CHAPTER

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COMPENSATION TO VICTIMS
A HUMAN RIGHTS APPROACH

The Criminal justice system is to protect the basic rights of the individuals and the state against intentional invasion of criminals who violates the basic norms of society. Our Judicial system ensures that every citizen shall have an effective remedy for informing his basic rights. The legal maxim “ubi jus ibi remedium” is not an empty promose. The universal declaration of Human Rights proclaims in Article 8.

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law”

In present scenario the Human Rights are the concern of the International community as a whole since they are the rights which every human being has apart from giving legal sanctity to the Human Rights, now there is trend even to pay compensation to the victims of Human Rights violation.

I. EVOLUTION OF CONCEPT OF HUMAN RIGHTS:

Human Rights have been described as inalienable rights in the sense that without them life left is not fully human life. Large Scale atrocities committed by the axis powers during the second world war, the utter disregard exhibited by them for human dignity and decency which came to be recognized as crimes against humanity necessitated the victorious allied nations to incorporate in


The United Nations General Assembly, on December 10, 1948 unanimously passed a resolution approving the Universal Declaration of Human Rights “as common standard of achievement for all peoples and of nations The thirty articles of the universal declaration cover almost the entire gamut of human right. The follow up action in 1966 to give effect to the Universal Declaration was in form of two international covenants (i) on Economic, Social and Cultural rights; and (ii) on Civil and political rights. The basic philosophy that lay behind the international covenants is that realization of the rights incorporated in the Universal Declaration of Human Rights is possible only if every human being has civil and political rights as well as economic social and cultural rights. The evolution, growth and development of human right had been marked by gradual erosion of absolutism, rise of democratization of decision-making the common people at the social and political level.

These phenomenon changes at the national and international level have not only contributed to the development of Human Rights as a part of international legal system, but also that development of principles concerning payment of compensation to victims in course of time. In other words the issue of payment of compensation to victims of crime which was hither to confined to municipal law system has now founds its way into international legal system.

We have long accepted human rights as one of the founding pillar of our Constitution. Part-III of our constitution incorporates many aspects and principles of the Universal Declaration of Human Rights, 1948 as well as the International covenant on civil and Political Rights, 1966 which is an optional protocol to the Universal Declaration. But we need to now focus on a new and developing strain of thought, that is, ‘rights of victims’. Are the victims of crime being adequately compensated and rehabilitated and is the criminal justice system adequately
punishing the guilty. These are the questions that we need to ask ourselves and try to find an answer. Our Criminal justice delivery system bears a big question mark. Only 30 to 35 percent of all criminal cases end in conviction, while 90 to 95 percent of matters involving heinous crimes end in acquittal. Under these circumstances, does the victim of a crime believe that he is ever going to get justice.2

II. DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS

Perhaps realizing the gravity of the problem the United Nations General Assembly (UNGA) in 1985 adopted a Declaration of the Basic Principles of Justice for the victim of crime and abuse of Power. The declaration envisages the basic norms to be adhered to for the recognition of victims’ right to information, treatment; restitution and compensation. The declaration also suggested certain measures to help victims and repose confidence in them. The prominent among them are; access to justice and fair treatment; restitution; assistance and the right based victims’ movement.

The General Assembly in 1985, approved following rights of the victims without prejudice to the rights of offender.

A. Right to protection from criminal activities through police and the law;
B. Right to Information from agencies of criminal justice system at every stage.
C. Right to assistance at every stage; such assistance will include medical, financial and legal aid.
D. Right to courteous and human treatment
E. Right to restitution from offenders
F. Right to compensation from State
G. Right to intervene at any stage of the proceedings through counsel, including the right to seek review or approval.

2 Gudalure M.J. Cherian v. Union of India, 1995 SCC(Cri.)925
The realization of these rights is possible when appropriate legal, administrative and policy decisions are made to ensure justice to the victims of crime in their interface with criminal justice agencies.

III. HUMAN RIGHTS AND COMPENSATION TO VICTIMS:
The Supreme Court has forged new tools, devised new methods and adopted new strategies for the purpose of making Human Rights meaningful even to the victims of crime.

In M.J. Cherian’s case the Supreme Court directed the State of U.P. to suspend and start disciplinary3 action against two police officers and one medical officer for making perfunctory investigating of rape case and to pay compensation of Rs.2,50,000/- as compensation to each of the victims of rape. The Principal that a party cannot invoke the writ jurisdiction if the alternative efficacious remedy is available has undergone a drastic change by various decisions of the Apex Court which has awarded compensation to the victims of State atrocity, inspite of existence of alternative remedy of compensation under ordinary law5.

Law making being an inherent and inevitable part of the judicial process in a democracy, the Supreme Court has laid down that the doctrine of sovereign immunity cannot stand on the way of awarding compensation to the victim whose fundamental right is violated by the agency of the State. By the Landmark judgment in Hari Kishan’s case the Supreme Court not only awarded compensation of Rs.50,000/- to the victim, but also directed subordinate criminal courts to exercise this power of awarding compensation to the victim of offences in such a liberal way, that5, the victims may not have to rush to the civil courts for compensation. The General Assembly of United Nations has recommended

3 Gudalure M.J. Cherian v. Union of India, 1995 SCC(Cri.)925
payment of compensation to the victims of crime by the State, when compensation is not fully available from the offender or other sources. Since the State has a duty to protect life, liberty and security of its citizens, it is bound to pay compensation to the victims, irrespective of whether the accused is convicted or acquitted of the criminal charge.

A. Compensation for murder

In murder cases, courts are of the view that true justice will be rendered only when proper compensation is provided to the dependants of the deceased. The amount of compensation awarded ranges from Rs. 10,000 to Rs. 1,00,000 depending upon the number of dependants of the deceased and capacity of the accused to pay the same. In Italic Guruswamy v. State of Tamil Nadu\(^6\), the Supreme Court awarded Rs. 10,000 as compensation to the widow and the minor children of the deceased. In Guruswamy case\(^7\) five accused armed with weapons caused injuries to the deceased which resulted in his death due to a dispute over water among brothers in a family. The Supreme Court imposed a fine of Rs. 3500 on each of the accused which amount was to be paid to the widow of the deceased as compensation. In Sarwan Singh v. State of Punjab\(^8\), the Supreme Court awarded compensation to the extent of Rs. 10,000 payable to the widow and the unmarried daughter of the deceased.

It is evident from the analysis of the cases cited above that whenever the court enhances compensation amount, it commutes or reduces the punishment. In other words, monetary compensation is substituted in lieu of substantive sentence. However, the Supreme Court is not consistent in awarding compensation while reducing substantive sentence. For instance, in the Palaniappa Gounder case\(^9\) it held that the compensation of Rs. 20,000 awarded by the High Court was unduly

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\(^6\) (1979) 3 SCC 797:1979 SCC (Cri) 879
\(^7\) Ibid.
\(^8\) 1978) 4 SCC 111
\(^9\) (1977) 2 SCC 634
excessive and reduced the amount to Rs.3000. Similarly, in the Palaniappa Gounder v. State of T.N.\textsuperscript{10}, the Supreme Court reduced the amount of compensation from Rs.10,000 to Rs. 5000 payable to the heirs of the deceased. The Supreme Court pointed out that there was no justification for substituting the monetary compensation for the substantive sentence. In Swaran Singh v. State of U.P.\textsuperscript{11}, the Supreme Court treated compensation as an alternative to imprisonment. On Special Leave Petition, it upheld the conviction but reduced the sentence to the period already undergone (one year) by the accused. It directed the accused to pay to the widow of the deceased a fine of Rs. 20,000 by way of compensation under Section 357 of the Criminal Procedure Code.

The Apex Court's decisions may be viewed as a liberal interpretation of the law in order to aid the cause of the victim. Although the quantum of compensation ordered by the Court is a paltry sum in relation to the gravity of the offence, nonetheless the decision is in line with the growing trend of incorporating the concept of paying compensation to victims in the course of criminal proceedings. It may be painful for the offender to pay compensation, but it would be equally painful if the victim is directed to approach the civil court for compensation.

B. Compensation for sexual assault

Of late, the Apex Court has come to the rescue of the victims of sexual assault by holding that interim compensation may be awarded to a rape victim even during the pendency of criminal trial.\textsuperscript{12} The Court has said on more than one occasion that a victim of rape must be compensated, though there can be no compensation for what she has suffered or lost. It cannot be translated into monetary terms. However, adequate compensation is necessary for the loss of reputation, agony, torture, misery and the deprivation of the prospect of marriage and setting down to

\textsuperscript{10} Ibid.

\textsuperscript{11} 12.(1998)4 SCC 75.

\textsuperscript{12} Bodhisattwa Gautam V Subra Chakraborty, (1996) 1 SCC 490
a serene family life. This philosophy is reflected in Kunhimon v. State, where five accused committed rape on a young rustic girl. The High Court of Kerala, justifying the necessity of compensation to rape victims, observed that courts should enforce the conscience of law as seen in Section 357 of the Cr.P.C.

The High Court sentenced the four accused to pay a fine of Rs.3000 each and the fifth accused, to pay Rs. 10,000 as compensation to rape victim. To espouse the pathetic plight of four domestic servant who were subjected to indecent assault by seven army personnel in a train, the Delhi Domestic Women's Forum filed a writ petition in the Supreme Court under Article 32 of the Constitution. The Forum urged the Supreme Court to spell out the parameters on expeditious conduct and investigation of trial including compensation to victims of rape. Taking note of the seriousness of the matter, the Supreme Court suggested to the Government to set up a Criminal Injuries Compensation Board, in order to award compensation to the victims of rape, whether or not a conviction has taken place. At the same time the court directed the trial courts to award compensation to the victims of sexual assault on conviction.

C. Constitutional Remedy for Human Rights Violations

In the Uttrakhand Stir (Rallyist) case the Allahabad High Court, on 9th February, 1996, delivered a historic judgement in a group of six cases arising out of the incidents in Khatima, Mussoorie and Muzaffarnagar of the State of Uttar Pradesh in September and October 1994. In the impugned case 24 persons were killed, seven women were raped. 17 were sexually molested, many others were injured and illegally detained as a result of police firing and atrocities committed on a peaceful demonstration for a separate State of Uttranchal in 1994. The court awarded compensation of Rs 10 lakh each to deceased victims families and Rs 10 lakh for rape victims judging the crime of rape equivalent to death; Rs 5 lakh to the

13 1988 Cri LJ 493
victims of sexual molestation; and Rs 2.5 lakh to Rs 50,000 for less serious injuries. The court advancing the cause of human rights and giving more teeth to the constitutional guarantee for a right to live with dignity vide Article 21 declared that the court itself could award compensation in a case of human rights violation. An important feature of the verdict is that the State has been held vicariously responsible for crimes committed by its officers and asked to compensate the victim and the officers responsible for committing crimes have been individually and jointly held liable to be prosecuted under the IPC. With this verdict, the High Court has scoffed at the State’s audacity in taking shelter under the umbrella of sovereign immunity, a principle left behind by the British Raj and cherished by the Government even after 54 years of independence. However, in A.K. Singh case\(^{16}\), the Supreme Court set aside the High Court’s order asking the convicts to pay compensation to the victims. Perhaps the Court viewed the amount of compensation of Rs 10 lakh too large for the crime.

With due respect, it is submitted that perhaps the Apex Court has not appreciated the gravity and seriousness of the crime committed by the State functionaries on innocent members of a peaceful demonstration demanding a separate State of Uttranchal which is permissible in a democracy. On the other hand in a recent case, Chairman, Railway Board v. Chandrima Dass,\(^{17}\) the Apex Court ordered Rs 10 lakh compensation for a foreign tourist from Bangladesh who was raped by the Railway employees in the Yatri Niwas at Calcutta on February 26, 1998. Endorsing the Calcutta High Court’s view, the Court held that the foreign national is also entitled to the fundamental right to life in India. The Court said:

“As a national of another country, Smt. Hanuffa Khatoon could not be subjected to physical violence at the hands of the Government employees who outraged her

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\(^{16}\) A.K. Singh V. Uttrakhand Jan Morcha, AIR 1999 SC 2193.

\(^{17}\) (2000) 1 SCC 465. The victim had arrived at Howrah Railway Station from Bangladesh with a view to catch a train for Ajmer. She was raped there by four Railway employees.
modesty. The right available to her under Article 21 was thus violated. Consequently, the State was under a constitutional liability to pay compensation to her."

The contention of the Railway, that it cannot be held vicariously liable for the offence of rape committed by its employees, for the liability would arise only when the act complained of was performed in the course of official duty. Since rape cannot be said to be an official act, the Government would not be liable even under the law of torts, was rejected. This is a welcome judgment and will go a long way in deterring employees.

However, with due respect it is submitted that there appears to be inconsistency in the judgments of the Apex Court on similar fact situations in different cases. This is evident from the decision of the court in the Uttrakhand Jan Morcha (1999) and Chandrima Dass cases (2000). In the former the court turned down the grant of compensation to the rape victims, while in the latter it approved of the compensation. It may be noted that in both the cases women were sexually assaulted by State functionaries. Such diametrically opposite verdicts on similar facts are not only uncalled for but also send a wrong signal.

The Supreme Court has also displayed similar concern to the victims of police atrocities. In the Saheli case the Apex Court held that the Delhi Administration responsible and asked it to pay Rs.75,000 as compensation to Smt. Kamlesh Kumari for the death of her 9 years old son Naresh which resulted from assault by the police. The State as an employer was held vicariously liable for the wrongful acts of its employees done in the course of employment. The Court further held that the Delhi Administration might take appropriate steps for recovery of the amount paid as compensation or part thereof from the erring officer. This compensation has nothing to do with the criminal prosecution pending against the

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accused in connection with the death of Naresh. Similarly in Nilabati Behera v State of Orissa\textsuperscript{19} the Supreme Court held that the State is liable to pay compensation to the victim or his heir by way of monetary amends' and redressal for custodial death. And in Rudal Sah v. State of Bihar\textsuperscript{20} the Court held the State liable to pay compensation to the petitioner for illegal detention, depriving him of his fundamental right to life and liberty guaranteed under Article 21 of the Constitution.

IV. ARTICLE 32 AND VIOLATION OF HUMAN RIGHTS.
Compensation to victims is a recognized principle of law being enforced through the ordinary civil courts. Under the law of torts the victims can claim compensation for the injury to the person or property suffered by them. It is taking decades for the victims to get a decree for damages or compensation through civil courts, which is resulting in so much hardship to them. The emergence of compensatory jurisprudence in the light of human rights philosophy is a positive signal indicating that judiciary has undertaken the task of protecting the rights of all people irrespective of the absence of any express constitutional provision and of judicial precedent.

Article 32 of the Constitution of India reads as follows:
"32 Remedies for enforcement of rights conferred by this part-
(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed\textsuperscript{21}.
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

\textsuperscript{19} (1993) 2 SCC 746
\textsuperscript{20} (1983) 4 SCC 141 For comment see, K.I. Vibhute: "Compensatory Jurisdiction of the Supreme Court- A Critique".
\textsuperscript{21} (1981) 1 SCC 627
Article 32(1) provides for the right to move the Supreme Court by appropriate proceedings for the enforcement of the fundamental rights. The Supreme Court under Article 32(2) is free to devise any procedure for the enforcement of fundamental right and it has the power to issue any process necessary in a given case. In view of this constitutional provision, the Supreme Court may even give remedial assistance, which may include compensation in “appropriate cases”.

A question regarding the awarding of monetary compensation through writ jurisdiction was first raised before the Supreme Court in Kharti (II) Vs. State of Bihar¹, in this case, Bhagwati, J. observed:

"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"²².

Regarding the liability of the State to pay compensation for infringing Article 21, the Court answered in the affirmative saying that if it were not so, Article 21 will be denuded of its significant content. The Court further observed that where there are issues of the gravest constitutional importance involving as they do the exploration of a new dimension of the right to life and personal liberty, it has to lay down the correct implications of the constitutional right in Article 21 in the light of the dynamic constitutional jurisprudence, which the Court is evolving.

In Sant Bir Vs. State of Bihar²³ also the court observed that the question of compensating the victim of the lawlessness of the State was left open.

In Veena Sethi v. State of Bihar²⁴, also the court observed that the question would still remain to be considered whether the petitioners are entitled to

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¹ Kharti (II) Vs. State of Bihar
²² Ibid., P.630, para 4.
²³ (1982)3 SCC 131
²⁴ (1982)2 SCC 583
compensation from the State Government for the contravention of the right
guaranteed under Article 21 of the Constitution.

In the light of the views expressed by the Court in the above cases it can be said
that the court had shown its concern for the protection of right to life and liberty
against the lawlessness of the State but did not actually grant any compensation to
the victims. The seed of compensation for the infraction of the rights implicit in
Article 21 was first sowed in Khatri, Sant Bir and Veena Sethi, which sprouted
with such a vigorous growth that it finally enabled the Court to hold that the State
is liable to pay compensation. This dynamic move of the Supreme Court resulted
in the emergence of compensatory jurisprudence for the violation of right to
personal liberty through Rudul Sah. The Supreme Court of India in Rudul Sah v.
State of Bihar25 brought about a revolutionary breakthrough in human rights
jurisprudence by granting monetary compensation to an unfortunate victim of State
lawlessness on the part of the Bihar Government for keeping him in illegal
detention for over 14 years after his acquittal of a murder charge. Till the
pronouncement made in the above case, the Supreme Court was hesitating to
recognize the principle of monetary compensation for violation of fundamental
rights while acknowledging the inadequacy of conventional judicial remedies in
this type of cases.

The concern of the highest court to do justice rather than mechanically applying
the law based on precedents is reinforcing the credibility of the judiciary among
the public, especially the helpless have-nots. Though there is no express provision
for awarding compensation under Article 32 of the Constitution of India, it is
interesting to mention about the development of the law regarding compensatory
jurisprudence with reference to the experience in India and some other countries.

Article 5(5) of European Convention for the Protection of Human Rights and

25 AIR 1983 SC 1086.
Fundamental Freedoms provides that “everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation”. This right must be provided for within the national legal system, that is, a remedy must be made available under the domestic law and enforceable in a domestic court. The basic duty of the State is to ensure that a breach of Article 5 may be remedied by way of compensation in the domestic legal system.

Where, under the law of a State the Convention forms part of the law of the land, there is less likelihood of difficulty in complying with this paragraph, but where “transformation” or specific adoption is required constitutionally, and if this has not occurred, a problem may arise. In the case of Brogan and others of 1988, the detention of the applicants had been in conformity with British law but was ruled to have breached the Convention provisions. The Court rejected the UK Government’s argument that “lawfulness” referred to in the text applied only to domestic law. Thus compensation was payable, and failure to provide this as of right resulted in a breach of the article. But even where the land, the Human Rights Commission and Human Rights Court at Strasbourg have the duty to consider the legal effect of incorporation to ensure that the practical result was indeed to confer and effective right on individuals to compensation, a point made in the 1989 case of Ciulla V. Italy. Mere incorporation or replication may not thus suffice.

Article 9(5) of the International Covenant on Civil and Political Rights of 1966 indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right. Article 9(5) reads as follows:

"Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation".

India adopted the Covenant with a reservation regarding the enforceable right to compensation. The Declaration by the Government of India dated 10.4.1979 in respect of Article 9(5) is as under:

Declaration II—With reference to Article 9 of the International Covenant on Civil and Political Rights, the Government of the Republic of India takes the position that the provisions of the article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of Article 22 of the Constitution of India. Further under the Indian legal system, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State. The Supreme Court of India in D.K. Basu 28 made the following observation with reference to the above Covenant:

The Government of India at the time of its ratification of International Covenant on Civil and Political Rights, in 1979 had made a specific reservation to the effect that the Indian legal system does not recognize a right to compensation for victims of unlawful arrest or detention and thus did not become a party to the Covenant. That reservation, however, has now lost its relevance in view of the law laid down by this Court in a number of cases awarding compensation for the infringement of the fundamental right to life of a citizen.

Article 32 of the Constitution of India confers power on the Supreme Court to issue direction or order or writ, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by Part III of the Constitution 29. The rights to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III is "guaranteed", that is to

29 Ibid., P. 438, para 42.
say, the right to move the Supreme Court under Article 32 for the enforcement of any of the rights conferred by Part III of the Constitution is itself a fundamental right.

The approach of redressing the wrong by award of monetary compensation against the State for its failure to protect the fundamental right of the citizen has been adopted by the courts of Ireland, which has a written Constitution, guaranteeing fundamental rights, but which also like the Indian Constitution contains no provision of remedy of compensation for the infringement of those rights. That has, however, not prevented the courts in Ireland from developing remedies, including the award of damages, not only against individuals guilty of infringement, but also against the State itself.

The enlightening observations of the Chief Justice in State (at the prosecution of Quinn) v. Ryan, deserve special notice. The learned Chief Justice said:

It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at naught or circumvented. The intention was that rights of substance were being assured to the individual and that the courts were the custodians of those rights. As a necessary corollary, it follows that no one can with impunity set these rights at naught or circumvent them, and that the court's powers in this regard are as ample as the defence of the Constitution requires.

In Byrne v. Ireland, Walsh, J. opined:

In several parts of the Constitution, duties to make certain provisions for the benefit of the citizens are imposed on the State in terms which bestow rights upon the citizens and, unless some contrary provision appears in the Constitution, the Constitution must be deemed to have created a remedy for the enforcement of these rights. It follows that, where the right is one guaranteed by the State, it is

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30 (1964)IR70 (122)
31 (1972) IR 241 at P.264
against the State that the remedy must be sought if there has been a failure to discharge the constitutional obligation imposed.

In *Maharaj v. Attorney General of Trinidad and Tobago*\(^\text{32}\) the Privy Council while interpreting Section 6 of the Constitution of Trinidad and Tobago held that though not expressly provided therein, it permitted an order for monetary compensation, by way of redress for contravention of the basic human rights and fundamental freedoms. Lord Diplock speaking for the majority said:

"It was argued on behalf of the Attorney General that Section 6(2) does not permit of an order for monetary compensation despite the fact that this kind of redress was ordered in *Jaundoo v. Attorney General of Guyana*\(^\text{33}\). Reliance was placed on the reference in the sub-section to 'enforcing, or securing the enforcement of, any of the provisions of the said foregoing sections as the purpose for which orders etc. could be made. An order or payment of compensation, it was submitted, did not amount to the enforcement of the rights that had been contravened. In their Lordships' view an order for payment of compensation when a right protected under Section 1 has been contravened is clearly a form of 'redress' which a person is entitled to claim under Section 6(1) and may well be the only practicable form of redress, as by now it is in the instant case. The jurisdiction to make such an order is conferred on the High Court by para (a) of Section 6(2), viz. jurisdiction 'to hear and determine any application made by any person in pursuance of sub-section(1) of this section'.

The very wide powers to make orders, issue writs and given directions are ancillary to this".

Lord Diplock then went on to observe\(^\text{34}\)

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32 (1978)2 AILER 670  
33 1971 AC 972  
34 Maharaj V. Attorney General of Trinidad and Tobago (1978) 2 All ER 670 at P.680 c-d.
“Finally, their Lordships would say something about the measure of monetary compensation recoverable under Section 6 where the contravention of the claimant’s constitutional rights consists of deprivation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone”.

In Simpson v. Attorney General (Baigent’s case)35 the Court of Appeal in New Zealand, dealt with the issue in a very elaborate manner by reference to a catena of authorities from different jurisdictions.

It considered the applicability of the doctrine of vicarious liability for torts, like unlawful search, committed by the police officials which violate the New Zealand Bill of Rights Act, 1990. While dealing with the enforcement of rights and freedoms as guaranteed by the Bill of Rights for which no specific remedy was provided, Hardie Boys, J observed:

The New Zealand Bill of rights Act, unless it is to be no more than an empty statement, is a Government by the Crown that those who in the three branches of the Government exercise its functions, powers and duties will observe the rights that the Bill affirms. It is I consider implicit in that commitment, indeed essential to its worth, that the courts are not only to observe the Bill in the discharge of their own duties but are able to grant appropriate and effective remedies where rights have been infringed. I see no reason to think that this should depend on the terms of a written Constitution. Enjoyment of the basic human rights are the entitlement of every citizen, and their protection is the obligation of every civilized State. They are inherent in and essential to the structure of society. They do not depend on the legal or constitutional form in which they are declared. The reasoning that has led

35 (1994) NZLR 667
the Privy Council and the courts of Ireland and India to the conclusions reached in
the cases to which I have referred (and they are but a sample) is in my opinion
equally valid to the New Zealand Bill Rights Act if it is to have life and meaning.

The Court of Appeal relied upon the judgments of the Irish courts, the Privy
Council and referred to the law laid down in Nilabati Behera v. State of Orissa36
thus:

Another valuable authority comes from India, where the Constitution empowers
the Supreme Court to enforce rights guaranteed under it. In Nilabati Behera v.
State of Orissa, the Supreme Court awarded damages against the State to the
mother of a young man beaten to death in police custody. The Court held that its
powers of enforcement imposed a duty to “forge new tools”, of which
compensation was an appropriate one where that was the only mode of redress
available. This was not a remedy in tort, but one in public law based on strict
liability for the contravention of fundamental rights to which the principle of
sovereign immunity does not apply.

The old doctrine of only relegating the aggrieved to the remedies available in civil
law limits the role of the courts too much as protector and guarantor of the
indefeasible rights of the citizens. The courts have the obligation to satisfy the
social aspirations of the citizens because the courts and the law are for the people
and expected to respond to their aspirations. The purpose of public law is not only
to civilize public power but also to assure the citizen that they live under a legal
system which aims to protect their interests and preserve their rights.

Each of the five members of the court of appeal in Simpson case delivered a
separate judgment but there was unanimity of opinion regarding the grant of
pecuniary compensation to the victim, for the contravention of his rights

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36 (1993) 2 SCC 746
guaranteed under the Bill of Rights Act, notwithstanding the absence of an express provision in that behalf in the Bill of Rights Act.

In India, the judgment in Rudul Sah v. State of Bihar added a new dimension to judicial activism and raised a set of vital questions, such as, liability of State to compensate for unlawful detention, feasibility of claiming compensation from the State under Article 32 for wrongful deprivation of fundamental rights, propriety of the Supreme Court passing an order for compensation on a habeas corpus petition for enforcing the right to personal liberty.

The Supreme Court in the above case observed:

"It is true that Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of courts, civil and criminal. A money claim has therefore to be agitated in and adjudicated upon in a suit instituted in a court of lowest grade competent to try it. But the important question for our consideration is whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right" The court further observed:

In the circumstances of the case the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip service to his fundamental right to liberty which the State Government has so grossly violated. Article 21, which guarantees the right to life and liberty, will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation37.

37 17. Supra fn5, p-147, para 10.
The Supreme Court had taken a different view in *Jiwan Mal Kochar v. Union of India*\(^{38}\) by holding that the petitioner could not be granted the damages and compensation under Article 32 of the Constitution when the writ petition was filed challenging certain remarks made against him by the Supreme Court behind his back at the instance of Respondents 3 to 10 in the writ petition and requested awarding of damages and compensation against the Union of India and other respondents including the State of Madhya Pradesh for all losses, direct or indirect, and humiliations and indignity suffered by him.

The power of the Supreme Court to deviate from traditional concepts and to formulate new rules for granting effective relief for violation of fundamental rights is traceable to Article 32. Regarding the ambit of clause (1) of Article 32, Bhagwati, J. in *Bandhua Mukti Morcha*\(^{39}\) observed:

There is no limitation in regard to the kind of proceeding envisaged in Article 32 (1) except that the proceeding must be “appropriate” and this requirement of appropriateness must be judged in the light of the purpose for which the proceeding is to be taken, namely enforcement of a fundamental right. The Constitution-makers deliberately did not lay down any particular form of proceeding for enforcement of a fundamental right. They did not stipulate that such proceeding should conform to any rigid pattern or straitjacket formula as in England. They knew that in a country like India where there is so much of poverty, ignorance, illiteracy, deprivation and exploitation, any insistence on a rigid formula of proceeding for enforcement of a fundamental right, would become self-defeating and it would place enforcement of fundamental rights beyond the reach of common man. The entire remedy for enforcement of fundamental rights which the Constitution-makers regarded as so precious and invaluable, and eevated

\(^{39}\) Bandhua Mukti Morcha V.Union of India,(1984)3 SCC 161
to the status of fundamental right, would become a mere rope of sand so far as the large masses of the people of this country are concerned.

Article 32(2) also expressly provided that the court may grant “appropriate” remedy for enforcing the rights. Hence the power can be traced to “appropriate” remedy under Article 32(2) of the Constitution of India.

The court in Bandhua Mukti Morcha v. Union of India emphasized that while interpreting the article the approach must be guided not by any verbal or formalistic canons of construction but by the paramount object and purpose underlying the article and its interpretation must receive illumination from the trinity of provisions which permeate and energies the entire Constitution viz. the preamble, fundamental rights and directive principles of State policy.

Regarding the power of the Supreme Court for the enforcement of fundamental rights the Supreme Court observed:

“It is not only the high prerogative writs of mandamus, habeas corpus, prohibition, quo warranto and certiorari which can be issued by the Supreme Court but also writs in the nature of these high prerogative writs and therefore even if the conditions for issue of any of these high prerogative writs are not fulfilled, the Supreme Court would not be constrained to fold its hands in despair and plead its inability to help the citizen who has come before it for judicial redress, but would have power to issue any direction, order or writ including a writ in the nature of any high prerogative writ”.

The Supreme Court in M.C. Mehta v. Union of India40 reiterated its stand taken in Rudul Sah, that apart from issuing directions it can under Article 32 forge new remedies and fashion new strategies designed to enforce the fundamental right. The Court went on to preventive measure when the rights were violated. The

court further observed that a contrary position would rob Article 32 of the entire efficacy and render it impotent and futile.

The most important point considered by the Bench was whether the Supreme Court could entertain claims for damages in respect of violation of fundamental rights and it was held that the court had the power to award compensation in appropriate cases where:

"The infringement of the fundamental right must be gross and patent, that is, incontrovertible and ex facie glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons, or it should appear unjust or unduly harsh or oppressive on account of their poverty or disability or socially or economically disadvantaged position to require the person or persons affected by such infringement to initiate and pursue action in the civil courts".

The power given to the Supreme Court under Article 32, which itself is a fundamental right, imposes a constitutional obligation on the Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enable the award of monetary compensation in appropriate cases, where that is the only mode of redress available. The contrary view would not merely render the Court powerless and the constitutional guarantee a mirage, but may, in certain situations, be an incentive to extinguish life, if for the extreme contravention the Court is powerless to grant any relief against the State, except by punishment of the wrongdoers for the resulting offence, and recovery of damages under private law, by the ordinary process. If the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law\textsuperscript{41}, is to be real, the enforcement of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the facts of each case. This

\textsuperscript{41} P&H High Court Bar Assn. V. State of Punjab,(1996) 4 SCC 742
remedy in public law has to be made readily available when invoked by the have-nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies, where more appropriate.

The compensatory Jurisprudence introduced by the Supreme Court of India by invoking powers under Art. 32 gained tremendous importance in recent times due to the increase of the incidents of State lawlessness, police lawlessness, custodial violence, violence in jails, unlawful detentions and other violations. This innovation made by the multiplicity of litigation but also helping the courts to render speedy justice to victims.

The Human Civilization during the long journey from the primitive society to organized welfare states of modern times, has witnessed several changes in the criminal justice system, particularly concerning the victim compensation and rehabilitation at different stages of history while retributive justice philosophy prevailed in the primitive societies, the concept of restitution and compensation are taking front seat in the administration of criminal justice system at the National and international level.

Further with the dawn of 20th century and emergence of the concept of Human Rights as most significant and inalienable rights of human beings, the philosophy of victim compensation assumed greater importance, while the nations are evolving principles governing victim compensation, the individual movements and the international organizations like United Nations Organization etc. are equally striving hard to develop and strengthen the law relating to victim compensation as an essential welfare and social Programme.