

**REVISITING AWARD OF COMPENSATION FOR VIOLATION OF
FUNDAMENTAL HUMAN RIGHTS: AN ANALYSIS OF INDIAN SUPREME
COURT DECISIONS**

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INTRODUCTION

The language of human rights has over the years gathered great momentum in all legal systems of the world. The idea of human rights itself has become universalised, even though no convergence between socio-legal systems about the exact content and systems of protection of human rights is easily forthcoming. Indeed, despite this, the human rights have been described as “common language of humanity”.¹ The human rights discourses have sought meaningfully to interpose human rights in every conceivable area of human activity. The national and international human rights law, which has grown over the years has been so interpreted that it provides broad content to the rights regime of individuals, groups, sub-groups and minorities. Various theoretical justifications have been offered to the growing affirmation of ‘the universal rights of man’².

The methodology for implementation of human rights at both national and international levels has not been free from difficulties. Even though the national constitutions and the legal regimes guarantee the human rights, yet the enforcement of these rights has been far from satisfactory. It is eventually the superior courts, which have an onerous task towards enforcement of human rights. Broadly speaking the Courts and National Human Rights Commissions³ and other designated authorities, have been empowered to uphold and enforce human rights and pass appropriate orders in this regard. Also the emergence of the victim

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¹ See Boutros Ghali, “The Common Language of Humanity”, Inaugural Address at the United Nations World Conference on Human Rights, Vienna Declaration and Program of Action. 1993

² See Shad Saleem Faruqi, “Human Rights: Asian and Western Perspectives” in *Criminal Justice* (2004) K.I.Vibhute (Ed) 62-81. For an analysis of various paradigms in this regard, See Archana Parashar, “Human Rights: Imperatives of Theoretical Change”, 40 *JILI* (1998), no.1-4,6-38

³ In India, the National Human Rights Commission has been established under *Protection of Human Rights Act*, 1993.

protection jurisprudence⁴ has enlarged the scope of protection of human rights. However, this jurisprudence includes the protection programs for victims of crime, as well as victims of abuse of power⁵. While as the former is the subject matter of criminal justice system, the latter is the subject matter of public law, and hence falls within the rubric of protection and enforcement of human rights regime. In our submission, compensatory jurisprudence falls within the realm of public law remedy, against abuse of power, resulting into abridgement of right to life and liberty. However, not all abuse of power, resulting into victimization can be brought under public law enforcement category particularly under compensatory jurisprudence.

In India too, the human rights are catalogued in the Constitution. The Constitution of India guarantees civil and political rights in Part III and social, cultural and economic rights in Part IV⁶. It also confers power on the Supreme Court⁷ and the High Courts⁸ to protect and enforce fundamental human rights in Part III. The Supreme Court acts as ‘Sentinel on the qui vive’ in relation to fundamental human rights. Over the years, and particularly in post-emergency era, the Indian Supreme Court has interpreted the rights regime broadly and enthusiastically. It has also resorted to judicial activism⁹ in key constitutional and legal interpretations, which has supported the cause of protection of human rights. In the process it has devised newer strategies to enforce the fundamental human rights. The Supreme Court and the High Courts have even

⁴ See Justice A.S.Anand, “Rights of Victims of Crime” XXVI *Delhi Law Review* (2004)1-11

⁵ *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985*. The Declaration defined victim as including not only the victims of Crime, but also victim of abuse of power. However, for our purposes the abuse of power resulting into abridgement of human rights particularly, relating to life and liberty is important and relevant.

⁶ Articles 12-35 are included in Part III under the nomenclature of Fundamental Rights, and Articles 36-51 are included in Part IV under the nomenclature of Directive Principles of State Policy. The main difference between the two is that while as the former is justiciable, the latter is not. However, this distinction has of late become more illusory rather than substantial one, as some of rights in Part IV have been interposed in Part III by judicial reasoning. There have been strong arguments in favour of inclusion of some Part IV rights in Part III, and we also endorse this view. See e.g. *National Commission to Review the Working of the Constitution* (2001), See also, M.P.Singh, “The Statics and the Dynamics of the Fundamental Rights and the Directive Principles- A Human Rights Perspective” (2003) 5 *SCC (J)* 1

⁷ Art.32. arms the Supreme Court with a power to issue appropriate writs, orders or directions to prevent the violation of a Fundamental Right.

⁸ Art.226. Similarly empowers the High Courts to issue appropriate writs, orders or directions to prevent the violation of a Fundamental Right.

⁹ The legitimacy of judicial activism on the part of Indian Supreme court has been questioned. See S.P.Sathe, *Judicial Activism in India* (2002). For legitimacy of judicial activism, See Anirudh Rastogi, “A Jurisprudential Affirmation of Judicial Activism”, II *Delhi Law Review* (Student Edition) 2005-6, 140-44.”...Its activism is to be advocated on grounds of functionalism in today’s era, wherein the context for a popular revolution against the all pervasive state is missing. It is in this context that inevitable and legitimate activism attains its own significance”, *Id* at 144

awarded compensation to the victims of violation of human rights, in the exercise of their inherent constitutional powers. This remedy of claim of compensation is apart from the remedies available to such victim under ordinary law of tort. The compensatory remedy may be seen as important fallout of constitutional tort litigation, which has increased in India in recent years. This is indeed a progressive way of looking at promotion and enforcement of human rights and has found general support in the Indian legal scenario. Even though the Courts have not been consistent in awarding such damages/compensation in violation of right to life, yet it exhibits a rich interplay between compensation as an individual remedy and the development of important constitutional norms. Indeed of late, Indian Supreme Court has been actively contributing to such constitutionalism.¹⁰ Looking at how, Supreme Court has embarked upon the compensation as a remedy for violation of Fundamental Rights; it has given rise to arguments that every violation of such right under Art.21¹¹ of Indian Constitution should be accompanied by appropriate compensation, and should always be legally enforceable. This is so, because Supreme Court has taken into account the doctrine of strict liability in constitutional tort litigation¹². Secondly, should this right be forthcoming even in cases involving violation of other Fundamental Rights apart from Art.21.

This paper analyses the doctrine of award of compensation in case of violation of Fundamental Human Rights, as enunciated by the Indian Supreme Court. It tries to look at the justifications given by the Court for such awards. Part II of the paper highlights the position of Human Rights in Indian Constitution. It argues that these rights are justifiably included in our Constitution. Part III of the paper examines the way in which Supreme Court has positioned itself in protection and enforcement of Fundamental Human Rights. Part IV and Part V analyse the concept of compensatory jurisprudence as enunciated and developed by the Indian Supreme Court. It also explains the theoretical basis as expounded by the Court. Various judgements of the Indian Supreme Court in this connection are also discussed. Lastly, Part VI as usual deals with the conclusions.

II

LEGITIMACY OF HUMAN RIGHTS

Human rights as a concept have evolved gradually over several centuries¹³. They have been given a plurality of names, like rights of man, natural rights, human rights or Fundamental

¹⁰ One of the important exercises in Indian constitutionalism has been the liberalization of *locus standi* in Public Interest Litigation (PIL). See P.M.Bakshi, *Public interest Litigation* (2002).

¹¹ Art. 21 states: No person shall be deprived of his life or personal liberty except according to procedure established by law. The procedure established by law has to be just, fair and reasonable, as held by Indian Supreme Court. See e.g. *Maneka Gandhi v. Union of India*, AIR 1978 S.C.596

¹² See *Nilabati Behera v. State of Orissa*, (1993) 2SCC 746, See infra.

¹³ See generally, Jawahar L. Kaul, *Human Rights: Issues and Perspectives* (1996)

Rights, each one of them referring to different sets of non-derogable rights which individuals must possess¹⁴. Such a nomenclature has been the product of juristic thought emanating at particular periods of progressive evolution and realization of these rights. Even though the theoretical explanations of the legitimacy of human rights differ, yet they have made us believe that they are indispensable for the holistic development of individual's personality. These rights are of such a nature that the State is under a duty not to violate these rights and the individuals have a right to enforcement of these rights.¹⁵

Every legal system, India being no exception to it, recognizes the legitimacy of human rights in their social and legal conscience. These rights are overwhelmingly necessary for overall human welfare. The United Nations has been a pioneer in building a universal consensus for the protection and promotion of human rights. Indeed the Universal Declaration of Human Rights, 1948 was a milestone in progressive realization of human rights throughout the world. It has provided a framework for all shades of human rights development. In fact the 1948 Declaration emphasizes that recognition of the inherent dignity and of equal and inalienable rights of all members of the human family, is the foundation of freedom, justice and peace in the world¹⁶. Dereze and Sen rightly observe that integrity of democracy can deeply be threatened by widespread human rights violations.¹⁷ Post the 1948 Declaration, United Nations has worked well in the drafting of various conventions, treaties and protocols concerning universal realization of human rights¹⁸. Human rights activists, trade union groups and others have even relied upon the 1948 Declaration, and subsequent international covenants, in their

¹⁴ However, over the years, not only rights, but also even entitlements have been brought under the rubric of human rights. Dereze and Sen, the noble laureate rightly states, it may not be appropriate to define human rights simply as rights that ideally should be legally recognized. A human right can be invoked in many contexts, even when its legal enforcement as opposed to giving it general support, would be inappropriate and unhelpful. Jean Dereze and Amartya Sen, *India: Development and Participation* (2002) at 372. It is precisely because of this reason that even entitlements have been clubbed together in right to life. "Right to life includes the right to live with human dignity and all that goes along with it namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms freely moving about and mixing and co-mingling with fellow human beings"..... See *Francis Coralie v. Union Territory of Delhi*, AIR 1981 SC 746

¹⁵ Art.13 (1) and 13(2) of Constitution of India obligates the State not to make any law, which takes away or abridges the rights conferred by Part III. Any such law, if made shall be void to the extent of contravention/abridgement. Under Art. 32. the right to move the Supreme Court and High Courts under Art. 226, for the enforcement of Fundamental Rights is itself a Fundamental Right under Part III of the Constitution.

¹⁶Preamble of UDHR, para, 2nd. Even though UN Declaration did not provide for easily discernible enforcement mechanism, yet over the years, UN has served the cause of human rights objectives in many ways. See V.S.Mani, "Human Rights and the United Nations: A Survey", 40 *JILI* (1998) no.1-4, 38-66 at 45.

¹⁷ See Supra note 14.

¹⁸ See generally, Steiner and Alston, *International Human Rights in Context* (1996).

struggles for liberation and empowerment. Consequently, the provisions of the UN declaration find significant place in national constitutions throughout the world. It may be argued that the inscription of these rights in the constitutions of the world bear testimony to the legitimacy and importance of human rights. This gives us an impression of a trend of convergence of legal cultures towards universal protection of human rights¹⁹. However, a visionary commitment to building institutions, laws and enabling conditions to secure fundamental freedom for all: all human rights, for all people in all countries has to be emphasized²⁰.

The making of India's Constitution also demonstrates the greatest concern for fundamental human rights and freedoms for people of India. Even much before the UN Charter concern for the protection of human rights, the concern for human rights of people of India was recurrent theme in the freedom struggle. The persistent demands for their protection reverberated throughout the freedom struggle. It was made as far back as in 1895 in the Constitution of India Bill, popularly called the Swaraj Bill, which was inspired by Lokmanya Tilak. The demand was repeated in Mrs. Annie Besant's Commonwealth of India Bill finalised by the National Convention of Political Parties in 1925, by the Motilal Nehru Committee in 1928 at the Karachi Session of the Indian National Congress in 1932, and by the Tej Bahadur Sapru Committee in 1944-1945²¹.

The drafters of Indian Constitution had before them important documents like Magna Carta, Declaration of Rights of Man, US Constitution, even UN Charter and other social welfare laws of several countries. As rightly pointed out by Seervai, the emphasis on human rights, in the UN Charter, to which India was a party, was not without its impact on our Constitution²². In our submission many provisions in our Constitution bear the imprint of UN provisions. The Constituent Assembly discussed the subject of fundamental human rights extensively and painstakingly. Thereafter, the Assembly embodied in Preamble to the Constitution, the resolution to secure to all its citizens, justice social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote fraternity assuring the dignity of the individual and unity of the nation. The Preamble is the mirror of our Constitution²³. The Preamble indicates to secure the basic human rights to the

¹⁹ However, despite this, much difference exists between legal orders about the scope and content of human rights protection. See Faruqi, *Supra* note 2 at 65.

²⁰ Human Development Report 2000 has dovetailed the necessity of such a commitment. See UNDP, *Human Development Report* (2000)

²¹ *Supra* note 6, para 6.

²² H.M.Seervai, *Constitutional Law of India*, Vol.1 (1991) 154-155

²³ Even though Preamble does not grant any power but it gives a direction and purpose to the Constitution. It contains the fundamentals of the Constitution, and therefore the Supreme Court has many a times referred to it while interpreting the Constitutional provisions. See e.g. *Kesavananda Bharati v. State of Kerala*, AIR 1973 S.C.1461, *In Re Kerala Education Bill, 1957*, AIR 1958 S.C.956

people. The dignity of the individual secured by the Preamble and some of the Fundamental Rights are one of the basic features of the Constitution²⁴.

India is only the third country of the Common Law system to incorporate within it, a justiciable bill of rights, apart from U.S. and Ireland²⁵. It may be noted that entire human rights jurisprudence of India centres on Part III and Part IV of the Constitution. Part III of the Constitution, under the caption of Fundamental Rights, guarantees a fairly comprehensive array of basic human rights to citizens and casts a duty on the State not to violate these rights²⁶. While as Part III rights are enforceable rights, Part IV, the Directive Principles of State Policy incorporating socio-economic rights, are not enforceable, nevertheless they are fundamental in the governance of the country²⁷. Part III supplemented by Part IV and the Preamble represent the compendium of human rights and fundamental freedoms as enshrined in the Constitution of India.²⁸ These rights cover a wide spectrum such as equality²⁹, freedom of expression, assembly and association, freedom of movement, freedom to carry on profession or business³⁰, freedom of conscience and freedom of religion³¹. There are guarantees against retrospective criminal laws, double jeopardy and self-incrimination³² and against deprivation of life and personal liberty³³. Fundamental Rights as enacted in our Constitution not only recognize the dignity of individual, but also recognize the necessity for the full development of the individual and for preserving the unity of India. Minorities are guaranteed linguistic and cultural rights, and the right to establish and administer educational institutions of their choice³⁴. Seervai observes, “These religious and cultural freedoms remove the most potential sources of discord in a multi-

²⁴ According to *Kesvananda* formulation, the Parliament has the power to amend any part of the Constitution, but it has no power to amend the “basic features/structure” of the Constitution. See *Id.*

²⁵ Justice Sujata Manohar, “Human Rights Protection: Current Challenges”, XXII *Delhi Law Review* (2000) 15-20 at 16.

²⁶ . See *Supra* note 15. Human rights and Fundamental Rights are used interchangeably. The State for purposes of Part III includes Parliament, State Legislature, Governments and all local and other authorities. In order that these rights are protected in a meaningful way, the Supreme Court has given a wide interpretation to the term “other authorities” in Art.12 of the Constitution. See particularly, *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1SCC 722

²⁷ Art.37, Constitution of India. The Supreme Court has of late given a strong meaning and orientation to these Directive Principles. See M.P.Singh, *Supra* note 6.

²⁸ The Supreme Court has innovatively recognized the ‘trinity’ of Fundamental Rights, directive principles and preamble, an important backbone of human rights jurisprudence in India. See *Delhi Road Transport Corporation v. DTC Mazdoor Congress*, AIR 1991 SC 101 at 193.

²⁹ Art.14.

³⁰ Art.19.

³¹ Art.25.

³² Art.20.

³³ Articles 21 and 22.

³⁴ Articles 29 and 30.

racial society”³⁵. At the same time, the Constitution provides an elaborate mechanism for the enforcement of such human rights. Part III of the Constitution itself guarantees the enforcement of these Fundamental Rights³⁶.

Commenting upon the legitimacy of these human rights, it has been observed that they inhere in the dignity of human beings and are therefore inalienable rights.³⁷ Human rights are not gifts conferred by the State. Constitution and law do not create human rights. They are enacted to protect human rights, which inhere in individual’s antecedent to constitutions and the laws. Fundamental human rights are essential for development of the human personality and for full realization of the human potential. Chief Justice Subba Rao observed, “Fundamental Rights are the modern name for what have been traditionally known as natural rights. They are moral rights, which every human being everywhere at all times ought to have simply because of the fact that in contradistinction with other beings he is rational or moral.”³⁸ Similarly, Mathew, J. in *Kesavananda Bharti v. Union of India* observed, “they are rights, which are inherent in human beings, because they are human beings, whether you call them by human rights or any other appellation. It was to secure the basic human rights like liberty and equality that people gave unto themselves the constitution. These basic rights are essential features of our constitution”.³⁹ Similar sentiments have been echoed by Bhagwati J, when he observed, “these Fundamental Rights represent the basic values cherished by the people of India, since the Vedic times and they are calculated to protect the dignity of individuals and create conditions in which every human being can develop his personality to the fullest extent. They weave a “pattern of guarantee” on the basic structure of human rights and impose negative obligations on the state not to encroach on individual liberty in its various dimensions”.⁴⁰ Actual working of the Constitution shows that the inclusion of Fundamental Rights has been more than justified. They have also acted as restraint on executive and legislative power. That is precisely the reason that under Art, 13 (2), any law made by the State inconsistent with or violating Fundamental Rights will be protanto void. Commenting upon the necessity and relevance of the fundamental human rights, the Supreme Court has observed:

³⁵ *Supra* note 22.

³⁶ Guaranteeing enforcement of Fundamental Rights is vital to the protection and enforcement of fundamental freedoms and human rights in any legal order. Under Art.32, the right to move the Supreme Court by *appropriate* proceedings for enforcement of Part III right is guaranteed (*emphasis added*). The Court has the power to issue appropriate orders, directions or writs, like *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*. However, looking at the ambit of this article, despite being guaranteed right, the discretionary element in these writs cannot be overlooked, in our submission.

³⁷ *State of West Bengal v. Subodh Gopal Bose*, AIR 1954 SC 95

³⁸ *I.C.Golaknath v. State of Punjab* AIR 1967 SC 1656. Golaknath also ruled that Parliament has no power to take away the Fundamental Rights, even by an amendment, which was later overruled by *Kesavananda*.

See *infra* note, 44

³⁹ *Supra* note 23.

⁴⁰ *Maneka Gandhi v. Union of India* AIR 1978 2S.C.R. 621

..”The Fundamental Rights are intended not only to protect individual’s rights but they are based on high public policy. Liberty of the individual and the protection of his Fundamental Rights are the very essence of the democratic way of life adopted by the Constitution...This Court would refuse to circumscribe them or to curtail them except as provided by the Constitution”.⁴¹

Secondly, the Court has broadened the scope of these rights by interpretative techniques. The Court has rightly observed:

.....”it must be remembered that Fundamental Rights are constitutional guarantees given to the people of India and are not merely paper hopes or fleeting promises and so long as they find a place in the Constitution, they should not be allowed to be emasculated in their application by narrow and constricted judicial interpretation”.⁴²

Thirdly, the legitimacy of the Fundamental Rights springs from the fact that, constitutionally if the effect of any legislation is that it violates rights in Part III, the legislation would be unconstitutional; the motive of the legislature is of no consequence.⁴³ Furthermore, even a Constitutional amendment that takes away or abridges basic/essential features of Part III (Fundamental Rights) will be void and unconstitutional.⁴⁴ The Court has even legitimized the Directive Principles as providing support and content to the Fundamental Rights. Although, initially it ruled that Directive Principles were subservient to Fundamental Rights. However, over the years, it has followed a “collaborative and synergetic approach”, and has even ruled that harmony between Fundamental Rights and Directive Principles is one of the basic features of the Constitution⁴⁵. If need be, Part III rights may be given restricted interpretation in order to uphold Part IV rights. Indeed, if the social-welfare functions of the State is any indicator; one does not see any difficulty in accepting this thesis of reading Directive Principles of State Policy into the Fundamental Rights part. Of course, the State’s willingness and capacities to act as a social welfare agent and thus efficiently protect human rights and entitlements in the face of liberalisation of economy and globalisation remains doubtful.

⁴¹ *Daryao v. State of Uttar Pradesh*, AIR 1961 SC 211

⁴² *Ajay Hasia v. Khalid Mujib* AIR 1981 SC 487 at 493

⁴³ *Bennett Coleman v. Union of India* (1980)A.SC. 898

⁴⁴ *I.R.Coelho v.State of Tamil Nadu*, 2007(1) SCALE 197. *Keshavananda*, *Supra* note, 23 had ruled that Parliament has the powers to amend any part of the Constitution including Part III, but it has no powers to amend the basic/essential features of the Constitution. *Coelho* is important, as Art.31 (B) and IX schedule of Constitution of India, protected all laws put in IX schedule from judicial attack, which now stands reversed by this judgement.

In our submission, *Coelho* is a partial return to *Golaknath*, *Supra* note 38 which had ruled that any amendment of the Constitution abridging the Fundamental Rights is impermissible and unconstitutional.

⁴⁵ *Minerva Mills Ltd v. Union of India*, (1981) S. C. R.206

III

SUPREME COURT AND FUNDAMENTAL HUMAN RIGHTS

The Indian judiciary has played an effective role in promoting and enforcing the culture of human rights. The Supreme Court being the ultimate interpreter of the Constitution has displayed its concern for Fundamental Rights from time to time. The Court acts as the protector and guardian of these rights. Secondly, the Court as an interpreter of the Fundamental Rights has interpreted these rights in most liberal manner.⁴⁶ It has shown highest judicial creativity in catalysing human rights and fundamental freedoms in Indian Constitutionalism. The Courts have exercised judicial review most profitably in the area of Fundamental Rights.⁴⁷

Art.32 and Art.226 of the constitution are the pivotal provisions empowering Supreme Court and High Courts to enforce the Fundamental Rights. Article 32 guarantees the right to move the Supreme Court by appropriate proceedings for the enforcement of the Fundamental Rights. The Supreme Court is also empowered to issue appropriate writs for the enforcement of the Fundamental Rights. The significance of Art. 32 is further highlighted by the fact that this provision not only empowers the court to issue directions or orders or certain writs for the enforcement of Fundamental Rights, but it also provides a guaranteed remedy, as this enforcement right is itself made a Fundamental Right. This provision cannot even be suspended in respect of Articles 20 and 21.⁴⁸

Commenting upon the importance of Art.32 the chairman of the Drafting Committee B.R.Ambedkar has remarked:

“If I was asked to name any particular article in this constitution as the most important, an article without which this constitution will be nullity, I could not refer to any other article except this one. It is the very soul of the constitution, and the very heart of it and I am glad that the House has realized its importance”.⁴⁹

Apart from the powers being exercised by the Supreme Court under this article, the court also exercises appellate jurisdiction,⁵⁰ and even has original jurisdiction⁵¹ in several matters. Art.226 of the Constitution empowers the High Courts to issue orders, directions or writs not only for the enforcement of Fundamental Rights but also for any other purposes.

⁴⁶ See M.P.Jain, *Indian Constitutional Law* (2003) 827-854

⁴⁷ *Id* at 832, See also P.N.Singh *Infra* note 53

⁴⁸ Art.359(1)

⁴⁹ *Constituent Assembly Debates*. Vol. VII, 953

⁵⁰ Articles.132-36.

⁵¹ Art.131.

These two articles combinedly form the citadel of judicial review under Indian constitution. These powers of the superior courts enable them to judicially review legislative actions, judicial, quasi-judicial decisions and administrative actions to examine whether they conform to the Constitutional provisions, including the Fundamental Rights in Part III. The scope and extent of power of judicial review has been the subject matter of several decisions. Despite several doubts over the way the superior courts particularly the Supreme Court has exercised the judicial review, it is now a settled legal proposition that the Constitution confers powers on the superior courts to review not only legislations, but also the Constitutional amendments in order that they do not violate Fundamental Rights. It is also a settled legal proposition that judicial review is the basic feature of the Constitution, which cannot be taken away even by a constitutional amendment.⁵²

Judicial review has been resorted to, most profitably in the areas of protection of individual freedoms and human rights. The last two decades of working of the judicial review has demonstrated that Supreme Court and High Courts have enthusiastically entertained petitions relating to violation of human rights.⁵³ The cases involving violation of human rights have come to the Supreme Court and High Courts not only as private litigations, but also under the banner of *Public Interest Litigation* (PIL). The Supreme Court has liberalized *locus standi* in PIL, and thus any public-spirited citizen having no private interest can approach the Supreme Court and High Courts for prosecuting violation of Fundamental Rights.⁵⁴ The Court exercising its powers under the banner of public interest litigation has made an immense contribution to human rights jurisprudence in India by creating a new regime of human rights by expanding the meaning of Fundamental Right to equality, life and personal liberty; by fashioning new kinds of reliefs under the courts writ jurisdiction; and by judicial monitoring of State institutions, such as jails, women's protective homes, mental asylums and the like.⁵⁵ Issues relating to human rights concerns relating to criminal justice administration alongside right to life and liberty under Court has even enunciated the doctrine of implied Art.21 have been profusely dealt with. The Fundamental Rights. The Court has asserted that in order to treat a right as a Fundamental Right, it is not necessary that it should be expressly stated in the Constitution as a Fundamental Right. Political, social and economic changes occurring in the country may entail the

⁵² *Minerva Mills*, *Supra* note 40.

⁵³ See P.N. Singh, "Promises and Perils of Public Interest Litigation in Protecting the Rights of the Poor and the Oppressed", XXVII DLR (2005) 8-25

⁵⁴ *S.P.Gupta v. Union Of India*, 1981(Supp) SCC 87, See also *Bandhua Mukti Morcha v. Union of India*, (1984) 4 SCC 161

⁵⁵ By invoking epistolary jurisdiction, the Court entertains a petition even in the form of a letter or a telegram addressed to the Court. The Court also does not apply the usual technical procedures in such petitions. See Parmanand Singh, "Human Rights Protection Through Public Interest Litigation in India," XLV IJPA (1999) 731-49 at 734 See Bakshi, *Supra* note, 10. For a valuable critique of PIL, See Upendra Baxi, "The Avatars of Indian Judicial Activism: Explorations in the Geographies of (IN)Justice" in *Fifty Years of The Supreme Court of India* (2003) Verma and Kusum (Eds), 156-209

recognition of new rights and the law in its eternal youth grows to meet social demands.⁵⁶ Most significantly, custodial deaths,⁵⁷ illegal detentions,⁵⁸ prison administration,⁵⁹ right to shelter,⁶⁰ rehabilitation of mentally retarded and physically handicapped persons,⁶¹ rights of women and children,⁶² protection against exploitation,⁶³ telephone tapping and other privacy rights,⁶⁴ have been ably and legitimately dealt with by the Indian Supreme Court and High Courts. Simultaneously, the socio-economic rights have also been agitated before the courts and Courts have not shied away from giving relief in these areas. Issues relating to bonded labour, better environmental standards,⁶⁵ consumer rights,⁶⁶ rights against exposure to hazardous substances⁶⁷, inter-country adoptions⁶⁸ fall in this area. The Courts have even taken up the subject matter of good governance of the country under the public interest litigation. Therefore, issues relating to public life, corruption, the criminal-politician nexus, allotment of plots, disinvestments of public sector undertakings, violation of building laws and byelaws have raked judicial attention.⁶⁹

The procedure followed by Supreme Court under Art.32 has given new dimension to the enforcement of human rights in India. Not only has it liberalized the *locus standi* rule, to the extent of permitting any member of the public acting in a bonafide manner to espouse the cause of human rights violations by the State. It has developed epistolary jurisdiction, wherunder any member can invoke court's jurisdiction by writing a simple letter or sending a telegram. The court has also permitted new forms of fact finding authorities such as socio-legal commissions of enquiry and even handed over the investigation to National Human Rights Commission or even Central Bureau of Investigation. It has also taken the help of lawyers, journalists, retired judges, District Judges, and others for ascertaining the facts of violations of human rights. It has also stated that the Supreme Court rules pertaining to private litigations may not be appropriate in such public interest litigations involving human rights violations of class or classes of

⁵⁶ *Unnikrishnan, J.P. v. State of Andhra Pradesh* AIR 1993 SC 2178

⁵⁷ *In Re Death of Sawinder Singh Grover*, 1995 (Supp) 4 SCC 450

⁵⁸ *D.K.Basu v. State of West Bengal*, AIR 1997 S.C.610, See also *Joginder Kumar v. State of U.P.* AIR 1994 SC 1349, *Nilabati Behera v. State of Orissa*, AIR 1993 SC 1960

⁵⁹ *Supreme Court Legal Aid Committee v. Union Of India* (1994) 6 SCC 731

⁶⁰ *Desh Raj Khurana v. Delhi Administration*, 1987 (1) SCALE 1313

⁶¹ *Sheela Barse v. Union of India*, (1995) 5 SCALE 159

⁶² *Sheela Barse v. Union of India*, (1986) 3SCR 443

⁶³ *Bandhua Mukhti Morcha*, *Supra* note 49, See also, *P.U.D.R v. Union of India* (1982) 3SCC 235

⁶⁴ *P.U.C.L. v. Union of India*, (1997) 1SCC 301

⁶⁵ *M.C.Mehta v. Union of India*, 1996(5) SCALE (Sp) 3

⁶⁶ *Common Cause, a Registered Society v. Union of India* (1997) 10 SCC 729

⁶⁷ *Research Foundation for Science, Technology Policy v. Union of India*, SCALE(PIL) 1981-97 1670.

⁶⁸ *Lakshmi Kant Pandey v. Union of India*, 1989(2)SCALE 691

⁶⁹ *M.C.Mehta v. Union of India*, (1997)8SCC770 ; *Delhi Development Authority v. Skipper Construction Co.(p)Ltd.* (1996)4SCC 622 ; *Vineet Narain v. Union of India*, (1996) 2SCC199

people.⁷⁰ It has been rightly argued that there are no limitations on the powers of Supreme Court and High Courts to award *appropriate* relief and remedy, except the ones that may be imposed by the Courts themselves.⁷¹ Consequently, in dealing with the cases of violations of human rights, the courts have fashioned newer kinds of relief. These reliefs stand in contrast to the reliefs available under private law and private litigations.⁷² These reliefs are preventive, curative, restitutive, rehabilitative and compensatory.⁷³ The compensatory relief is essentially a relief based on the doctrine of constitutional tort applied in constitutional litigations in human rights litigations. This type of remedy is available in other legal jurisdictions also. The Supreme Court has heavily relied on this doctrine in legitimising payment of compensation to the victims of human rights violations. This relief does not prevent the victim of human rights violation from claiming damages from a civil court.

IV

CONSTITUTIONAL TORT AND COMPENSATORY RELIEF

The liability of the State for tortious acts of its servants has for some time posed immense difficulties. Even though the concept is recognized in all jurisdictions, yet the doctrine of sovereign immunity was interposed to deny the liability of the state. However, in the event of state donning various activities for the welfare of its citizens, the immunity rule has been diluted by the judicial reasoning in upholding the liability of state for tortious acts of its employees.

A tort is generally viewed as the breach of a duty owed to the public in general (as distinguished from a duty owed to an individual). In India we do not have a legislation which deals with the liability of State for tortious liability of its servants. The vicarious liability of Union of India and the State Govt. for the tortious acts of its employees is regulated by Art. 300 of the Constitution of India.⁷⁴ However, the Supreme Court has also enunciated the concept of 'constitutional tort'. A constitutional tort occurs, when an act or omission violates a constitutional right, particularly, a Fundamental Right. In cases of relief on account of Fundamental Right violations, the Courts applying 'constitutional tort' doctrine have done away with some of the doctrines generally applicable in law of torts that make liability dependent on fault. Some of these doctrines have created controversies" e.g. state liability for acts committed

⁷⁰ See P.N.Singh, *Supra* note, 48, and also Bakshi, *Supra* note, 10

⁷¹ Seervai, *Supra* note 15

⁷² See also, Justice Madan B.Lokur, "Some Recent developments in Indian Public Law-Forging New Tools", VII *Nyaya Deep* (2006) Issue 2, 40-56

⁷³ P.N.Singh, *Supra* note, 48 at 10.

⁷⁴ According to Supreme Court Art. 300 confers juristic personality on the State, and therefore State can be held liable for acts of its employees. See e.g. *State of Rajasthan v. Vidyawati*, AIR 1962 SC 933 See *Infra* note 75 and the accompanying text.

in the course of ‘sovereign’ functions⁷⁵. The Supreme Court of India has also accorded recognition to what may be called the ‘tort of misfeasance’ in public office, where Union Ministers were ordered to pay damages to the State for malafide official action amounting to abuse of power.⁷⁶

R.M Sahai, J., has finally laid down the entire concept of tortious liability of state at rest in *N. Nagender Rao and Company v State of Andhra Pradesh*.⁷⁷ The Court held

“...No civilised system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with structural changes in the society. No legal or political system today can place the state above the law.... From sincerity, efficiency and dignity of state as a juristic person, propounded in nineteenth century as sound sociological basis for state immunity the circle has gone round and the emphasis is now more on liberty, equality and the rule of law. 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 on the path with any other juristic legal entity. Any watertight compartmentalisation of the functions of the state as “sovereign and non sovereign” or “governmental of non governmental” is not sound. It is contrary to modern jurisprudential thinking. The need of the state to have extra ordinary powers can’t be doubted but with the conceptual change in the statutory powers being statutory duty for the sake of the society and the people the claim of the common man or ordinary citizen cant be thrown out merely because it was done by an officer of the state even tough it was against law and negligent. Needs of the state, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a welfare state is not shaken....In welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign sand non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc which are among the primary and inalienable functions of a government, the State can’t claim any immunity.”

⁷⁵ Nilabati Behera v *State of Orrisa* (1993) 2SCC 746. *Kasturilal Raliaram Jain v. State of U.P.* AIR 1965 SC 1039 made a distinction between “sovereign and non-sovereign functions” of the State being exercised by the officers of the State. The liability of the State was only confined in non-sovereign functions only, thus effectively undoing *State of Rajasthan v. Vidyawati* AIR 1962 SC 933 which did not accept any justification for not holding the State liable for the tortious acts of its servants. For a comparative analysis of the doctrine of sovereign immunity, See A. Raghunadha Reddy, “*Reparation of the Wrong: Problems and Perspectives*”, 46 *Indian Journal Of International Law* (2006) No 4,572-585

⁷⁶ *Common Cause v Union of India* (1996) 8 SCALE 127, 130.

⁷⁷ AIR 1994 SC 2663

V

SUPREME COURT AND AWARD OF COMPENSATION

The Supreme Court by interpreting Art.32 of the Constitution has innovated new methods, techniques and strategies for purposes of securing the enforcement of Fundamental Rights of the individuals. The purpose of such an activist interpretation is to entrench rule of law and to secure the sacrosanct nature and inalienability of the fundamental human rights. However, as we shall see later, the Supreme Court and even the High Courts have put “right to life and liberty” on a higher pedestal than other Fundamental Rights.

The powers under Art.32 are not subject to any limitations, except the ones self imposed by the Court.⁷⁸ Judicial review has also been held to be part of the basic structure of the Constitution.⁷⁹ The powers under the said article have been used by the Court for preventing as well as remedying the infringement of Fundamental Human Rights. The Court has evolved the award of monetary compensation as one of the means of remedying encroachment of Fundamental Rights as well as providing relief to the victims of said violation. This remedy, it may be mentioned is provided in the International Covenant on Civil and Political Rights⁸⁰ that has been relied upon by the Court in some of its decisions, as we shall see later.

Before 1983 the Court refused to award such compensation under Art.32 for violation of Fundamental Rights. In such a scenario, the victim had to file a civil suit under the ordinary law of torts for claiming compensation, which by all means was dilatory and time consuming and subject to other statutory limitations. The Court for the first time in *Khatri v. State of Bihar*⁸¹ (infamously known as Bhagalpur Blinding Case) considered the issue of award of monetary compensation to the victim of violation of right to life and liberty by the State. Speaking for the Court, Bhagwati, J. stated:

“Why should the Court not be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious Fundamental Right to life and personal liberty?”⁸²

An important question considered by the Court in *Khatri* was, would the state be liable to pay compensation for the acts of its servants outside the scope of their power and authority affecting the life or personal liberty of a person and infringing Art.21 of the Constitution? The

⁷⁸ Seervai, *Supra* note 15

⁷⁹ *L.Chandra Kumary. Union of India*, AIR 1997 SC 1125 See also, *Subhash v. Union of India* AIR 1991 SC 63: *Shri Kumar v. Union of India*, 1992(2) SCC 428

⁸⁰ Art.9 (5) *International Covenant on Civil and Political Rights* 1966. The Court has also relied on international treaties and covenants for protection of Fundamental Rights. See e.g. *Vishaka v.State of Rajasthan* AIR 1997 SC 3011, *Delhi Domestic Working Womens Forum v. Union of India* (1995) 1 SCC 14

⁸¹ AIR 1981 SC 928 at 1068

⁸² *Id* at 930

Court answered the question in affirmative, saying that otherwise Art.21 would be reduced to a nullity, a mere rope of sand. This way if the officer of the State is acting according to law, there will be no violation of Art.21, and if he were acting without the authority of law, the State would be able to contend that it is not responsible for his actions and therefore there is no violation of Art. 21. This case also interposed new dimensions of the constituency of the right to life and personal liberty, which has over the years been continued by the Court.⁸³

Even though in *Khatri*, the Court did not award compensation to the victims of violation, but the Court upheld the doctrine that the Supreme Court under Art.32 and the High Courts under Art.226 can award compensation in the event of infringement of Fundamental Right to life and liberty. It is because of the reasons that the Supreme Court and High Courts under their writ jurisdiction have the powers to issue appropriate orders for remedying the situation.

*Rudul Sah v. State of Bihar*⁸⁴ is a landmark decision in compensatory jurisprudence evolved by the Court. The State and its machinery illegally incarcerated the petitioner in jail for 14 years, even after his acquittal by a criminal court, demonstrating absolute administrative laxity and scant respect for life and liberty. The Court in a *habeas corpus* petition awarded damages against the State for breach of petitioners' right of personal liberty. The Court observed that the instant case revealed "a sordid and disturbing state of affairs" for which the State was accountable. Taking an activist rather than a traditional approach, in which the Court would have released the petitioner with liberty to file a suit for compensation against the state, the Court awarded compensation in favour of the petitioner. The Court stated, "Not doing so would be doing a mere lip service to the Fundamental Right to liberty which the State Government has so grossly violated". The Court further observed:

"One of the telling ways in which the violation of the right can reasonably be prevented and due compliance with the mandate of Art.21 secured, is to mulct the violators in the payment of monetary compensation...The right to compensation is some palliative to the unlawful acts of the instrumentalities of the State which act in the name of public interest and which present for their protection the powers of the State as a shield..."⁸⁵

It is submitted that had the Court allowed legal technicalities to prevail; it would have amounted to surrendering its powers to State's lawlessness, conveying indifference to the personal liberty of the peoples and their sufferings. It would also have conveyed a message that the gross violations of life and liberties go un-punished. Judicial response to human rights cannot be blunted by legal jugglery, as rightly stated by the Supreme Court.⁸⁶

⁸³ *Ibid.* Lokur, *Supra note*, 66, See also *Sunil Batra v. Delhi Administration* AIR 1978 SC 1675, *Indian Council for Enviro-legal Action v. Union of India* AIR 1996 SC 1446, *M.C.Mehta v. Union of India* AIR 2004 SC 4016, *Vishakha v. State of Rajasthan* AIR 1997 SC 3011, *P.U.D.R. v. State of Bihar* AIR 1987 SC 355

⁸⁴ AIR 1983 SC 1086

⁸⁵ *Id* at 1089

⁸⁶ *Bhupinder Sharma v. State of Himachal Pradesh* 2003(8) SCC 551

Again in *Sebastian M.Hongray v. Union of India*,⁸⁷ a *habeas corpus* petition was filed to produce the two missing persons before the Supreme Court. The persons having been taken away by army officers went missing mysteriously. The Government failed to produce them and asserted that they left the military camp alive. The Court found this assertion untenable and incorrect. It came to a conclusion that they were not alive and had met an unnatural death. The Supreme Court keeping in view the torture, agony and mental oppression, through which the wives of these persons had to pass, directed the Government to pay Rupees One Lakh as a measure of exemplary cost to each of the two women. It also directed that a complaint should be filed under Cr. P.C. to take actions against persons responsible for what prima facie appeared to be a case of murder. The Court used the term *exemplary costs* and not the term *exemplary damages*. The award of exemplary costs is permissible in such cases. The Court also did not cite any precedents nor did it support its findings on any jurisprudential doctrines. The object of awarding such costs, in our opinion is reflecting both a deterrent policy and a relief to the victims of such gross violations of life and liberty of persons.

*Bhim Singh v. State of J&K*⁸⁸ involved illegal detention of the petitioner, who was a member of legislative assembly of Jammu and Kashmir. The police officers obtained remand orders from the executive magistrate and the sub-judge without production of the petitioner before them. The law required such production before the magistrate. He was detained with malicious intent, and thus deprived of his right to attend the session of the Assembly. The Court found that there was gross violation of the petitioner's constitutional rights under Art. 21 & 22 of the Constitution. The Court opined that the deprivation of constitutional rights might not be washed away by mere release of the petitioner. It further observed that in appropriate cases the Court has the power to compensate the victim by awarding suitable monetary compensation. It directed the State of J&K to pay the petitioner a sum of Rupees 50,000. It may be noted here that unlike *Rudul Shah* where the compensation was an interim measure and in the form of exemplary costs, in *Bhim Singh* the award was to compensate the victim, even though in the form of exemplary costs. It is to be noted that the Court relied on *Rudul Shah* and *Sebastian* to substantiate its order of award of compensation.

*Nilabati Behera v. State of Orissa*⁸⁹ seems to have firmly settled the issue of award of compensation as a measure of enforcement of Fundamental Rights. This case involved the death in public custody. It is for the first time that the Court acknowledged the award of compensation as a remedy under public law in contradistinction to private law claim. It also held that the concept of sovereign immunity is not applicable in cases of violation of the right to life and liberty guaranteed by Art.21 of the Constitution. The Court observed:

“The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation as exemplary damages, in proceedings

⁸⁷ AIR 1984 SC 1026, See also *Nilabati Behara v.State of Orissa*, *Infra* note 89

⁸⁸ AIR 1986 SC 494, at 499

⁸⁹ (1993) 2 SCC 746

under Art.32 by this Court or under Art.226 by the High Courts, for established infringement of indefeasible right guaranteed under Art.21 of the Constitution, is a remedy available under public law and is based upon strict liability for contravention of the guaranteed basic and indefeasible rights of the citizens. The purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system, which aims to protect their interest and preserve their rights. Therefore when the Court moulds the relief by granting “compensation” in proceedings under Arts.32 or 226 of the Constitution seeking enforcement or protection of Fundamental Rights, it does so under the public law by way of penalizing the wrong doer and fixing the liability for the *public wrong* on the State which has failed in its public duty to protect the Fundamental Rights of the citizens. The payment of compensation is to be understood in the broader sense of providing relief by an order of making “amends” under the public law for the wrong done due to breach of public duty, of not protecting the Fundamental Rights of the citizen. The compensation is in the nature of “exemplary damages” awarded against the wrongdoer for the breach of its public law duty, and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law”.⁹⁰

It is for the first time that a clear principle and philosophy underlying the doctrine of award of compensation for violation of Fundamental Right to life can be discerned. The distinction between the remedy of damages under the private law, where sovereign immunity is available, and the public law of compensation, where it is not available, indicates the basis of award of compensation as a remedy. The Court introduced strict liability in public law claims pertaining to Fundamental Rights and particularly the right to life and liberty.⁹¹

The doctrine of sovereign immunity was again relied on by the State in denying its liability of payment of compensation to the victim of violation of Fundamental Right of life and liberty. In *State of Andhra Pradesh v. Challa Ramakrishna Reddy*⁹² where the respondents were in judicial custody, some persons entered the jail premises and hurled bombs, thus killing one of them. The suit for damages of the respondents was decreed by the High Court. The State argued in the appeal before the Supreme Court that the suit for compensation was not maintainable, as the establishment and maintenance of prisons was a sovereign function. The Court speaking through S.Sagir Ahmad, J. observed: “that right to life is one of the basic human rights of a prisoner, be he a convict or an under trial or a detenu does not cease to be a human being. Claiming sovereign immunity cannot defeat a prisoner’s Fundamental Right”. The Court dismissed the appeal and upheld the decree of the High Court awarding compensation to the dependants of the deceased. It is significant to note here that the Court in exercise of its

⁹⁰ *Id.*, paras 10& 17

⁹¹ Lokur *Supra* note 66 at 43.

⁹² AIR 2000 SC 2083

appellate jurisdiction discussed, considered and relied upon the cases of award of compensation under public law remedy under Art.32 of the Constitution.

In *D.K.Basu v. State of west Bengal*,⁹³ compensatory jurisprudence was firmly approved as a measure relevant to the protection of human rights in India. It also invoked reimbursement of the compensation money from the erring State officials who were found guilty of the violation of human rights. The Court discussed extensively the law pertaining to claim of compensation against the State for the wrong of police officers depriving citizen's rights under Art.21 of the Constitution. The Court examined in detail the issues relating to torture, custodial violence and deaths in lock ups, along with the liability of State to compensate the victims of such wrongs. It also discussed the accountability of police officers to reimburse the State. A.S.Anand, C.J. speaking for the Court issued mandatory guidelines for the police officers and other investigating officials in all cases of arrest and detention till legal provisions are made in that behalf by the competent legislature. With reference to the vicarious liability of the State he discussed the punitive provisions of Indian Penal Code, 1860 and lamented the inadequacy of these provisions to repair the wrong done to the victim. He further observed:

“... That a mere prosecution of the police officers or declaration of his action being invalid does not by itself provide any meaningful remedy to a person whose Fundamental Rights to life have been infringed. According to him, the civil action for damages is a long drawn and cumbersome judicial process. Hence, where the infringement of Fundamental Rights is established the Court must proceed further and give compensatory relief to the victim. The compensation shall not be by way of damages as in a civil action but by way of compensation under the public law jurisdiction, wherein the State is made liable to pay compensation as it has committed a breach of public duty of protecting the Fundamental Right to life of citizen.... the claim of the citizens for compensation is based on the principle of strict liability, to which the defence of sovereign immunity is not available...the citizens must receive the compensation from the State, which in turn shall be indemnified by the wrong doer.”⁹⁴

The Court reiterated that the award of compensation for established invasion of Fundamental Rights of citizens under public law jurisdiction, in addition to traditional remedy under the law of tort. Secondly, The Court did not accept the reservation, which the Govt. of India had attached to Art.9 (5) of International Covenant on Civil and Political Covenant (1966).⁹⁵

Once the Court firmly established the award of compensation as a measure of enforcement of Fundamental Right to life and liberty, it did apply this measure to violations of other

⁹³(1997) 1 SCC 416, Also See *In Re Death of Sawinder Singh Grover* 1995 Supp(4) SCC 450 wherein the deceased died in the custody of Directorate of Enforcement and the Union of India was made to pay ex-gratia payment of Rupees 200,000/ to the widow of the deceased as an interim measure.

⁹⁴ *Id* para 44 & 54

⁹⁵ *Id* para 46

Fundamental Rights also. Thus in *Common Cause v. Union of India*,⁹⁶ the Court while referring to the law in England, stated:

“There is therefore, not much of a difference between the powers of the Court exercised here in this country under Art.32 or Art.226 and those exercised in England for judicial review. Public law remedies are available in both the countries and the courts can award damages against public authorities to compensate for the loss or injury caused to the plaintiff/petitioner, provided the case involves, in this country, the violation of Fundamental Rights by the government or other public authorities or their action was wholly arbitrary or oppressive in violation of Art.14 or in breach of statutory duty and is not purely a private matter directed against a private individual.”

Reiterating the same theme in *Chairman, Railway Board and Ors, v. Chandrima Das*⁹⁷ and others, the Supreme Court held that the public law remedies have also been extended to the realm of tort. It was a case of gang rape of a Bangladeshi national by the employees of the Indian Railways in a room at Yatri Niwas at Howrah Station. These employees managed the Yatri Niwas. The Government contended that it could not be held liable under the law of torts, as the offence was not committed during the course of official duty. However, the Court did not accept this argument and stated as under:

“The employees of the Union of India, who are deputed to run the railways and to manage the establishment, including the railway stations and the yatri niwas, are essential components of the government machinery which carries on the commercial activity. If any of such employees commits an act of tort, the Union government, of which they are the employees, can, subject to other legal requirements being satisfied, be held vicariously liable in damages to the person wronged by those employees”.

This case is noteworthy for two important reasons; firstly the Court stated the need of reading the principles of international covenants into the domestic jurisprudence for purposes of effective implementation of human rights. Secondly, the Court held that even a non-citizen could claim compensation for violation of Art.21 of the Constitution. The Court ruled:

“Just as the State is under an obligation to protect the life of every citizen in this country, so also the State is under an obligation to protect the life of the persons who are not citizens...As a national of another country, she could not be subjected to a treatment which was below dignity nor could she be subjected to physical violence at the hands of Government employees who outraged her modesty. The right available to her under Art.21 was thus violated. Consequently, the State was under a constitutional liability to pay compensation to her”.

It would appear that the Court has extended the compensatory principles to violations of any Fundamental Right and entitling the victim to compensation. However, this has not been

⁹⁶ (1999) 6 SCC 667

⁹⁷ AIR 2000 SC 988

accepted in later formulations of the Court. Thus in *Hindustan Paper Corporation Ltd. v. Ananta Bhattacharjee*⁹⁸ the Court stated:

“Public law remedy for the purpose of grant of compensation can be resorted to only when the Fundamental Right of a citizen under Art.21 of the Constitution is violated and not otherwise. It is not every violation of the provisions of the Constitution or a statute, which would enable the court to direct grant of compensation. The power of Court of judicial review to grant compensation in public law remedy is limited”.

A perusal of the Apex Court decisions discussed above reflects that the relief of compensation is a judicial innovation in the inherent powers of the Court. Since the award of compensation by the Court is not consistent, it follows that the remedy is discretionary in nature, as we noted earlier. Considering this, it cannot be stated with firmness that the right to claim compensation in India has settled as a Fundamental remedial right. However, it has a cascading effect in greater evolution of human rights protections at the level of judiciary. Moreover, as seen above the Court has awarded compensation, when the violation occurred under Art.21.concerning rights to life and liberty. The Court has thus impressed upon the State to take these rights seriously and seizing any opportunity to pronounce itself upon such violations of rights to life and liberty. As a matter of fact, post emergency, the Court has truthfully and courageously embarked upon a journey towards sensitizing Indian legal order towards greater Human Rights protection programs. However, in our submission, the Indian legal order has still to go a long way in assuring each individual about the sanctity of his individual Human Rights, despite bolder attempts by the Indian Supreme Court.

VI

APPRAISAL

Over the years, it has become clear that Courts are heavily relying on the Constitution, Bill of rights, and even international norms to protect and enforce rule of law. They are equally using their powers and new strategies and tools to restrict parliamentary and executive autonomy, so that it conforms to constitutional norms, particularly relating to fundamental human rights. The interdependence between judicial conscience and reasoning has equally led to greater concerns being shown about rights by the Courts. The Supreme Court of India is not an exception to this legal compass.

The Supreme Court has enlarged the scope and protection of the fundamental human rights guaranteed under the Constitution, as analysed above. It has devised new tools to promote a right-based administration. The Public Interest Litigation has been an important strategy towards increasing access of people to the Court. It has also helped the Court to address

⁹⁸ (2004) 6SCC 213

violations of fundamental human rights in India and give appropriate relief. The Court has visualised the award of compensation as an important methodology not only to redress the violation but also as a deterrent. Consequently, it has awarded compensation to the victims of violation of Fundamental Right to life and liberty. This is so even though the Constitution of India does not expressly provide for a *right to compensation* unlike other legal systems. Nor is there any legislation, which deals with such compensatory relief in case of infringement of Fundamental Rights, unlike other common law and continental jurisdictions. Despite this the Court has awarded compensation, exercising its inherent power to do complete justice and awarding appropriate relief under Art.32. In the initial phase of evolution of compensatory relief, the Court did not offer any firm jurisprudential basis for such a remedy. It used different terminology like exemplary costs, and exemplary damages. However, the Court later relied on Constitutional tort theory to justify the award of compensation. The Supreme Court has taken a view that a claim in public law for compensation is distinct from, and in addition to, the remedy in private law for damages for the tort resulting from the contravention of Fundamental Rights. The Court has also relied on Art.9 (5) of international Covenant on Civil and Political Rights, 1966, while justifying the award of compensation under Art.32 of the Constitution. This is despite India having put a reservation to Art.9 of the Covenant, stating that the reservation has lost its importance.

In a welfare state the State must strive to establish just relations between the rights of the individual and the responsibilities of the state. The award of compensation as a remedial measure has been established by interpretative techniques of the Supreme Court, even though the Court has not been consistent in awarding the same. The award of compensation by the Court has evolved as a discretionary relief, even though it has emphasized justifications for such a relief. In our submission, the compensatory relief serves both deterrent as well as restitutive purposes. It is pertinent to note that despite many objections to the Courts awarding compensation as a remedy for violation of fundamental human rights, the Courts have leaned in favour of compensating the individuals for injuries suffered at the hands of State and its employees. It is submitted that preventing and remedying injury to an individual is the bedrock of many constitutional protections. Also the Court's attention is focussed towards establishing constitutional rights so that individuals are protected from State lawlessness. Such an approach is warranted for establishment of astute constitutionalism and rights conscious and accountable executive. . Indeed, such individual protection would have been considerably enhanced, had this right to compensation been made an enforceable right in India also.