
RIGHT TO COMPENSATION: CONTEMPORARY TRENDS AND JUDICIAL DOCTRINE

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I. Introduction

The Compensation to victim of crime is a matter of concern, throughout the world the condition of the victims of crime is not better. The function of Compensation is straightforward. Compensation serves to right what would otherwise count as wrongful injuries to persons or their property². For a quite, long time the victim was not concern for traditional criminology. It is true that the victim of any serious crime is not getting his due in whole world³. We find the human rights always dishonoured by the barbarous acts at the hands of individuals, groups or the sovereign powers. It is the need of the day to recognize and respect human rights in social, cultural, economic and political spheres. By nature, the human rights are indivisible, inter-related and inter-dependent. They are natural rights come by birth as human beings. Separate efforts are not required to get them. Generally, human rights are those rights which are inherent in every human being. In absence thereof human beings are not in position to live as human beings. They are entitled for their enjoyment, protection and enforcement. Human rights are universal equally and also inalienable. They are derived from the principle of natural law, neither derived from the social order nor conferred upon the individual by the society. They reside inherently in the individual human beings independent of and even prior to his participation in the society. Consequently, they are the result of recognition by the state but they are logically independent of the legal system for their existence. Their origin may be sought in the natural law and not in the positive law. They are based on their intrinsic justification and not on their enactment or recognition by certain individuals⁴. Human person possesses rights because of the very fact that it is a person, a whole, a master of itself and of its acts by natural law, the human person has the right to be respected, is the subject of rights, possesses rights. These are things which are owned to a man because of the very fact that he is

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² Robert E. Goodin, Theories of Compensation, Oxford Journal of Legal Studies, Vol. 9, 1989, at. 56.

³ Dr. Prakash Chandra Mishra, Victim Compensation Scheme: An Aspect of modern Criminology, Cri.LJ 2014, at 136.

⁴ Dr. V.K. Anand, Human Rights, 1st edition: 2001, Allahabad Law Agency, at 1.

a man. A human right is a moral right held unconditionally and unalterably by all human beings. Human Rights are often said to belong to persons already prior to and independently of legislative enactment⁵.

However, their protection requires efforts and their violation requires to be Compensated. Victims of crime, either direct or indirect, are human beings. They have every right to get compensated. The Compensation may be awarded against wrongs committed by individuals, groups or agencies of the State. In recent years, Compensation to victims of crime has been introduced in several countries, which has its roots in the concept of protection of human rights.

II. Human Rights under the Constitution of India

The accepted and recognized principles of Universal Declaration of Human Rights as an integral part of Constitutional obligations. They speak for civil, political, economic and social rights. The traditional civil and political rights form part of fundamental rights, whereas, social and economic rights are set forth as directive principles. Though the directive principles are not so enforceable by Courts, they are nonetheless fundamental in governance of the State. Thus, the State has enacted appropriate laws including the Protection of Human Rights Act, 1993, for respecting and promoting human rights. In absence of specific provisions of law, the Supreme Court invokes its original jurisdiction for protecting human rights and by compensating for their disregard. Article 41 of the Constitution provides that, “the State shall, within the limits of its economic capacity and development, make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement and any other cases of undeserved want”. No doubt, the victims of crime in number of cases are exposed to disablement, undeserved want and even privation⁶.

A Law Commission led by Justice Mallimath has made various recommendations to overcome the problem. Accordingly, the provisions of Section 357-A of the Code of Criminal Procedure are introduced. However, those provisions are not full-fledged to cope with all needs of victims and to cover all kinds of victims, direct and indirect. To bring reformation in criminals is an object of modern law. However, victims, their problems and violation of their human rights are

⁵ Oyelade O.S. ,Conflict Resolution and Human Rights in Traditional African Society, Indian Journal of International law, 2005, at 201.

⁶ M.S.Deshpande, Protection of Human Rights by invoking Compensatory Jurisdiction by Courts, Cri.LJ 2014, at 50.

not so much looked into. The Courts are much slow, rather restrained by inadequate provisions of law to grant Compensation to the victims. The definition of victim given in Section 2 (wa) of the Code of Criminal Procedure is not exhaustive. To become entitled for Compensation under Section 357-A, is dependent upon the recommendation made by the trial Court to the Legal Service Authority. Moreover, except few States like Tamil Nadu, other States have not prepared schemes and sanctioned requisite funds for the Compensation of victims. Thus, the provisions of Section 357-A are either inadequate or rendered inoperative by the passive attitude of the State. Moreover, the provisions of Section 372 of the Criminal Procedure Code are silent on the point when the Compensation is not at all granted by the trial Court, as there is no provision for appeal when Compensation is denied or recommendation is not made to the Legal Service Authority. The Constitution of India does not confer any special rights relating to compensation although the Courts have read such rights as inherent in Article 21 of the Constitution⁷. Hon'ble Supreme Court reiterated that in case of infringement of fundamental right of large number of persons the Court can award remedial relief of Compensation in writ petition itself (*M.C. Mehta v. Union of India*)⁸. However the Court qualified the said as an exceptional measure only when an infringement of fundamental right is gross and patent i.e incontrovertible and ex facie glaring. Taking into consideration the above principle the Supreme Court in *State of Maharashtra v. Ravi Kant S. Patel*⁹ awarded Compensation for wrongful hand cuffing of a person. A child being dead due to police torture, the Supreme Court in *Saheli, a Women's Resources Centre v. Commissioner of Police, Delhi*¹⁰ awarded Compensation of Rs 75,000/-. More than four decades back Krishna Lyer, J., speaking, it is weakness of our jurisprudence that victims of crime and the distress of their dependents of the victim do not attract the attention of law. In, fact, the victim reparation is still the vanishing point of our criminal law. This is the deficiency in the system, which must be rectified by the legislature¹¹. The Hon'ble Supreme Court in another case of *Kumari v. State of Tamil Nadu*¹² awarded Compensation of Rs. 50,000/- because a child of six years died falling into uncovered sewerage tank. Equally the Supreme Court in *Nilabati Behera v. State of Orissa*¹³, awarded

⁷ Article 21 of the Constitution of India states that: No person shall be deprived of his life or personal liberty except according to the procedure established by law.

⁸ *M.C. Mehta v. Union of India*, AIR 1987 SC 1086.

⁹ *State of Maharashtra v. Ravi Kant S. Patel* (1999) 2 SCC 373.

¹⁰ *Saheli, a Women's Resources Centre v. Commissioner of Police, Delhi*, AIR 1990 SC 513.

¹¹ *Rattan Singh v. State of Punjab*, AIR 1980 SC 84, see also *Maru Ram v. Union of India*, AIR 1980 SC 2147 in which Court observed victimology must fulfill not through barbarity but by compulsory recoupment by the wrongdoer of the damage inflicted not by giving more pain to the offender but by lessening the loss of the forlorn.

¹² *Kumari v. State of Tamil Nadu*, AIR 1992 SC 2096.

¹³ *Nilabati Behera v. State of Orissa*, AIR 1993 SC 1960.

Compensation of Rs. 1.3 lakh to the mother whose son had died during police custody and the same was described as 'exemplary damages'.

In this connection, the Court observed that for doing complete justice and for enforcing fundamental right guaranteed by the Constitution, monetary Compensation is the only practicable mode by the State or its servants by taking the resource to Article 32 and 226 of the Constitution. The Supreme Court by virtue of judicial activism emphasized that in Tortious Law the principle of Compensation and damages for violation of the civil right has effected the status of fundamental right. The Supreme Court and the High Court being the protectors of the liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of the jurisdiction under Articles 32 and 226, as the case may be to the victim or the heir of the victim whose Fundamental Rights have been infringed. Relief in exercise of the power under Article 32 and 226 would be granted only if it is established that there has been an infringement of the fundamental rights of the citizen and no other form of appropriate redressal by the Court in the facts and circumstances of the case is possible.

III. Remedy for violation of Constitutional Rights

In India, the jurisprudential basis for the award of Compensation seems to be two-fold;

- 1) Under a controlling Constitution like ours, the State has a legal duty to protect the rights that are guaranteed therein and therefore it must compensate the victims if it breaches the rights¹⁴.
- 2) The writ powers that are available to the Superior Courts to ensure that the State does protect these rights, are not to be used in a hypertechnical fashion and therefore in order to be really effective in securing redress to the victims must involve the payment of Compensation¹⁵. In India neither the Supreme Court nor the High Courts have laid down any proper guideline in this regard and Compensation has ranged from Rs. 5,000¹⁶ to 3 lakhs¹⁷. Only in one case, the Court resorted to the framework provided under the Motor Vehicles Act to compute the Compensation that was payable¹⁸. The question of Compensation of damages in Constitutional tort leads us to the method that is to be adopted to compute them. Are the sums that are payable

¹⁴ *R. Gandhi v. State of Tamil Nadu*, AIR 1989 Madras 205, where the State was made to pay Compensation to those who had suffered damage to property in communal riots. The Courts reasoning was to make the State accountable for the breach of its duty to protect these people and their properties. See also in *Inder Puri v. State of Jammu & Kashmir*, AIR 1992 J&K 11.

¹⁵ *Supra* note 7.

¹⁶ *Ganga Das v. State of Orissa*, 1993 (2) SCALE 989.

¹⁷ *Veer Bala v. Delhi Administration*, 1993 (2) SCALE 179.

¹⁸ *Kalavati v. State of Himachal Pradesh*, AIR 1989 Him Pra5.

to be arrived using some logical basis or are they merely in disbursements that are in the nature of ex gratia that are an arbitrary figure. But this again was a case where the injury was tangible and manifest¹⁹. The Supreme Court of India realizing the difficulties faced in estimating Compensation directed in a matter concerning rape that the Central Government must set up a Criminal Injuries Compensation Board²⁰. But this still does not solve the problem of infringement of many Constitutional rights which may not be readily manifest as injuries or may not even be the result of criminal behavior for that matter.

The Supreme Court of India declared in 1983 in a seminal ruling in *Rudul Sah v. State of Bihar*²¹, that it could award in appropriate cases, monetary Compensation, where there had been a violation of the guarantee of life and personal liberty under Article 21 of the Indian Constitution by the State. This pronouncement was based on the reasoning that the article would be denuded of its significant content if the power of the Court was limited to passing orders for the release from illegal detention or other orders of a declaratory kind. Therefore an effective way to ensure that the violation of the right could be reasonably prevented and due compliance with the Constitutional mandate could be assured, so the State with the payment of monetary Compensation. This ruling was truly path breaking in several ways. First it was the logical sequel of the Human Rights Litigation in the Supreme Court, in which ‘activist’ justices ushered in new vistas in the landscape of individual rights and personal liberty, by laying down new jurisprudence which considerably embellished the express human rights guaranteed in the Constitution by judicially incorporating other rights integral to the true enjoyment of these express rights²². Second, it made clear in no uncertain terms that lawlessness and violation of human rights on the part of the State would not be countenanced. Third, it improved the capacity and the effectiveness of the Superior Courts of this country in redressing violations of constitutionally guaranteed fundamental and human rights²³. The decision in *Rudul Sah* was further reiterated in two other cases²⁴, all of which together formed a trilogy in which the Court granted Compensation to citizens whose rights had been violated by the State. These ruling were followed in an important decision of the Andhra Pradesh High Court which discarded the

¹⁹ S.A. Azad, “Judicial Activism, Indian Judiciary – A Savior of Life and Personal Liberty, AIR 2000 journal 17.

²⁰ *Delhi Domestic Working Women’s Forum v. Union of India, W.P. (Cri) No. 362 of 1993 (SC Oct. 19, 1994).*

²¹ *Rudul Sah v. State of Bihar, AIR 1983 SC 1086.*

²² Vikram Raghavan, Compensation through Writ Petitions, 6 Student Advoc, 97 (1994). For the list of the various ‘concomitant’ rights that now form part of the guarantee of Article 21.

²³ Vikram Raghavan, “The Compensating Victims of Constitutional Torts: Learning from the Irish Experience”, AIR 1998 Journal 101.

²⁴ *Sebastian Hongray v. Union of India, AIR 1984 SC 571 and Bhim Singh v. State of Jammu & Kashmir, AIR 1986 SC 494.*

old concept of the defence of Sovereign Immunity²⁵. This concept had been in vague in India, Since the days of the vintage decision of the Supreme Court of Calcutta in *P.O Steam Navigation Company v. Secretary*²⁶, (1868) 5 Bom HCR (App) 1, where the State was held not to be liable in cases that fell within the domain of the sovereign immunity. The Andhra Pradesh High Court distinguished this ruling and the decision of the Constitution Bench of the Supreme Court, in *Kasturilal v. State of Uttar Pradesh*²⁷, which had affirmed the steamship case, the Court in Ramakonda, stated that these precedents did not apply to a case in which there was a deprivation of life and personal liberty. Subsequently the Supreme Court in a case which did not involve a question of the breach of fundamental rights, clarified the true scope and ambit of the doctrine of sovereign immunity. According to the Court, the State could invoke this defence only in extreme situations like during war. This new dictum of the Supreme Court has considerably diluted the rigour of the doctrine of sovereign immunity, which was earlier available as a shield against the tortious acts of the Government and its servants²⁸. With these ruling the remedy of Compensation for redressing the violation of fundamental rights was firmly established in India and Indian Courts have now been frequently dispensing Compensation in many cases, where the fundamental rights have been shown to have been infringed²⁹. This trend has no doubt gone a long way for securing respect for human rights and Constitutional tort in India. But it is not the exclusive prerogative of the Courts in India. In other Jurisdiction, the Judiciary has made similar innovations in order to protect the Constitutional rights of their citizens³⁰.

IV. Public Law Remedy

Public law consists of Constitutional law and administrative law. It is concerned with the rights and duties between the individuals and the State. It is the violation and breach of public rights and duties which affect the whole community. The purpose of public law is not only to civilize public power but to assure the citizens that they live under a legal system which aims to protect their interests and preserve their rights. The public law proceeding serves a different purpose

²⁵ *Ramakonda Reddy v. State of Andhra Pradesh*, AIR 1989 Andh Pra 235.

²⁶ *P.O Steam Navigation Company v. Secretary*, (1868) 5 Bom HCR (App) 1,

²⁷ *Kasturi Lal v. State of Uttar Pradesh*, AIR 1962 SC 933.

²⁸ *N.Nagendra Rao v. State of Andhra Pradesh*, AIR 1994 SC 2663.

²⁹ P. Leelakrishnan, Compensation for Government Lawlessness, 27 Cochin Univ.L.Rev., (1992).

³⁰ J.C.Love, Damages: A Remedy for Violation of Constitutional Rights, 67 Calif.L.Rev.1242 (1979). In the United States of America, Constitutional tort is redressed in two ways. There is available a statutory cause of action under the Civil Rights Act of 1871 for violation of the Constitutional rights and the other based on common law principles. American Courts have made some important progress in this regard.

than a private law proceedings. The relief of monetary compensation as exemplary damage, in proceeding under Article 32 by Supreme Court or under Article 226 by the High Court, for established infringement of the indefeasible right guaranteed under Article 21, of the Constitution is a remedy available in public. Therefore, when the Court moulds the relief by granting “Compensation in proceedings under Articles 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights³¹, it does so under the public law by way of penalizing the wrongdoer 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 citizen. The power of the Court to award monetary Compensation by way of exemplary costs or otherwise is now established by the decisions of the Supreme Court³².

It is a recognized principle of both the Civil and Criminal jurisprudence to punish any individual who infringes the rights of the other individual and also to award monetary Compensation under some circumstances to the victim who was adversely affected by such infringement³³. The Constitution of India in endowing the High Court and the Supreme Court with writ powers under Arts. 32 and 226 has conferred them for the purpose of enforcement of the rights guaranteed in the Constitution. Writ proceedings are extraordinary in nature and do not take the form of regular proceedings like a civil suit in which a claim for Compensation or damage can be made. Yet, the Court in *Rudul Sah*³⁴, felt compelled to grant a sum of money in the nature of palliatives. Thus a Constitutional remedy was made to partake the character of a civil action akin to a tort through the grant of monetary Compensation. This was only in addition to and not in derogation of the normal civil law right and the payment of a monetary sum was not in the nature of damages. In, *Nilabati Behra case*³⁵, the Supreme Court in continuation of the jurisprudence of the *Rudul Sah*, held that a claim in public law for the award of Compensation, as a result of the violation of the fundamental rights guaranteed under the Constitution, was a distinct remedy from the claim in private law for damages. Dr. A.S Anand, J. speaking for the Court ruled:

“A claim in public law for Compensation of human rights and fundamental freedoms, the

³¹ Article 32 or 226 of Indian Constitution, which grant wide power to higher Courts to protect the fundamental rights.

³² Supra note 19.

³³ M.S.V. Srinivas, “Compensation under Arts. 32 and 226 for violation of Human Rights and Fundamental Freedoms” AIR 1997 Journal 167.

³⁴ Supra note 19.

³⁵ Supra note 12.

protection of which is guaranteed in the Constitution is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a Constitutional remedy provided for the enforcement of a fundamental right is distinct from and in addition to the remedy in private law for damages for the tort resulting from the contravention of the fundamental right”.

The Compensation can follow as the natural consequence of the contravention of the fundamental rights. The judicial committee, further opined that the claim for Compensation did not come under the purview of private law such as tort law but under public law, dealing with human rights and fundamental freedoms. The Nilabati Behra Case set at rest all doubts as to the prerogative of the Supreme Courts in India to award Compensation to those who have had their Constitutional rights infringed³⁶. The maintenance of law and order is the primary duty of the State and under our Constitution it is a State subject and tops State List. No Government worth the name can abdicate this function and put the life and liberty, and the home of citizen in jeopardy.

V. Remedy under Criminal Procedure Code, 1973

In old Code of Criminal Procedure, 1898 contained a provision for restitution in the form of section 545³⁷. Now there is only one general law that governs the victims compensatory rights as mentioned in Criminal Procedure Code, 1973 in Section 357³⁸. According to sub-section (3) of Section 357, Compensation can be granted quite liberally and without any restriction. The

³⁶ Poonam Gopalswamy, New Development in Tort: Nilabati Behera v. State of Orissa, 6 Student Advoc. 157 (1994), See also, *T.C. Pathak v. Union of India*, (1995) 6 SCC 357.

³⁷ Section 545 of Cr.PC which stated in sub-cl. 1(b) that the Court may direct “payment to any person of compensation for any loss or injury caused by the offence when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court.

³⁸ Section 357 has been detailed in five sub-section under sub-section (1) of the Section 357, compensation could be directed to be paid only if the accused is punished with a sentence of fine or with some other section of which fine formed part; and secondly, it could be directed to be paid out of the amount of fine recovered. Consequently the amount of compensation could be in no case exceed the amount of fine; and the quantum of fine would again depend upon the limit up to which the fine was awardable for the particular offence and also upon the extent to which the Court had power to impose fine. Further, sub-section (2) provides that where the fine imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal. In sub-section (3) when a court imposes a sentence, of which fine does not form a part, the court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced. Under sub-section (4) an order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision. Sub-section (5) provides that at the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section.

only limitation of sub-section (3) is it would be awarded where sentence of fine is not imposed. If the sentence of fine is imposed, this section is not applicable. The Apex Court in *Hari Krishan v. Sukhbir Singh*³⁹, highlighting the importance of Section 357(3) of the Criminal Procedure Code, 1973, says, this section is an important provision. This power to award Compensation is not ancillary to other sections but it is in addition thereto. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender.

In *Guruswamy v. State of Tamil Nadu*⁴⁰, the Court are of the view that, in murder cases true justice will be rendered only when proper compensation is provided to the dependents of the deceased. The amount of compensation awarded range from Rs. 10,000 to Rs. 1,00,000 depending upon the number of dependents of the deceased and capacity of the accused to pay the same. Section 357 has own limitation while passing an order under Section 357(3), it is imperative for the courts to look at the ability and the capacity of the accused to pay the same amount as has been laid down by the cases, otherwise the very purpose of granting an order of compensation would stand defeated⁴¹. Prior to introduction of Section 545 of the Code of Criminal Procedure, 1898 (corresponding section 357 of the Code of Criminal Procedure, 1973), the dependents of victims might institute suit for damages under the Fatal Accidents Act, 1855. A decree for compensation Rs. 1500/- granted in such suit was set aside by the first appellate Court. However, by restoring the decree of High Court of Lahore, in *Sardara Singh v. Charan Singh*⁴², has observed that it is sufficient under the Fatal Accident Act, if a person by his wrongful act, neglect or default shall have caused the death of another person.

The High Court of Allahabad in *Jagannath Singh v. Pragi Kunwar*⁴³, under similar circumstances, has held that a suit for compensation under the Fatal Accident Act, 1855 was maintainable. It awarded compensation Rs.2000/-, A person could sue for damages in a civil Court if crime is at the same time a tort. However, the Fatal Accident Act, 1855 was leading to multiplicity of proceedings and expenses to the victims, as they had to approach criminal as well as civil courts for redress of their grievance. Thus, the concept of compensation to victims introduced in the Code of Criminal Procedure. The general principle behind payment of Compensation in criminal case is a simple and cheap way of giving a victim a civil remedy to

³⁹ *Hari Krishan v. Sukhbir Singh*, AIR 1988 SC 2131.

⁴⁰ *Guruswamy v. State of Tamil Nadu*, 1979 Cri.L.J 704.

⁴¹ *K.A. Abbas H.S.A. v. Sabu Joseph*, AIR 2011 SC (Cri) 1093.

⁴² *Sardara Singh v. Charan Singh*, AIR 1933 Lahore 770.

⁴³ *Jagannath Singh v. Pragi Kunwar*, AIR 1949 Allahabad 448.

which the victim is already entitled. It is not a punishment or an additional punishment to an offender. By principle, an excessive fine or compensation should not accompany with a substantial sentence. The High Court of Bombay, in *State v. Pandurang Shinde*⁴⁴ has observed that when the accused was sentenced to life for an offence of murder, a sentence of fine could not be imposed, as it was wholly opposite. Thus, the order of payment of fine Rs. 500/- was set aside.

VI. Role of Judiciary for granting Compensation

The judiciary has taken a lead role in protection of human rights of victims, especially by granting compensation and also by laying down various guiding principles for subordinate judiciary for dealing with such cases. The Supreme Court and various High Courts have taken lead to overcome these problems. The judicial attitude is changing on this point in good direction and becoming more favourable for granting Compensation to victims⁴⁵. Even in few cases an interim Compensation is also granted. Provisions of Articles 14, 21, 32 and 226 are considered by the Supreme Court for invoking its Compensatory jurisdiction for translating the Declaration of Human Rights into reality. In post independence era the judiciary, being custodian of rights of people, has shown deep concern about protection of human rights of victims⁴⁶.

Today the courts can be moved by filing application/petition/complaint/plains/counter claims etc. The Constitutional courts, namely, the High Courts and the Supreme Court, have evolved a formula to entertain grievances of the citizens in relation to violation of more sacred fundamental rights embedded in Articles 14, 21 and 22 etc. of the Constitution of India. If the grievances are prima facie found to be substantial or even acting suo motu overlooking the technicalities⁴⁷. Article 9(5) of the International Covenant on Civil and Political Rights, 1966, indicates that an enforceable right to Compensation is not alien to the concept of guaranteed rights, as it provides for award of Compensation to the victims who have been unlawfully arrested or detained and to get such Compensation is their enforceable right. On that basis the Supreme Court and High Courts in India are leading to recognize and protect the victims by awarding Compensation.

⁴⁴ *High Court of Bombay, in State v. Pandurang Shinde, AIR 1956 Bombay 711.*

⁴⁵ Justice J.S. Verma, "The Constitutional Obligation of the Judiciary", 1997 SCC (J), p. 24.

⁴⁶ S.N. Jain, Monetary Compensation for Administrative Wrongs through Article 32, 25 J. Ind. L. Inst. 118 (1988).

⁴⁷ Justice Binod Kumar Roy, 'Role of Judiciary in the present day Context', AIR 1998 Journal 17.

The Supreme Court express view in *Palaniappa Gounder v. State of Tamil Nadu*⁴⁸, in this case the accused was convicted for murder and sentenced to death. The High Court of Madras upheld the conviction but reduced the sentence to imprisonment for life, by imposing fine Rs. 20,000/- and directing to pay compensation Rs. 15,000/- out of fine. The Supreme Court held the fine to be unduly excessive and reduced it to Rs. 3000/- and directed to pay it to the dependants of victim. When there is a statutory provision for granting compensation, there is no scope for invoking inherent powers under Section 482 of the Code of Criminal Procedure. The Supreme Court expressed need to consider the propriety and adequacy of fine on the basis of the facts of the case. Another case in *Venkatesh v. State of Tamil Nadu*⁴⁹, the accused was sentenced to life imprisonment for murder. The High Court altered the conviction and convicted the accused under Section 304 (part-II) of Indian Penal Code inflicted rigorous imprisonment for five years and imposed fine Rs. 3000/- with a direction it pay the same to dependants of victim for compensation. The Supreme Court observed that if a steep sentence of fine is imposed and fine is made payable to widow and unmarried daughter of deceased, it will serve ends of justice. It reduced the sentence of imprisonment to one already undergone and enhanced fine to Rs. 1,00,000/- with a direction to pay compensation Rs. 75,000/- to widow and Rs. 25,000/- to unmarried daughter. Thus, it was laid down that in sentencing process, compensation is one of mitigating factors for reducing the substantive sentence.

In *Madhukar Chandar v. State of Maharashtra*⁵⁰, the accused a young farmer murdered his brother-in-law. The sentence of life imprisonment was reduced to rigorous imprisonment for seven years by the High Court of Bombay by holding that true justice will be achieved if the old mother and three children will receive some sustenance which the deceased would have otherwise provided. The High Court put an option before the accused to pay a fine Rs. 40,000/- and in default to undergo rigorous imprisonment for seven years. It was also directed that if fine is paid within twelve weeks the jail sentence shall stand reduced to three years. The amount of fine Rs. 40,000/- was directed to be paid to the dependants of victim. Here the Court equated the substantive sentence with compensation.

VII. Remedies through Writ Petition

When the fundamental rights are violated, the aggrieved can approach the writ court under

⁴⁸ *Palaniappa Gounder v. State of Tamil Nadu*, AIR 1977 SC 1323.

⁴⁹ *Venkatesh v. State of Tamil Nadu*, 1993 Cri LJ 61.

⁵⁰ *Madhukar Chandar v. State of Maharashtra*, 1993 Cri LJ 3281.

Article 226 of the Constitution by filing writ petition before the Supreme Court and the High Court. Writ is an order of the court issued to a person or authority to do some act or forbear from doing some act. It is necessary to understand the remedy available under Article 32 and 226 of the Constitution in writ petition to the aggrieved in cases of human rights violation. The power of judicial review guaranteed under Article 32 and 226 of the Indian Constitution has been inherited from Britain. Traditionally this Article was used only by persons whose fundamental rights were infringed⁵¹. After the commencement of Constitution, the High Courts and the Supreme Court were empowered to protect the precious rights of the citizen under Article 226 and Article 32 of the Constitution to give immediate remedy or relief to victim when a citizen's fundamental rights or legal rights are infringed. Writs mentioned under Article 226 were known as prerogative writs. The rights obtained under Article 32⁵² and 226 as Constitutional remedy for enforcing fundamental rights are considered as the crowning sections of fundamental rights⁵³.

Out of the different kinds of mechanism available in India to enforce and implement law, remedy available through writ court is the important one as it gives immediate remedy to the victim and takes measures to prevent the ongoing human rights violation. The main function of the writ court is in giving quick and immediate remedy for preventing human rights violation but most of the cases become anfractuous due to delay in deciding the cases. Delay in deciding the cases would become a denial of justice to the parties. In the course of an encounter, there is a chance of infringement of rights guaranteed to the citizen. In some cases it may be genuine and justifiable then the citizen is entitled to get remedy for the violation of their rights⁵⁴. Now the restriction has been considerably relaxed by the Supreme Court. In modern use, these rights are available to the citizen; it is the subject who benefits from the writ. Now this legal prerogative is used to ensure a good and lawful government. Now the court has widened the scope of public interest litigation or social interest litigations. So that the public spirited persons can approach the court for the welfare of the poor, socially and economically disadvantaged and weaker sections of the society, who are unable to approach the court for relief when there is infringement of Constitutional and legal rights. The court laid down the guidelines that the

⁵¹ K.C. Joshi, Compensation through Writs, 30 J. Ind. L. Inst 69 (1988).

⁵² Dr. B.R. Ambedkar, "Constitutional Assembly Debates", Constitutional Assembly of India, 9th Dec 1984, p 953. During the Constitutional assembly debate, he said that Article 32 is the most important Article in the Constitution and it is the very soul and heart of the Constitution.

⁵³ P. Ishwara Bhat, Fundamental Rights (2004) p.87.

⁵⁴ P.K. Tripathi, Article 32 and Compensation Conundrum, 2 SCC (J.) 51 (1984).

poor in India can be treated as petition to enforce their fundamental rights and the court is empowered to grant remedial relief in appropriate cases.

In *People's Union for Civil Liberties v. Union of India and another*⁵⁵, in this case writ petition was filed by the People's Union for civil liberties under Article 32 of the Constitution of India for the issuance of a writ of Mandamus or other appropriate writs to institute judicial inquiry into the fake encounter by Imphal police on April 3rd 1991 in which two persons were killed and to take appropriate action against the erring officials and to award compensation to the members of their family. The allegation of 'fake encounter' was denied by the government of Manipur. The question in this case is what are the relief measure that should be granted in this writ petition. In this case court disallowing any claim of sovereign immunity, the court referred the case of *Challa Rama Konda*⁵⁶ dealing with the liability of the State in which compensation granted for the deprivation of right to life guaranteed under Article 21 by stating that it is so fundamental and basic, non-negotiable, and no compromise is possible.

Next case was entertained by the court with civil writ jurisdiction. In *Bahlen Balmuchu v. State of Bihar*⁵⁷, the petitioner approached the court for granting compensation in custodial death allegedly committed by the police officials. Where three persons were taken into custody, in connection with a dacoity and they were subjected to brutal attack, resulting in their death. When the complaint filed by the widow on action was taken then they moved the Supreme Court and the concerned officials were arrested by the order of that court. It was well settled that in case of contravention of fundamental right by the State or its agency, compensation could be awarded under Article 226 of the Constitution of India. But the doubt in this case was whether an order of payment of compensation could be passed at that stage or not. If it was found that aforesaid persons were murdered by the police officials it would be open to the petitioners to move for payment of compensation in accordance with the law. The petitioner had the right to move the court for payment of compensation.

In *Vishaka & others v. State of Rajasthan*⁵⁸, a writ petition had been filed to enforce the fundamental rights of working women under Article 14, 19 and 21 of the Constitution, to prevent sexual harassment in all working women and to make necessary legislation for the

⁵⁵ *People's Union for Civil Liberties v. Union of India and another*, AIR 1997 SC 1203.

⁵⁶ *Supra* note 23.

⁵⁷ *Bahlen Balmuchu v. State of Bihar*, 2003 Cri. L.J. 3803.

⁵⁸ *Vishaka & Others v. State of Rajasthan*, AIR 1997NSC 3011.

protection of women. In this case, the petitioner wanted to lay down some guidelines for the protection of working women and to eradicate this social evil. The cause for filing this petition was due to the alleged brutal gang rape of a social worker in the village of Rajasthan and after that willful delay in investigation and prosecution of the suspected rapists. This writ petition was filed under Article 32 of the Constitution for the enforcement of fundamental right under Article 14, 19 and 21 of the Constitution of India. In this case Supreme Court directed that guidelines and norms would be strictly observed in all workplaces for the preservation of their rights and to enforce guarantee of equality. A suitable legislation is required to protect the rights of the women to live with dignity and to compensate the victim by taking steps, to strengthen and ensure the fundamental right to life and liberty of women. The court had given directions to the central government and the State government to follow certain guidelines and norms to be observed in all work place to protect the rights of working women.

The Apex court made a distinction between public law and private law. Under Article 226 of the Constitution the High Court has been given power and jurisdiction to issue appropriate action for the enforcement of the fundamental rights. So the High Court has jurisdiction not only to grant relief for the breach of enforcement of fundamental rights but also to enforce any other legal rights including the enforcement of public duties by public bodies.

VIII. The Protection of Human Rights Act, 1993

Issues relating to human rights violation are on the increase in India. So after conducting various seminars with Chief Ministers of different States and after reviewing the existing laws, procedure and administration of justice, the government decided to enact laws relating to the protection of Human Rights Act 1993⁵⁹.

Section (d) of the Protection of Human Rights Act, 1993 defines human rights as follows:-

“Human rights, means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by

⁵⁹ Justice Gulab Gupta; Human Rights Commission and Their Effectiveness, Central Indian Law Quarterly ILI J (2001) p 1.

Central government introduced “Human Rights Commission Bill 1992 in the Lok Sabha on 14th May 1992. Since this bill was referred to the standing committee of Parliament of Home Affairs it could not become law considering the urgency of the matter the President promulgated “The Protection of Human Rights Ordinance 1993 on 28th September 1993 which was subsequently replaced by the Protection of Human Rights Act 1993.

Courts in India”.

The Universal Declaration of Human Rights, 1948, declares, “all human beings are born free and equal in rights and dignity”. The purpose of this Act is to better the protection of human rights and for matters connected therewith. This Act provides for the Constitution of National Human Rights Commission with a jurisdiction all over India and a commission for each state. It is an investigative and reporting body with powers of the civil court in certain respects. It can take action on the basis of media report *suo moto* or direct complaint from victim, against human rights violation which looks into all complaints of violation and fixes accountability and can provide immediate remedy to the victim in the case of continuing human rights violation but it lacks the judicial power of imposing punishment. It is like an Ombudsman to supervise the enforcement of laws and can provide effective protection to the citizen. The Commission would probe into the matter thoroughly and provide help to the victim. It helps to safeguard the rights of the people and it is an instrument of justice. People, rich or poor, literate or illiterate, forward or backward can approach the NHRC without fear. It is not a court and at the same time it acts as a watchdog against the acts of human rights violation.

Human rights can be considered from two angles. Firstly, the rights necessary for dignified human existence, like basic human needs of food, clothing, shelter and medical care. Secondly, the rights which are necessary for adequate development of human personality such as right to education, freedom of culture, speech and expression, free movement, satisfaction of undeserved wants etc. Human rights are evolved through a long process right from Vedic period to recent past. They are again classified into liberty- oriented, security-oriented and internationally agreed. Liberty oriented human rights are mainly connected with civil and political rights. Whereas, rights related to social, economic and cultural security are termed as security oriented rights. The rights which are related to group of people concerning environmental, cultural and developmental aspects and which come into existence through international agreements consist in the third category. Unless, equilibrium of political and civil rights with economic, social and cultural rights is properly evolved, a sizeable section of the society will be deprived of such rights. Efforts are being made by the Courts to achieve that equilibrium⁶⁰.

⁶⁰ Justice H.R. Khanna, ‘Human Rights – Humanism and Challenges’, AIR 1998 Journal 49.

IX. Evolution of Victim Compensation Scheme

The universalist views on criminal justice system emphasize on the norms collectively recognized and accepted by all of humanity⁶¹. The internationally accepted norms where under an individual's criminal acts is accountable are universally binding and applicable across national borders on the premise that crimes committed are not just against individual victims but also against mankind as a whole. The crime against an individual thus transcends and is taken as an assault on humanity itself. It is the concept of the humanity at large as a victim which has essentially characterized 'crimes' on universally accepted principles. The acceptability of this principle was the genesis of Criminal justice system with State dominance and jurisdiction to investigate and adjudicate the 'crime'.

Various international declarations, domestic legislations and Courts across the world recognized the 'victim' and they voiced together for his right of representation, compensation and assistance. In India the principles of compensation to crime victims need to be reviewed and expanded to cover all cases. The compensation should not be limited only to fines, penalties and forfeitures realized. The State should accept the principle of providing assistance to victims out of its own funds. The concept of 'Victim Compensation Scheme' got birth by Section 357A which inter alia provides that "every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who, require rehabilitation". Under this provision, even if the accused is not tried but the victim needs to be rehabilitated, the victim may request the State or District Legal Services Authority to award him/her compensation. Section 357A(2) provides on recommendation of court for compensation the district legal service authority or the State legal service authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme provided, for section 357A sub-section (1), Section 357A (4) provides the rights to victim to proceed for compensation. According to this sub-section where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the district legal service authority for award of compensation. On getting the application by victim the authority will conduct an enquiry within two months regarding adequate compensation. Sub-section (6) of 357A of the Code of Criminal Procedure

⁶¹ The United States of America enacted The Victim of Crime Act, 1984, and The Victims' Rights and Restitution Act of 1990. Similarly South Australia Victim of Crime Act 2001.

explains the duty of the State or District Legal Service Authority as the case be, to alleviate the suffering of victim, order for immediate first aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fits.

X. Conclusion

Protection of human rights has got a wide recognition in the present day world of human rights revolution. Human rights need to be respected, protected and in case of violation they are required to be compensated. The Legislature and Judiciary in India have shown deep concern for promotion and protection of human rights. The Supreme Court has also made the State and its agencies liable for violation of human rights and required them to pay compensation to the victims of illegal detention, custodial death, rape, mass disasters. The Courts are committed to protect human rights of victims by granting compensation and creating obligation on their part to consider issue of compensation at a trial level. The judiciary has been contributing to human rights jurisprudence to protect human rights of the people. In addition to this, India signed and rectified several agreements and conventions to promote human rights jurisprudence. In India there is no express provision in the Constitution to grant compensation in case of violation of human right. While rectifying International Convention on Civil and Political Rights, India made a specific reservation to the Article 9 (5) which provides to grant compensation in case of human rights violation by the State, the writ court through its judicial activism began to grant ex-gratia payment in case of Constitutional torts. The writ court used Article 21 of the Constitution to enforce rights guaranteed to the people and began to grant compensation in case of human rights violation. The higher courts in India started giving compensation in case of violation of human rights. But there is no rationality in fixing the compensation. Now the compensation is considered on the fact and the circumstances of each case and it is determined by taking into account the nature of the crime, the justness of the claim by the victim, the ability of the accused to pay. The administration of the criminal justice system should be in conformity with the rapid change in the society. So most of the countries came forward to change their law according to the needs of the time.