



INTERNATIONAL LAW  
JOURNAL

---

**WHITE BLACK  
LEGAL LAW  
JOURNAL  
ISSN: 2581-  
8503**

*Peer - Reviewed & Refereed Journal*

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

[WWW.WHITEBLACKLEGAL.CO.IN](http://WWW.WHITEBLACKLEGAL.CO.IN)

## DISCLAIMER

No part of this publication may be reproduced, stored, transmitted, translated, or distributed in any form or by any means—whether electronic, mechanical, photocopying, recording, scanning, or otherwise—without the prior written permission of the Editor-in-Chief of *White Black Legal – The Law Journal*.

All copyrights in the articles published in this journal vest with *White Black Legal – The Law Journal*, unless otherwise expressly stated. Authors are solely responsible for the originality, authenticity, accuracy, and legality of the content submitted and published.

The views, opinions, interpretations, and conclusions expressed in the articles are exclusively those of the respective authors. They do not represent or reflect the views of the Editorial Board, Editors, Reviewers, Advisors, Publisher, or Management of *White Black Legal*.

While reasonable efforts are made to ensure academic quality and accuracy through editorial and peer-review processes, *White Black Legal* makes no representations or warranties, express or implied, regarding the completeness, accuracy, reliability, or suitability of the content published. The journal shall not be liable for any errors, omissions, inaccuracies, or consequences arising from the use, interpretation, or reliance upon the information contained in this publication.

The content published in this journal is intended solely for academic and informational purposes and shall not be construed as legal advice, professional advice, or legal opinion. *White Black Legal* expressly disclaims all liability for any loss, damage, claim, or legal consequence arising directly or indirectly from the use of any material published herein.

## ABOUT WHITE BLACK LEGAL

*White Black Legal – The Law Journal* is an open-access, peer-reviewed, and refereed legal journal established to provide a scholarly platform for the examination and discussion of contemporary legal issues. The journal is dedicated to encouraging rigorous legal research, critical analysis, and informed academic discourse across diverse fields of law.

The journal invites contributions from law students, researchers, academicians, legal practitioners, and policy scholars. By facilitating engagement between emerging scholars and experienced legal professionals, *White Black Legal* seeks to bridge theoretical legal research with practical, institutional, and societal perspectives.

In a rapidly evolving social, economic, and technological environment, the journal endeavours to examine the changing role of law and its impact on governance, justice systems, and society. *White Black Legal* remains committed to academic integrity, ethical research practices, and the dissemination of accessible legal scholarship to a global readership.

## AIM & SCOPE

The aim of *White Black Legal – The Law Journal* is to promote excellence in legal research and to provide a credible academic forum for the analysis, discussion, and advancement of contemporary legal issues. The journal encourages original, analytical, and well-researched contributions that add substantive value to legal scholarship.

The journal publishes scholarly works examining doctrinal, theoretical, empirical, and interdisciplinary perspectives of law. Submissions are welcomed from academicians, legal professionals, researchers, scholars, and students who demonstrate intellectual rigour, analytical clarity, and relevance to current legal and policy developments.

The scope of the journal includes, but is not limited to:

- Constitutional and Administrative Law
- Criminal Law and Criminal Justice
- Corporate, Commercial, and Business Laws
- Intellectual Property and Technology Law
- International Law and Human Rights
- Environmental and Sustainable Development Law
- Cyber Law, Artificial Intelligence, and Emerging Technologies
- Family Law, Labour Law, and Social Justice Studies

The journal accepts original research articles, case comments, legislative and policy analyses, book reviews, and interdisciplinary studies addressing legal issues at national and international levels. All submissions are subject to a rigorous double-blind peer-review process to ensure academic quality, originality, and relevance.

Through its publications, *White Black Legal – The Law Journal* seeks to foster critical legal thinking and contribute to the development of law as an instrument of justice, governance, and social progress, while expressly disclaiming responsibility for the application or misuse of published content.

# **COMPENSATORY THEORY AS AN ALTERNATIVE TO TRADITIONAL THEORIES OF PUNISHMENT**

AUTHORED BY - FRANCIS K.V,  
KARTHIKEYAN R. & BLEIMY T JOSE

## **1. Introduction**

The evolution of criminal justice has historically mirrored the shift from "private vengeance" to "state-administered punishment." In this transition, the state "stole" the conflict from the victim, transforming a personal injury into an offense against the Sovereign. Traditional penology has long been dominated by the "Big Three" theories: **Retribution, Deterrence, and Reformation**. They are inherently offender-centric. . While these theories focus on the state's relationship with the offender, the victim is often relegated to a mere witness for the prosecution. They prioritize the moral culpability of the perpetrator or the safety of the collective.

However, the late 20th century saw a "victimological revolution." The **Compensatory Theory (or Restitutionary Theory)** emerged as a radical alternative posits that the primary goal of justice should not be the infliction of pain on the offender and suggesting that the "Golden Thread" of justice should be the restoration of the victim to their pre-crime state- or as close to it as possible. In *State of Gujarat v Hon'ble High Court of Gujarat* the Supreme Court of India stated as follows; "In our efforts to look after and protect the human rights of the convict, we cannot forget the victim or his family in case of his death or who is otherwise incapacitated to earn his livelihood because of the criminal act of the convict. The victim is certainly entitled to reparation, restitution and safeguard of his rights. Criminal justice would look hollow if justice is not done to the victim of the crime. The subject of victimology is gaining ground while we are also concerned with the rights of the prisoners and prison reforms. A victim of crime cannot be a 'forgotten man' in the criminal justice system. It is he who has suffered the most. His family is ruined particularly in case of death and other bodily injury. This is apart from the factors like loss of reputation, humiliation, etc. An honor which is lost or life which is snuffed out cannot be recompensed but then monetary compensation will at least provide some solace"<sup>1</sup>

---

<sup>1</sup> (1998) 7 SCC 392[P.434]

## **Victimological Comprehension: Moving Beyond "Victim Precipitation"**

To understand compensatory theory, one must understand the evolution of Victimology: The evolution of victimology is the story of the "rediscovery" of the victim. For centuries, the legal system focused almost exclusively on the offender and the state. Victimology emerged to challenge this by making the victim a central figure in the study of crime and justice.

### **Meaning of Victimology**

When breaking up the word victimology, there is 'victim' and 'ology'. Victim means all those who experience injury, loss, or hardship due to any cause, and on the other hand 'ology' is just a suffix meaning the study of. So the meaning of victimology may be described as "it is the study of people who experience injury, or hardship due to any course." Here, we are looking at a specific kind of cause. This hardship is caused by crime. The most accepted definition of victimology is, "The scientific study of crime victims, which focuses on the physical, emotional, and financial harm people suffer at the hands of criminals."<sup>2</sup>

Andrew Karman has defined victimology in broad sense. According to him: "Victimology is the scientific study of victimization, including the relationship between victims and offenders, the interaction between victims and the criminal justice system, that is, the police and courts, and corrections officials, and the connection between victims and other societal groups and institutions, such as media, business, and social movements."<sup>3</sup>

According to Justice JN Bhatt, High Court of Gujarat, "Victimology is a science of sufferings and resultant compensation. The doctrine of victimology has various aspects. Victimology means the science of relationship between the victims (sufferers) of the crime and creators of the crime. The victim of crime shall be entitled to compensation if they have not contributed in the emergence of the crime."<sup>4</sup>

As modern legal systems shift toward Restorative Justice, the question arises: can compensation effectively replace or supplement traditional punitive measures by prioritizing restorative concerns and victim's right. The evolution of criminal justice has historically mirrored the shift from "private vengeance" to "state-administered punishment." In this

---

<sup>2</sup> DR. Krishna Pal Malik- Penology, Victimology & Correctional Administration in India. 1st Edition 2011. p.209

<sup>3</sup> Andrew Karman: "Crime victims: An Introduction to Victimology" published in 1990.

<sup>4</sup> Justice JN Bhatt - 1999 Cri.LJ 2823, (1999), 1GLR 466

transition, the state "stole" the conflict from the victim, transforming a personal injury into an offense against the Sovereign. Traditional theories—**Retribution, Deterrence, and Reformation**—are inherently offender-centric. They prioritize the moral culpability of the perpetrator or the safety of the collective.

This article discusses whether compensation can stand as a viable alternative to traditional punitive measures by prioritizing restorative concerns and victim rights.

### **The Era of the "Golden Age" (Pre-11th Century)**

In ancient times, victims were the central figures in justice. Crime was seen as a personal wrong against an individual or family, not the state. The "State" was not the primary aggrieved party as it is in modern criminal law. Instead, crime was seen as a personal or community ruptures that required **restoration**.

Both the **Manusmriti** (Hindu law) and the **Quranic traditions** (Islamic law) emphasized that the ultimate goal of justice was to heal the victim's loss and ensure the offender achieved spiritual or social "cleansing."

**Compensatory focus:** Ancient Hindu laws (Manusmriti) and Islamic law (Qisas/Diyat) prioritized reparation and atonement to the victim or their kin.

#### **1. Ancient Hindu Law: Manusmriti<sup>5</sup>**

In the *Manusmriti* and subsequent *Dharmashastras*, the concept of justice is deeply tied to **Dharma** (the cosmic and social order). When a crime is committed, Dharma is broken, and it must be re-established through punishment (*Danda*), penance (*Prayaschitta*), and reparation.

**Restitution for Injuries:** The *Manusmriti* (Chapter VIII, Verse 287) explicitly mandates that if an aggressor causes physical harm or the loss of a limb, they must not only face a fine to the King but also pay for the **cost of the cure** and provide compensation for the injury itself.

**Social Restoration:** The focus was on "returning the victim to their previous condition" as much as possible, which modern scholars view as an early form of **restorative justice**.

---

<sup>5</sup> Manusmriti Chapters..7,8 and 11

## 2. Islamic Law: Qisas and Diyat<sup>6</sup>

Islamic jurisprudence divides crimes into different categories. While *Hudud* crimes (like theft or adultery) have fixed punishments, crimes against the person (murder or battery) fall under a compensatory framework.

### Qisas (Retaliation in Kind)

**Definition:** *Qisas* translates to "retaliation" or "following in the footsteps." It is the principle of "an eye for an eye."

### Diyat (Blood Money)

**The Compensatory Alternative:** The Quran strongly encourages the victim's family to opt for *Diyat* (financial compensation) instead of *Qisas*.

### Afw (Forgiveness)

**Atonement:** If the victim's family forgives the offender (*Afw*)—either for money or as an act of charity—the offender is often released from the death penalty. This is seen as a supreme act of piety that allows the offender a chance for repentance and spiritual atonement.

**Lex Talionis**, derived from the Latin *lex* (law) and *talio* (retaliation), is the legal principle that a person who has injured another is to be penalized to a similar degree. While it is often famously summarized by the phrase "an eye for an eye," its historical significance goes far beyond mere revenge.

### 1. The Core Purpose: Limiting Violence

To modern eyes, "an eye for an eye" sounds barbaric. However, in the context of ancient Mesopotamia (c. 1750 BCE), it was a **progressive reform**. Before the Code of Hammurabi, disputes often led to "blood feuds" where a single injury could result in the slaughter of an entire family.

**Restraint:** Lex Talionis mandated that the punishment **must not exceed** the crime. If someone lost a tooth, the victim could not kill the offender; they could only demand a tooth in return.

---

<sup>6</sup> Surah An-Nisa(4:92), Surah AL- Baqarah(2:178), Sura Al-HASHR(59:2) Sura An-Nisa (4:59)

**State Intervention:** It shifted the power of punishment from the individual or tribe to the state/king, creating a more predictable and stable society.

## 2. Key Features in the Code of Hammurabi<sup>7</sup>

The Code contains 282 laws, many of which follow the *talionic* (reciprocal) model. However, the application was not always literal or equal across different social classes. In Babylonian law, Lex Talionis was strictly applied among social equals, while financial compensation was used when the social status of the victim was lower.

## 3. Retribution vs. Restitution

While Lex Talionis focuses on **retribution** (punishment as a "payback"), the Code of Hammurabi also heavily emphasized **restitution** (compensating the victim).

## 4. Legacy and Modern Influence

The principle evolved through the **Mosaic Law (Torah/Bible) and Roman Law**, eventually shifting from physical retaliation to **pecuniary (monetary) compensation**. The Torah/Old Testament contains the most famous phrasing of Lex Talionis. While the text reads literally, historical Jewish jurisprudence interpreted these as mandates for monetary compensation rather than physical mutilation.

**The Proportionality Principle:** Today, this is the ancestor of our modern concept of "proportionality" in sentencing. We no longer take eyes, but we do insist that a shoplifter should not receive the same sentence as a murderer.

**Retributive Justice:** It remains a foundational pillar of criminal law philosophy, arguing that the primary goal of the legal system is to provide a "just desert" for the offender.

## The Era of the "Forgotten Victim" (11th Century – 1940s)<sup>8</sup>

With the rise of the nation-state, the King or the State "stole" the conflict. Crime became a breach of the "King's Peace." During the era of the "Forgotten Victim" (roughly the **11th century to the 1940s**), the legal landscape underwent a seismic shift. As the nation-state

---

<sup>7</sup> Law 196 to Law 200 and Law 230

<sup>8</sup> Hans Joachim Schneider- The Victim and the Criminal Justice Process- Forgotten Victim Concept. pp.3-8

consolidated power, the victim was systematically pushed out of the justice process.

This period is defined by the transition from **restitution** (payment to the victim) to **retribution**

(punishment by the state).

**1. The "Theft" of the Conflict:** - In earlier tribal or feudal societies, crime was a private matter between the offender and the victim. However, as Kings sought to centralize their authority, they redefined crime.

**The King's Peace:** Legal theorists argued that a crime was not just an attack on an individual, but a breach of the "**King's Peace**." Since the King was the ultimate protector of the realm, any violence was an insult to his authority.

**The State as the Aggrieved:** Consequently, the State (or Crown) replaced the victim as the primary "aggrieved party." The legal case became *The King vs. The Offender*, rather than *The Victim vs. The Offender*.

## **2. The Disappearance of Compensation**

During this era, the mechanisms for awarding compensation to victims almost entirely vanished from the criminal courts:

**Fines vs. Restitution:** Previously, offenders paid a *Bot* (compensation to the victim). Under the new system, they paid a **Fine** (payment to the State treasury). The financial penalty served to enrich the Crown rather than repair the victim's loss.

**Forfeiture of Assets:** If a criminal was convicted of a serious felony, their lands and goods were often forfeited to the King. This left the offender "civilly dead" and bankrupt, making it impossible for the victim to ever recover damages, even through separate legal action.

**The Civil-Criminal Divide:** This era saw the rigid separation of law into two silos:

**Criminal Law:** Focused solely on punishment, deterrence, and the King's revenue.

**Civil Law (Torts):** The only place where a victim could seek compensation. However, most

criminals were too poor to be sued successfully, and the cost of a civil trial was prohibitive for the average victim.

### 3. The Victim as a "Mere Witness"

By the 18th and 19th centuries, the victim's role was reduced to that of a "**piece of evidence.**"

They were required to testify to help the state secure a conviction, but they had no say in the sentencing. They received no information about the progress of the case. No provisions existed for their medical bills, lost wages, or emotional trauma.

*"The State cannot prevent crime... and then, after all that, it accepts a reward [the fine]; and over and above this, it puts the expense of the criminal's maintenance on the back of the honest citizen whom it has neither protected nor indemnified." — Enrico Ferri, 19th-century Criminologist*

This era only began to end in the 1950s and 60s, when reformers like **Margery Fry** began to argue that if the State claims a monopoly on force and fails to protect its citizens, it has a moral duty to compensate them.

#### **The Birth of Scientific Victimology (1940s – 1950s)**

Early victimologists were primarily criminologists who began to notice that some victims seemed more "prone" to crime than others. This phase is often called **Positivist Victimology**.

#### **Key Pioneers:**

**Mendelsohn(1937)** interviewed victims to obtain information, and his analysis led him to believe that most victims had an "unconscious aptitude for being victimized". He created a typology of six types of victims, with only the first type, the innocent, portrayed as just being in the wrong place at the wrong time. The other five types all contributed somehow to their own injury, and represented victim precipitation.

**Hans von Hentig (1948):** In his book *The Criminal and His Victim*, he argued that victims are often "born" (vulnerable) or "made" (provoking). He created a typology based on vulnerabilities (the young, the old, the female, the "dull normal's"). He studied victims of homicide, and said that the most likely type of victim is the "depressive type" who is an easy

target, careless and unsuspecting. The greedy type is easily duped because his or her motivation for easy gain lowers his or her natural tendency to be suspicious. The “wanton type” is particularly vulnerable to stresses that occur at a given period of time in the life cycle, such as juvenile victims. The ‘tormenter’, is the victim of attack from the target of his or her abuse, such as with battered women. Von Hentig’s work provided the foundation for analysis of victim-precipitation that is still somewhat evident in the literature today.

**Wolfgang’s** research (1958) followed this lead and later theorized that “many victim-participated homicides were, in fact, caused by the unconscious desire of the victims to commit suicide.

**Schafer’s** theoretical work(1968) also represented how victimology invested a substantial amount of its energy to the study of how victims contribute, knowingly or unknowingly, to their own victimization, and potential ways they may share responsibility with offenders for specific crimes.<sup>9</sup> Wrote *The Victim and His Criminal*, shifting focus to the **Functional Responsibility**—the idea that victims have rights but also a duty to prevent crime through caution.

### **The Transition to Applied Victimology (1960s – 1970s)**

This period moved from "blaming the victim" to "helping the victim." It was driven by social movements (Civil Rights, Feminism) and the realization that the justice system was failing victims.

**Victims’ Rights Movement:** Groups began advocating for state-funded compensation and better treatment in court.

**Margery Fry:** A social reformer in the UK who campaigned for the first modern state compensation schemes (established in 1964).

### **Modern & Radical Victimology (1980s – Present)**

Contemporary victimology is broad, focusing on human rights, restorative justice, and the "secondary victimization" caused by the system.

---

<sup>9</sup> Dr. Krishnapal Malik-Penology, Victimology & Correctional Administration in India- First Edition, p.210

Modern Victimology shifts focus to **Secondary Victimization**—the trauma caused by the legal system itself. Compensatory theory addresses this by giving the victim a "Right to Redress." It transforms the victim from a "forgotten actor" into a "primary stakeholder" in the sentencing process.

Influenced by critical theory, this branch looks at how the state itself can be an offender (e.g., police brutality, environmental crimes, or corporate fraud). It argues that "who is a victim" is often a political decision.

### **Theoretical Advancements**

Modern theories explain victimization patterns without blaming the victim:

**Routine Activities Theory (Cohen & Felson):** Crime happens when a *motivated offender*, a *suitable target*, and a *lack of capable guardianship* meet in time and space.

**Lifestyle Exposure Theory:** A person's routine (working late, frequenting bars) increases their risk of being targeted.

It may be summarized that during the founding of victimology in the 1940s, victimologists such as Mendelsohn, Von Hentig, and Wolfgang tended to use dictionary definitions of victims as hapless dupes who instigated their own victimizations.

All these above theories are some how study the contributory role of the victim in commission of the crime. But, in the decades of 1980s the concept of victimology is shifted from criminal to victim of the crime. The concept has given new era to the victimology to find out place for victim in the court room and find the remedies for their rehabilitation by providing of monetary relief in the form of compensation.

### **International Milestones. Addressing the Victim's Rights: International Standards**

The shift toward compensatory justice is supported by several international instruments: The shift away from the "Forgotten Victim" era culminated in two landmark legal instruments that re-centered the victim in the justice system. While the **UN Declaration (1985)** provided the global moral and philosophical framework, the **EU Directive (2012)** turned those ideals into binding, enforceable laws.

## 1. The UN Declaration of 1985<sup>10</sup>

Known as the "**Magna Carta for Victims**," this declaration was the first international document to formally define "victim" and outline their fundamental rights.

### Key Pillars of the Declaration:

- **Broad Definition of "Victim":** It covers people who suffered harm through acts that violate national laws **and** those who suffered from "abuse of power" (even if the act isn't yet a crime under local law).
- **Access to Justice:** Victims should be treated with compassion and dignity. They have a right to be informed of their role and the progress of their case.
- **Restitution:** It emphasizes that offenders should pay for the harm caused. If the offender is a government official, the State should provide restitution.
- **Compensation:** When the offender cannot pay, the Declaration urges States to establish financial funds for victims who have sustained serious bodily injury or mental impairment.
- **Social Assistance:** Governments should provide medical, psychological, and social support.

**Status:** It is a "Declaration," meaning it is **not legally binding**, but it serves as the universal benchmark for every country's victim legislation.

## 2. The EU Victims' Rights Directive<sup>11</sup> (2012/29/EU)

While the UN Declaration was a set of guidelines, the EU Directive is a **legally binding mandate**. All EU Member States were required to integrate these "minimum standards" into their national laws by 2015.

### Core Rights under the Directive:

- **The Right to Information:** From the very first contact with police, victims must be informed of their rights in a language they understand.
- **Individual Assessment:** Authorities must conduct a "bespoke" assessment for every victim to see if they have specific protection needs (e.g., child victims, victims of terrorism, or gender-based violence).

---

<sup>10</sup> The UN General Assembly Resolution 40/34

<sup>11</sup> The European Union Victim's Rights Directive-2012/29/EU

- **Protection during Proceedings:** To avoid "secondary victimization" (the trauma of the trial itself), victims can be interviewed without being in the same room as the offender and can have hearings held in private.
- **Right to Support:** Victims must have access to free-of-charge, confidential support services ( help lines, shelters, etc.) regardless of whether they have reported the crime to the police.
- **Right to Review:** If a prosecutor decides not to prosecute a case, the victim has the legal right to ask for a review of that decision.

## Compensatory Theory as an Effective Alternative

For compensatory theory to serve as an alternative, it must fulfill the functions that traditional punishment currently serves.

**I. Accountability via Restitution** -Compensatory theory replaces the "passive suffering" of a prison cell with "active responsibility." By requiring the offender to work and pay back the victim, it serves a **Reformative** purpose more effectively than idle incarceration.

### II. State Responsibility (The Social Contract Theory)

When an offender cannot pay, the state—having failed in its primary duty to protect the citizen— must step in. This is the basis for **Victim Compensation Schemes** (e.g., Section 357A of the CrPC in India, or the CVAA in the USA). This shifts the penological focus from "punishing the bad" to "supporting the good."

### III. Restorative Justice (The Healing Focus)

Unlike traditional penology which seeks "closure" through the end of a sentence, compensatory theory seeks "restoration" through the repair of harm.

## Comparative Jurisprudence & Judicial Trends

**UK:** The *Criminal Injuries Compensation Scheme* allows victims of violent crime to claim from the state regardless of whether the offender is caught.

**India:** The Supreme Court in *Ankush Shivaji Gaikwad v. State of Maharashtra (2013)* made it mandatory for courts to record reasons for not awarding compensation, effectively elevating it from a "judicial discretion" to a "statutory duty."

**USA:** The *Mandatory Victims Restitution Act* ensures that for certain crimes, the court *must* order the defendant to pay the full amount of the victim's losses.

### Critical Evaluation: The "Alternative" Debate

Can compensation *fully* replace traditional punishment?

1. **The Moral Limit:** For heinous crimes (murder, treason), money cannot satisfy the "conscience of the community." Here, Penology must remain retributive.
2. **The Inequality Risk:** We must avoid a "Wealthy Man's Justice" where the rich can buy their way out of jail by paying high compensation.
3. **The Safety Concern:** Compensatory theory lacks the "Incapacitation" element. A dangerous serial offender may pay, but they are still a threat if not physically restrained (Deterrence/Prevention).

A higher level synthesis suggests that Compensatory Theory should not be viewed as a **substitute** for punishment, but as a **redefinition** of it. A sophisticated penal system must be an "Amalgam":

- It uses **Penology** to determine the social debt (prison/fine).
- It uses **Victimology** to determine the individual debt (compensation/restitution).

Compensatory theory is an "effective alternative" only if we shift our definition of "Justice" from "The State vs. The Criminal" to "The Healing of the Victim and the Accountability of the Offender."

### The Core of Compensatory Theory

Compensatory theory views crime not just as a violation of the "King's Peace" or state laws, but as an infringement on an individual's rights.

### Key Principles: -

1. **Restitution:** The offender pays the victim directly (monetary or service).
2. **State Compensation:** In cases where the offender is indigent, the state provides a safety net (Victim Compensation Schemes).
3. **Recognition of Victim Agency:** The victim is given a voice in the legal process, moving from a passive observer to an active participant.

**Addressing Victim's Rights and Restorative Concerns<sup>12</sup>**:- Compensatory theory aligns more closely with the **UN Declaration of Basic Principles of Justice for Victims of Crime (1985)** than any traditional theory.

### **A. Economic Restoration**

In many crimes (theft, fraud, negligence), the victim's primary concern is financial. Traditional imprisonment may satisfy the state, but it often renders the offender unable to pay damages, leaving the victim doubly victimized.

### **B. Psychological Healing**

Restorative justice, underpinned by compensation, allows for mediation. When an offender acknowledges the harm and pays for it, it provides a sense of "closure" that a prison sentence—often perceived as a "black box" process—cannot provide.

### **C. Reducing Recidivism through Responsibility**

Unlike retribution, which can embitter an offender, compensatory models force the offender to face the human cost of their actions. This accountability is a core tenet of restorative justice. Despite its benefits, compensatory theory faces significant hurdles if proposed as a total replacement for punishment:

**The Problem of Violent Crimes:** How does one "compensate" for murder or grievous hurt? Life and limb cannot be monetized effectively without devaluing human life.

**Inequality of Wealth:** A wealthy offender might view compensation as a "fee" to commit a crime, effectively buying their way out of justice, whereas a poor offender remains trapped in the system.

**The Public Interest:** Punishment serves a public function of maintaining social order and expressing moral outrage. Total privatization of punishment through compensation might weaken the law's expressive power. To discuss whether **Compensatory Theory** serves as an effective alternative to **Traditional Theories** (Retributive, Deterrent, Preventive, and Reformative), one must look at how the focus of justice shifts from the "state vs. offender" to

---

<sup>12</sup> Burt Galaway & Joe Hudson- Criminal Justice, Restitution and Reconciliation, Criminal Justice Press, 1990. P.7-15

the "offender vs. victim."

While traditional theories focus on punishing the criminal to uphold the law, compensatory theory prioritizes "making the victim whole."

### **Effectiveness in Addressing Victim's Rights**

Traditional criminal justice often treats the victim as a mere witness. In contrast, compensatory theory elevates the victim to a central stakeholder:

**Financial Redress:** It addresses the immediate, tangible needs of the victim—medical bills, loss of property, or loss of earnings—which imprisonment alone does not solve.

**Psychological Closure:** By requiring the offender to acknowledge the harm and pay for it, victims often experience a greater sense of "justice served" than they do from seeing an offender sit in a cell.

**Agency and Voice:** Restorative practices (often linked with compensation) allow victims to express how the crime affected them, shifting them from a passive "object" of the trial to an active participant in the resolution

### **Synthesis: The Modern "Mixed" Approach**

Most modern legal systems (including the **Bhartiya Nagarik Suraksha Sanhita 2023** in India or the **Victims of Crime Act** in the US) do not use compensatory theory as a total replacement. Instead, they use it as a **vital supplement**.

- 1. State Compensation Funds:** To solve the issue of indigent offenders, the State steps in to provide compensation, upholding the victim's right to relief regardless of the offender's bank account.
- 2. Sentence Mitigation:** Courts may reduce a prison sentence if the offender shows genuine remorse through voluntary and significant restitution.
- 3. Mandatory Restitution:** In many jurisdictions, compensation is now a mandatory part of sentencing, ensuring that even if an offender goes to jail, they still owe a debt to the victim.

Compensatory theory is a **highly effective alternative** for property crimes, minor torts, and cases where the victim-offender relationship can be repaired. However, for serious threats to

public order, it cannot fully replace the deterrent and incapacitative functions of traditional punishment. The most effective system is a **hybrid** that uses traditional punishment to protect society while using compensatory measures to honor the victim.

### **Synthesis: The "Middle Path"**

Modern jurisprudence suggests a **Hybrid Model**. In this approach, compensation is integrated into the sentencing process. For example:

- Section 357 of the CrPC (India) or similar provisions in the UK and US allow courts to order compensation in addition to fine or imprisonment.
- Suspended sentences conditioned on the payment of restitution.

Compensatory theory serves as a vital corrective to the cold, state-centric nature of traditional punishment. While it may not serve as a *total* alternative—especially in cases of heinous, non-compensable crimes—it is an indispensable component of a modern, humane legal system.

True justice must be multidimensional: it must punish the guilty, deter the many, but above all, **heal the victim**. Moving forward, the focus of policymakers should be on refining "Victim Impact Statements" and ensuring that "State Compensation Funds" are accessible and robust.

The evolution of criminal justice has historically mirrored the shift from "private vengeance" to "state-administered punishment." In this transition, the state "stole" the conflict from the victim, transforming a personal injury into an offense against the Sovereign. Traditional theories—**Retribution, Deterrence, and Reformation**—are inherently offender-centric. They prioritize the moral culpability of the perpetrator or the safety of the collective.

However, the late 20th century saw a "victimological revolution." The **Compensatory Theory** emerged as a radical alternative, suggesting that the "Golden Thread" of justice should be the restoration of the victim. This assignment discusses whether compensation can stand as a viable alternative to traditional punitive measures by prioritizing restorative concerns and victim rights.

### **Theoretical Framework: The Traditional vs. The Restorative**

Traditional penology operates on a vertical axis (State vs. Offender), whereas compensatory theory operates on a horizontal axis (Offender vs. Victim).

## A. The Failure of Retributive and Deterrent Models

Traditional models often fail the victim in three ways:

1. **Re-victimization:** The trial process treats the victim as a "piece of evidence," often subjecting them to grueling cross-examination without offering tangible relief.
2. **Lack of Reparation:** A ten-year prison sentence for a thief satisfies the law but leaves the victim impoverished.
3. **The "Idle" Offender:** Incarceration is expensive for the state and prevents the offender from earning wages that could go toward restitution.

## Compensatory Theory: A Deep Dive

Compensatory theory is rooted in the belief that a crime creates an "obligatory debt." It is not merely a violation of a statute, but a disruption of the victim's life that requires a concrete remedy.

### I. Civil vs. Criminal Overlap

Compensatory theory blurs the lines between **Tort** and **Crime**. In civil law, the focus is *restitutio in integrum* (restoration to the original position). The scholars argue that bringing this civil remedy into the criminal fold ensures that justice is holistic rather than fragmented.

### II. Types of Compensation

- **Restitution:** Direct payment or service by the offender to the victim (e.g., repairing property).
- **State-Funded Compensation:** Essential for cases where the offender is unidentified, deceased, or indigent.
- **Ex-Gratia Payments:** Interim relief provided by the state during the pendency of a trial.

## Challenges to Compensation as a "Sole" Alternative

While compensatory theory is an effective *supplement*, its efficacy as a *total alternative* remains a subject of intense academic debate.

### A. The Commensurability Problem

How do we calculate the "cost" of a non-monetary injury? For offenses like sexual assault or the loss of a loved one, any financial sum feels inadequate. There is a risk that compensation

could be misinterpreted as "putting a price on a person," which undermines the moral gravity of the crime.

## **B. The "Wealthy Offender" Loophole**

If compensation is the primary alternative to punishment, the legal system risks becoming a "pay-to-play" model. Rich defendants could treat crimes as a business expense, paying off victims to avoid the social stigma or physical restriction of traditional punishment.

## **C. The Indigent Offender**

A significant portion of criminal offenders come from marginalized socio-economic backgrounds. If they cannot afford to compensate the victim, does the theory fail? This necessitates a heavy reliance on state funds, which shifts the burden from the "wrongdoer" back to the "taxpayer."

### **1. Compensatory Theory of Punishment – Meaning**

The **Compensatory Theory** treats crime as not only an offence against the State but also as a **wrong against the victim**. Its focus is:

- Repairing the **loss, injury or suffering** of the victim
- Making the offender **financially accountable**
- Restoring social justice rather than merely punishing

In India, this theory finds statutory recognition mainly under:

- **Section 357 CrPC** – Compensation by criminal courts
- **Section 357A CrPC** – Victim Compensation Scheme
- **Article 21 of the Constitution** (Right to life with dignity)

### **2. Landmark Supreme Court Judgments on Compensation**

#### **1. Hari Singh v. Sukhbir Singh<sup>13</sup>**

***Held:***

- Courts must **liberally exercise power under Section 357 CrPC**
- Compensation is not ancillary but a **substantive part of justice**
- Fine should be used to compensate victims, not merely to punish

“The power to award compensation is intended to do something to reassure the victim that he

---

<sup>13</sup> (1988) 4 SCC 551

is not forgotten.”

## 2. Ankush Shivaji Gaikwad v. State of Maharashtra<sup>14</sup>

*Held:*

- Courts are **duty-bound to apply their mind** to compensation
- Reasons must be recorded if compensation is **not granted**
- Section 357 CrPC must be read as a **mandatory consideration**

## 3. Manohar Singh v. State of Rajasthan<sup>15</sup>

*Held:*

- Compensation can be awarded **even when fine is not imposed**
- Section 357(3) CrPC has **independent existence**
- Ability of accused to pay must be considered, but poverty alone is not a bar

## 4. K.A. Abbas v. Sabu Joseph<sup>16</sup>

*Held:*

- Compensation can be ordered **even in cases of acquittal** under Section 357A CrPC
- Victim compensation is part of **State’s welfare obligation**

## 5. Bodhisattwa Gautam v. Subhra Chakraborty<sup>17</sup>

*Held:*

- Courts can award **interim compensation** to rape victims
- Rape violates **Article 21** – compensation is constitutional relief
- Criminal courts can act even before final conviction

## 3. Constitutional Compensation – Public Law Remedy

### 7. Rudul Sah v. State of Bihar<sup>18</sup>

*Held:*

- Supreme Court awarded compensation for **illegal detention**
- Compensation under **Article 32** is distinct from civil damages

---

<sup>14</sup> (2013) 6 SCC 770

<sup>15</sup> (2015) 3 SCC 449

<sup>16</sup> (2010) 6 SCC 230

<sup>17</sup> (1996) 1 SCC 490

<sup>18</sup> (1983) 4 SCC 141

- State liability arises for violation of **fundamental rights**

## 8. Nilabati Behera v. State of Orissa<sup>19</sup>

### *Held:*

- Compensation awarded for **custodial death**
- Public law compensation aims at **vindicating fundamental rights**
- Sovereign immunity not a defense

### Conclusion

Compensatory theory represents a paradigm shift from **punitive justice** to **restorative justice**. It recognizes that the state's interest in punishing a criminal should not supersede the individual's right to be made whole.

However, it cannot serve as a complete alternative to traditional theories. Retribution and deterrence remain necessary to express societal condemnation and maintain public order. The most effective model is a **Synthesized Approach**: where punishment serves as the societal sanction, and compensation serves as the victim's remedy. For an LLM student, the research focus should remain on how to refine the "Victim Impact Assessment" to ensure that compensation is not just a token gesture, but a meaningful restoration of dignity and livelihood.

### Bibliography

- **Doerner, W. G., & Lab, S. P. (2020).** *Victimology*. Routledge. (Provides a comprehensive historical timeline of victim movements).
- **Karmen, A. (2015).** *Crime Victims: An Introduction to Victimology*. Cengage Learning. (Discusses the "rediscovery" of victims post-1940s).
- **Schafer, S. (1977).** *Victimology: The Victim and His Criminal*. Reston Publishing Company.

---

<sup>19</sup> (1993) 2 SCC 746