurisdictions.

### **4.3 Growth of Compensatory Jurisprudence in India**

The recognition of compensatory right in criminal procedure code has been multi phases edification in Indian jurisprudence. In India it has evolved in stages through combined efforts of legislature, judiciary, law commission reports, other expert committee reports like Justice Malimath Committee and NGO's.

Section 545 of the Code of Criminal Procedure of 1898 provided for the power of the Courts to award compensation to the person who has suffered loss or injury due to the offence, if substantial compensation is recoverable in a Civil Court. In 1969, Law Commission of India in its 42<sup>nd</sup> Report suggested reforms in Section 545 of Code of 1898.

In para 3.17 it observed, “We have a fairly comprehensive provision for payment of compensation to the injured party under Section 545 of the Criminal Procedure Code. It is regrettable that our courts do not exercise their statutory powers under this Section as freely and liberally as could be desired...” While commenting on the meaning of term ‘substantial compensation recoverable in Civil Court’ law commission observed that in essence it means that offence alleged must also be a Tort and to exclude cases where only nominal damages are recoverable. Law commission noted that power of courts under Section 545 is discretionary and courts are not liberally using this provision to award compensation. It suggested to omit the word ‘substantial’.

Government of India introduced Code of Criminal Procedure Bill, 1970. Statement of Objects and Reasons stated that since compensation can be ordered by courts when offence is punishable with fine and fine is actually imposed. Bill proposed to do away with this requirement and provided that compensation can be ordered upon conviction of accused. Bill laid certain guiding factors for courts when awarding compensation i.e. nature of injury, manner of infliction, capacity of accused and other factors. Accordingly, Section 357 was introduced in the Code of Criminal Procedure, 1973 providing for payment of compensation. Compensation was now payable by 'any court'.

While the statutory law was stagnant judiciary played an important role in furthering the rights of victims.

In case of *Palaniappa Gounder v. State of Tamil Nadu*, AIR 1977 SC 1323, the apex court for the first time directed the accused to pay the compensation which was to be realized from the amount of fine. In case of *State of Haryana v. Sukhbir Singh and others* AIR 1988 SC 2127 apex court observed that, "...the power under Section 357 Criminal Procedure Code is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is, to some extent, a recompensatory measure to rehabilitate to an extent the beleaguered victims of the crime, a modern constructive approach to crime, a step forward in our criminal justice system"

Further the Supreme Court in *Mangilal v. State of Madhya Pradesh*, AIR 2004 SC 1280 held that the power of the court to award compensation to the victims under Section 357 is not ancillary to other sentences but in addition thereto. The basic difference between subsection (1) and (3) of the Section 357 is that in the former case, the imposition of fine is the basic and essential requirement, while in the latter even the absence thereof empowers the court to direct payment of compensation. Such power can even be exercised by an appellate court, the High Court or the Court of Sessions when exercising revisional jurisdiction.

*Rudal Shah v. State of Bihar* AIR 1983 SC 1086, *Vishaka v. State of Rajasthan* (1997) 6 SCC 241, *DK Basu v. State of West Bengal* AIR 1997 SC 610, are illustrative of the liberal approach in granting the compensation to the victims while exercising constitutional writ jurisdiction. The victims of Bhagalpur blinding in case of *Khatri (I) Vs. State of Bihar* (1981) 1 SCC 623, were provided medical justice, the victims of communal violence were given rehabilitative justice and victims of Bhopal gas tragedy in case of *Union Carbide Corporation Vs. Union of India*, (1989) 1 SCC 674 were given compensatory justice. The instrumentalities of State were made liable to pay compensation in the case of *Nilabati Behera V. State of Orissa* 1993 2 SCC 746 and *Chairman, Railway Board V. Chandrima Das* (2000) 2 SCC 465.

In 1996, Law Commission of India in its 154th report greatly emphasised on victims' rights. It included a Chapter on 'Victimology'. Following points from the Report are worth noticing:

- i. Crime entails not merely symbolic harm to social order but substantive harm to people, therefore, attentions should be given to victims' rights.
- ii. Principles of awarding compensation should be expanded to cover all kinds of cases. It shouldn't be limited to fines, penalties and forfeiture.
- iii. The State need to take responsibility for "providing assistance to victims out of its own funds".

In a decision of Punjab & Haryana High Court in case of *Rohtash v. State of Haryana* (Crl.A. No. 250 of 1999 decided on 1.4.2008) commenting on the dismay state of victims' rights vis-à-vis Section 357 of the CrPC echoed the recommendations of Malimath Committee Report (2003) and observed as follows:

“18. May be, inspite of best efforts, the State fails in apprehending and punishing the guilty but that does not prevent the State from taking such steps as may reassure and protect the victims of crime...

19. The victims have right to get justice, to remedy the harm suffered as a result of crime. This right is different from and independent of the right to retribution, responsibility of which has been assumed by the State in a society governed by Rule of Law. But if the State fails in discharging this responsibility, the State must still provide a mechanism to ensure that the victim's right to be compensated for his injury is not ignored or defeated.

21. Though a provision has been made for compensation to victims under Section 357 Cr.P.C., there are several inherent limitations. The said provision can be invoked only upon conviction, that too at the discretion of the judge and subject to financial capacity to pay by the accused. The long time taken in disposal of the criminal case is another handicap for bringing justice to the victims who need immediate relief, and cannot wait for conviction, which could take decades. The grant of compensation under the said provision depends upon financial capacity of the accused to compensate, for which, the evidence is rarely collected. Further, victims are often unable to make a representation before the Court for want of legal aid or otherwise. This is perhaps why even on conviction this provision is rarely pressed into service by the Courts. Rate of conviction being quite low, inter-alia, for competence of investigation, apathy of witnesses or strict standard of proof required to ensure that innocent is not punished, the said provision is hardly adequate to address to need of victims.”

The award of compensation dependable on conviction was so absurd and unworkable in the Indian context where the conviction rate is as low as less than 10% and accused are from poor strata of society. Thus, victims derive no real benefit from the provisions of section 357. Further, majority of the crimes in India are unreported or are those where the offender is un-traceable and thus, justice for victims remains illusionary.

Pursuant to various judicial decisions, 152nd and 154th Law Commission of India Reports, in 2008, victim oriented amendments were made in the Criminal Procedure Code of 1973.

Section 357 A was introduced which provided for State obligation to pay the compensation to victims focussing on their rehabilitation, irrespective of the fact that accused is tried or not. This change was brought keeping particularly in mind the requirement of rehabilitation of victim of sexual offences. The victim can approach the State or District Legal Service Authority. Compensation is payable if,

- i. compensation under Section 357 is not adequate for the rehabilitation
- ii. case ends in acquittal or discharge and victim has to be rehabilitated.

This forward looking provision however didn't garner immediate attentions from the State as 25 out of 29 State Governments have notified victim compensation schemes till 2014. The Supreme Court in *Suresh & Anr. v. State of Haryana* showing its dissatisfaction with this laxity of States observed, “It has been brought to our notice that even though almost a period of five years has expired since the enactment of Section 357A, the award of compensation has not become a rule and interim compensation, which is very important, is not being granted by the Courts. It has also been pointed out that the upper limit of compensation fixed by some of the States is arbitrarily low and is not in keeping with the object of the legislation.”

The apex court has also recognised in its plethora of decisions right of victims to get an interim compensation. It was recognised in *Bodhisattwa Gautam v. Miss Subhra Chakraborty*, (1996) 1 SCC 490. It referred to *Delhi Domestic Working Women's Forum vs. Union of India* and others to reiterate the centrality of compensation as a remedial measure in case of rape victims wherein it was observed that, “If the Court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the Court the right to award interim compensation which should also be provided in the Scheme.” Further in *P. Rathinam v. State of Gujarat*, (1994) SCC (Cr1) 1163, which pertained to rape of a tribal woman in police custody, the court awarded an interim compensation of Rs. 50,000/- to be paid by the State Government.

The Section 357A has received the attention of Supreme Court in several decisions including *Ankush Shivaji Gaikwad vs. State of Maharashtra* [(2013) 6 SCC 770], *In Re: Indian Woman says gang-raped on orders of Village Court* published in *Business and Financial News*[(2014) 4 SCC 786], *Mohammad Haroon vs. Union of India*[(2014) 5 SCC 252] and *Laxmi vs. Union of India*[(2014) 4 SCC 427].

Again in 2013, Criminal law was amended providing for the mandatory compensation by the government in certain offences.

**4.4 Factors to be considered while granting compensation.** Following criterions have been laid down by the Supreme Court in various decisions.

- ❖ Capacity of the accused to pay ( a summary enquiry may be conducted to determine it)
- ❖ nature of offence and its impact on the victim
- ❖ Compensation should be reasonable
- ❖ justness of the claim
- ❖ While the award or refusal of compensation in a particular case may be within the Court's discretion, there exists a mandatory duty on the Court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion.
- ❖ If there are more than one accused, they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by instalments, may also be given. The court may enforce the order by imposing sentence in default
- ❖ Power under section 357(3) should be exercised only in appropriate cases. Such a jurisdiction cannot be exercised at the whims and caprice of a Judge. Though the word used is 'may' it is mandatory for the judge to apply the mind.
- ❖ other relevant circumstances depending upon facts and circumstances

(*See, Sarwan Singh v. State of Punjab* AIR 1978 SC 1525, *Bhaskaran v. Sankaran Vaidhyan Balan* AIR 1999 SC 3762, *Sarup Singh v. State of Haryana* AIR 1995 SC 2452, *Ankush Shivaji Gaikwad Vs. State of Maharashtra*, (2013) 6 SCC 770 )

There is Section 250 of the Code of Criminal Procedure which provides for compensation to the victim of vexatious complaint. It provides that if the prosecution is launched based on false accusation, and ultimately after trial, if the person is acquitted and if the trial Court finds that absolutely false case is lodged, then, the compensation is to be levied on the complainant under Section 250. Again Section 358 empowers the court to order a person to pay compensation to another person for causing a police officer to arrest such other person wrongfully.

**4.5 Other provisions in Indian law providing for the compensation.** Apart from the Code of Criminal Procedure there are certain other legislations which provides for the payment of compensation to the victims. For example, under Section 5 of the Probation of Offenders Act, 1958 Court may order to pay compensation to victim while releasing accused on admonition or probation. Also, in Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 a minimum fixed limit of compensation to be paid to the victim. The Workmen's Compensation Act of 1923, Motor Vehicles Act of 1988, The Fatal Accidents Act of 1855 also provides for payment of compensation. Indeed, there is a provision of no fault liability (Section 140) under Motors Vehicle Act wherein the accused has to compulsorily pay a certain amount of sum to the victim. This was indeed introduced in light of judgment of the Supreme Court in *M. K. Kunhimohammed v. P. A. Ahmedkutty* (1987) 4 SCC 284, wherein certain suggestions were made to raise the limit of

compensation payable as a result of motor accidents in respect of death and permanent disablement in the event of there being no proof of fault on the part of the person involved in the accident. Section 161 provides for the compensation in hit and run cases. An application of compensation can be filed under section 166 of the Act.

**4.6 Distinction between Restitution and Compensation.** Strictly speaking, the terms ‘restitution’, ‘reparation’, and ‘compensation’ are neither interchangeable nor overlapping as in fact they represent two different obligations and provide two different vantage points from which society’s interest in the victim can be studied. As used in the literature, restitution and reparation refer to remedies which draw wholly upon the resources of the offender. Compensation, on the other hand, refers to a making whole of the victim by the state. Compensation is a responsibility assumed by society; it is civil in character, and thus represents a non-criminal welfare goal. Restitution, on the other hand, allocates responsibility to the offender; a claim for restitution by the criminal is penal in character, and thus manifests a correctional goal in the criminal process. Restitution differs from reparation in that it contemplates a restoration in kind rather than by way of some monetary equivalent.

## 5. Assistance

**5.1 Meaning.** In *Khatri (I) v. State of Bihar* (1981) 1 SCC 627, the Hon’ble Supreme Court pondered over the question of forging “new tools and devise for the purpose of vindicating the most precious of the precious Fundamental Right to life and personal liberty”. Therefore, it needs to be assessed that whether, punishing an accused for depriving a person

The victim assistance would include services like Crisis Intervention, Counseling, Emergency Shelter, Criminal justice advocacy and Emergency Transportation.

of his life and personal liberty would better the harm done to victim. The answer is certainly ‘no’. The victims are left in a destitute and impoverished state after the Crime. For proper support and rehabilitation, they require State assistance at various fronts. The new victims’ jurisprudence has led to introduction of various changes in the legislations so as to render assistance to the victims.

**5.2 Right of Assistance.** The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 recognize the right of assistance for victims in following terms:

“Assistance

- a. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.
- b. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.
- c. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.

- d. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above”

**5.3 Rationale of Assistance.** It should be the obligation of the State to provide necessary assistance to the victim because:

- ❖ Victim may have lost everything as a consequence of crime. Therefore, to restore the balance of life victim may require medical, financial or legal assistance
- ❖ In certain cases after the crime, victims are left destitute and without any family or peer support.
- ❖ Justice is not merely initiation or conclusion of the legal process but also providing healing to the victim outside the legal system.
- ❖ Victims of Rape, assault, acid attacks etc. requires immediate medical assistance
- ❖ Victims of communal violence, natural disasters lost their homes

#### 5.4 Kinds of Assistance



(figure 3)

#### 5.5 Legal Provisions in Code of Criminal Procedure, 1973

- ❖ Section 164 A – Medical examination of victims of Rape.
- ❖ Section 154 – Information of offences under Ss. 326 A, 326 B, 354, 354A – 354D, 376, 376A- 376E & 509 of IPC if given by woman shall be recorded by woman police officer or any woman officer.

In such offences against women if the victim is temporally or permanently mentally or physically disabled then, information should be recorded by police officer at the residence of or a convenient place of choice in the presence of an interpreter or a special educator.

- ❖ In addition to this Section 164 (5A) provides that statement in such offences should be recorded by the Magistrate as soon as commission of offence is brought to the notice of police. It also provides for assistance of special educator or interpreter if the victim is permanently or temporarily disabled (mental or physical). Such statement should be videographed and it can be used in lieu of examination in chief at the time of trial.
- ❖ Record of information of certain offences against women by woman police officer – This particular measure of assistance was introduced by Criminal Law (Amendment) Act, 2013 to prevent **secondary victimization** in the police station.
- ❖ Representation by State – A victim's claim is represented by the State through Public Prosecutor in the Court and is allowed to have his counsel to aid public prosecutor. Victim counsel can submit written arguments to the court (Section 301).
- ❖ In cases where victim who is mentally or physically disabled, has to identify an accused then such identification should be carried in presence of the Judicial Magistrate. The methods with which victim is comfortable should be ensured by judicial Magistrate during process of identification and same shall be videographed.
- ❖ An appropriate measures should be taken to ensure that the victim of Rape or sexual offences who is minor doesn't confront the accused during cross examination.
- ❖ Section 357B contemplates that compensation to be in addition to fine under section 326A or section 376D or Indian Penal Code. The compensation payable by the State Government under section 357A shall be in addition to the payment of fine to the victim under section 326A or section 376D of the Indian Penal Code (45 of 1860)
- ❖ Section 326 A says that fine in the case of offence of acid attack should be paid to victim and such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim
- ❖ Section 357C provides for treatment of victims- All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under section 326A, 376, 376A, 376B, 376C, 376D or section 376E of the Indian Penal Code (45 of 1860), and shall immediately inform the police of such incident. Non-compliance of this section is punishable under IPC.

## 6. Summary

- ❖ In primitive society, the concept of restitution was very much there.
- ❖ The State usurped the justice dispensation functions and made the criminal law its monopoly. This resulted in dilution of restitution and compensatory measures in the criminal law. Thus, arose the distinction between torts and crime.
- ❖ The victim became the forgotten entity as the goal was to punish the offender. The aims of justice were retributive and deterrent.
- ❖ Starting from 1940's victim rights movement picked momentum. At international front UK became the first nation to come up with pro-victim legislation. In 1985, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recognized "restitution, assistance and compensation" as the pivotal rights of the victim.

- ❖ In India ever since 1898 there was provision for compensation but seldom invoked. 41<sup>st</sup>, 152<sup>nd</sup>, & 154<sup>th</sup> Law Commission Report, Malimath Committee Report and Madhava Menon Committee report etc. recommended progressive changes for enforcing victims' rights.
- ❖ Higher judiciary has also played a prominent role in advancing victim rights jurisprudence. Various judgments of the apex courts have resulted into amendments in law for example, *Bodhisattwa Gautam v. Miss Subhra Chakraborty*, (1996) 1 SCC 490. The expansion of writ jurisdiction in cases like *Rudal Shah*, *DK Basu*, *Visakha*, *Khatri*, *Union Carbide Corporation* etc. has also provided social justice to the victims by making the State liable to pay the compensation.
- ❖ Consequently, Victim Compensation Scheme came be introduced in 2009. Measures of victim's assistance (especially rape and acid attack victims) were introduced in 2013.
- ❖ Though, the term Restitution and Compensation are interchangeably used, they have distinct meanings.



## Books & Articles:

1. Abraham S. Goldstein, *Defining Role of the victim in Criminal Prosecution*, 52 MISSISSIPPI LAW JOURNAL, 515, 536-42 (1982).
2. AT Harland, *Theoretical and programmatic concerns in restitution: An Integration* in B. GALAWAY AND J. HUDSON, OFFENDER RESTITUTION IN THEORY AND ACTION, 193, 193-202 (1978)
3. DD BASU, CONSTITUTIONAL LAW OF INDIA, (2003)
4. EDWIN H SUTHERLAND & DONALD R CRESSEY, PRINCIPLES OF CRIMINOLOGY, 332 (1966).
5. Government of India, *Report of the Committee on Reforms of Criminal Justice System*, 75–84 (2003)
6. N. R. Madhav Menon, *Victim Compensation Law and Criminal justice: A plea for a Victim Orientation in Criminal justice* in K. I. VIBHUTE (ED.), CRIMINAL JUSTICE, (2004)
7. Oxford Handbook of Criminology (1994)
8. Randy E. Barnett, *Restitution: A New Paradigm for Criminal Justice*, 87 ETHICS, 279-301 (1977)
9. *Report of the Committee on Draft National Policy On Criminal Justice*, MHA, GOI (July, 2007) (N.R. Madhava Menon report).
10. Richard C. Boldt, *Restitution, Criminal Law, and the Ideology of Individuality*, 77 J. CRIM. L. & CRIMINOLOGY, 969 (1986)
11. S. SCHAFER, THE VICTIM AND HIS CRIMINAL, 23-25 (1968).
12. STEPHEN SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME, (1970)
13. Stephen Schafer, *Victim Compensation and Responsibility*, 43 S. CAL. L. REV, 55-67 (1970)
14. Stephen Schafer, *Restitution to the Victims of Crime – An Old Correctional Aim Modernized*, 50 MINNESOTA LAW REVIEW, 243 (1965).
15. *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV., 933-34 (1984)

## Law and International Instruments:

1. The Criminal Injuries Compensation Scheme, 1964 (UK)
2. The Code of Criminal Procedure, 1973 (Ss. 357, 357A – 357 C)
3. The Criminal Justice Act of 1982 (UK)
4. The Victim and Witness Protection Act of 1982 (USA)
5. *The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 1985
6. Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure, 1985

## Reports

1. Government of India, *Report of the Committee on Reforms of Criminal Justice System*, 75–84 (2003)
2. *Report of the Committee on Draft National Policy On Criminal Justice*, MHA, GOI (July, 2007) (N.R. Madhava Menon report).
3. 41<sup>st</sup> Report of Law Commission of India
4. 152<sup>nd</sup> Report of Law Commission of India
5. 154<sup>th</sup> Report of Law Commission of India

## Cases

1. Ankush Shivaji Gaikwad vs. State of Maharashtra (2013) 6 SCC 770
2. Bhaskaran v. Sankaran Vaidhyan Balan AIR 1999 SC 3762
3. Bodhisattwa Gautam v. Miss Subhra Chakraborty, (1996) 1 SCC 490
4. DK Basu v. State of West Bengal AIR 1997 SC 610
5. In Re: Indian Woman says gang-raped on orders of Village Court published in Business and Financial News (2014) 4 SCC 786
6. Khatri (I) v. State of Bihar (1981) 1 SCC 627
7. Laxmi vs. Union of India (2014) 4 SCC 427
8. M. K. Kunhimohammed v. P. A. Ahmedkutty (1987) 4 SCC 284
9. Mangilal v. State of Madhya Pradesh, AIR 2004 SC 1280
10. Mohommad Haroon vs. Union of India (2014) 5 SCC 252
11. Palaniappa Gounder v. State of Tamil Nadu, AIR 1977 SC 1323
12. Rohtash v. State of Haryana (Crl.A. No. 250 of 1999 decided on 1.4.2008, P&H)
13. Rudal Shah v. State of Bihar AIR 1983 SC 1086,
14. Sarup Singh v. State of Haryana AIR 1995 SC 2452
15. Sarwan Singh v. State of Punjab AIR 1978 SC 1525
16. Vishaka v. State of Rajasthan (1997) 6 SCC 241