CHAPTER-VII
LEGAL AID AND COMPENSATION THROUGH WRITS

7.1 Introduction

‘[H]is own suit upon his own bottom and at his own expense’. Those who are poor - of small means - can bring their cases at the expense of the state. They can have them conducted by lawyers of their own choice- without making any contribution out of their own pocket.¹

Law is one of the most faithful mirrors reflecting the fundamental social, economic and political values, of a particular period. Since these values have been undergoing far-reaching changes, the content and object of law have to be changed because the law is not eternal. The right to equality, liberty and justice have become the prime concern of the state. State being a welfare organ of society, it has a primary duty to provide for an atmospheres in which every man gets an opportunity for the development of his faculties.² Therefore, state has realized that the special protection or aid of the state is imperative to those persons who are unable to protect their interest.³ The then President of United States of America Roosevelt had put the same view in different words; that the state should strive to establish a social order which should ensure “freedom from wants” and “freedom from fear for all”.⁴

India, being a welfare state, cannot be indifferent towards legal aid system. The present system of administration of justice suffers from various defects more specifically

those of delay and expense.\(^5\) The Legal aid is very essential for a healthy democracy, which is founded on the equality and dignity; otherwise it is degradation of social justice.\(^6\) The rule of law, without legal aid is nothing but a pseudo slogan and juristic myth.

### 7.2 Definition and Meaning of Legal Aid

#### 7.2.1 Definition of Legal Aid

The New Encyclopaedia Britannica defines legal aid as the professional legal assistance given, either free or for a nominal sum, to indigent persons in need of such help.\(^7\) Justice Krishna Iyer, has said “The spiritual essence of Legal Aid movement consists in investing law with a human soul: Its Constitutional core is the provision of equal legal service as much to the weak and in want as to the strong and affluent, and the dispensation of social justice through the legal order.”\(^8\) Arthur Berney has described legal aid in India as Constitutional imperative and “the courts must rule that the assistance of trained personnel be produced to any party who requires such aid”.\(^9\) Lord Denning, the chief exponent of philosophy of legal aid believed it to be the spirit and corner stone of equality, liberty and concept of *audi alteram partem*. Lord Denning has aptly, observed that “Since the second world war, the greatest revolution in the law has been the mechanism and evolution of the system of legal aid and it is a fundamental human right.”\(^10\)

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\(^5\) *Supra* note 2, at p. 3.
\(^6\) *Ibid.*, at p. 5.
\(^10\) *Supra* note 1, at p. 94.
7.2.2 Meaning of Legal Aid

Legal aid means the free legal assistance to the poor and weaker sections of the society at the State’s cost with the object to enable them to exercise the rights given to them by law in any judicial proceedings before Courts or Tribunals. P.N. Bhagwati, J. observed that legal aid means providing an arrangement in the society so that the machinery of administration of justice becomes easily accessible and is not out of reach of those who have to resort to it for enforcement of rights given to them by law.11

The concept of legal aid is the very spirit of equality and its movement is dedicated to the principle of equal justice to the poor. Equal justice requires a systematic approach in response to the prevailing inequalities and injustices exiting in the society.12 The poor suffer denial of redress and equal protection of law because of inability to pay for legal services. Thus, the old rule “Every person must bring his own suit upon his own bottom at his own expenses” operated very harshly against poor who have not enough money to meet out the cost of litigation.13 Hence, without legal aid there can be no equality in a true sense. Similarly, one of the principles of natural justice i.e., audi alteram partem in the absence of legal aid may become a mere formality or procedural requirement and can be used as a subtle device to hoodwink justice. The right of being heard without a provision of vocal cord of legal aid is a sheer formality and an illusion devoid of reality.14

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11 Speaking through the Legal Aid Committee formed in 1971 by the State of Gujarat on Legal Aid with its Chairman, Mr. P. N. Bhagwati along with its members. His Lordship answered to the question of inequality in the administration of justice between the rich and the poor.
12 Supra note 2, at p. 6.
13 Ibid., at p. 7.
The concept of legal aid must not be considered as foreign to Indian legal system but as an essential part of it. It is to be seen as the legal commitment of the State to its citizens. In formal sense legal aid is neither more nor less than the help given to a person concerned to maintain his or her right under the law. At its minimum, it is a phrase which means giving to persons of limited means *gratis*, or for nominal fees, legal advice and legal assistance in court in civil and criminal matters. Legal aid in its wider meaning equalizes the fruits of justice in action in all social, economic and political fields. It makes imperative that no man shall be denied his right at law for lack of means. Legal aid is to be treated as a part of a programme to secure social justice to the poor. It is also an indispensable part of equipment for streamlining and removing the defects of the working of present legal system. Therefore, the scope of legal aid cannot be circumscribed to the limited skirmishes of exemption of court fee, process fee or making provision for providing counsel or legal assistance in court but will lead ultimately to a comprehensive and complete socialization of legal process and conversion of legal doctrine into a welfare scheme to uplift the poor.

In the absence of Free Legal Aid to the poor and needy, Fundamental Rights and Human Freedoms guaranteed by the Constitution and International Human Rights covenants have no value. The free legal aid has multifarious objectives.

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19 The objects of legal aid are, 1) no person should be denied of Justice only on the ground of poverty and other social disability. 2) There should be operation of quality in dispensation of Justice. 3) Political democracy should give effect to social democracy. 4) All the persons should be able to reap the fruits of democracy. 5) There should be easy and guaranteed aces to Justice. 6) The poor should not face the painful side of law. 7) Due regard must be given to the principles of natural Justice, and no person should be condemned unheard. 8) The rigor of law should be softened in favour of indigent people, and 9) The law should give additional support to vulnerable, downtrodden and backward masses of the society. See, “Legal Aid a Constitutional Mandate”, available in http://www.shodhganga.inflibnet.ac.in, Accessed, on August 11, 2014.
7.3 Legal Aid as Human Right

Humanity is the basic foundation of human society upon which human rights are nurtured and asserted.²⁰ There are millions of peoples who are denied human rights only because they are unable to afford the cost of enforcement of their legal rights. Mere declaration and passing of resolutions about human rights are not enough; the guarantee for the enforcement of these rights is equally essential. Therefore, it will not be incorrect to say that right to legal aid stands first in the specie of human rights. The consumers of justice have to pay fees to the lawyer and incur other expenses. Legal aid is only a way of providing social justice to all.²¹

The international concern for human rights found expression after the First World War in covenants of the League of Nations²² and further in the United Nations.²³ Article 8 of the *Universal Declaration of Human Rights*, 1948 provides: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating fundamental rights granted to him by the Constitution or by other law”. Article 6(3) (c) of the *European Convention on Human Rights* provides for legal aid in criminal cases.²⁴ A person who wants to avail the benefit of this Article has to prove that he has no means to pay the cost of justice. The United Nations Conference on the *Prevention of Crime and Treatment of Offenders*, 1965 recognised the right to free legal aid in criminal cases as a

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²¹ *Supra* note 2, at p. 52.
²² Article 23 (a) of League of Nations Convention provided that state shall endeavour to secure fair and humane conditions which was considered to include legal aid is part of humane conditions.
²³ Article 55(c) of United Nations Charter provides universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Hence non accessibility of justice on the ground of poverty would definitely result in discrimination.
²⁴ Article 6 (3)(c) provides that every one charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choice or, if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so requires.
tool of social justice. Though right to legal aid is not expressly found in the *Universal Declaration of Human Rights*, 1948, the Conventions which followed specifically incorporated the concept of legal aid. The *Covenant of Civil and Political Rights*, 1966 provides that in determination of any criminal charge every one shall be entitled to legal assistance under Article 14(3) (d).\(^{25}\) The Tehran Conference, 1968,\(^ {26}\) passed 26 resolutions. Some of the important resolutions are in connection with legal aid. It required the States to devise standards for granting financial, professional and other legal assistance in appropriate cases and also to consider ways and means of defraying expenses involved in developing a complete legal aid system. Responding to these resolutions, the General Assembly took effective steps which led to the formation of an International Legal Aid Committee with the objectives of introducing, improving and expanding the legal aid system. It is reported that provisions for providing legal aid to needy indigent persons, particularly in criminal trials, has been enacted in more than 132 nations.\(^ {27}\)

7.4 Legal Aid in India
7.4.1 Provisions in the Constitution

Unlike United States Constitution\(^ {28}\) Indian Constitution has not explicitly provided the legal aid as a fundamental right\(^ {29}\) but there are many provisions in the

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\(^{25}\) Article 14 (3) (d) provides that, every one charged with a criminal offence has the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

\(^{26}\) Tehran Conference in Iran was held on 22\(^ {nd}\) April- 13\(^ {th}\) May 1968 under the auspices of United Nations.

\(^{27}\) Mamta Rao, *Public Interest Litigation Legal Aid and Lok Adalats, 3\(^ {rd}\) edn.*, (Lucknow: EBC Publishing (p) Ltd., 2010), p. 343.

\(^{28}\) The Specific guarantee in the 6\(^ {th}\) Amendment that all criminal prosecution, the accused has a right to assistance of counsel for his or her defence has also been deduced from the omnibus Due Process Clause as an ingredient of fair trial, because a layman “may be put to trial without a proper charge and convicted upon incompetent evidence”. See, *Powell v. Alabama*, (1932) 287 U.S. 45.

\(^{29}\) Report of the Legal Aid Committee of Gujarat (1971), at p.1
Constitution dealing with legal aid. The preamble of the Constitution provides social, economic and political justice and of equality of status and opportunity.\(^{30}\) The Supreme Court in *Kesavananda Bharati v. State of Kerala*\(^{31}\) held that, the Preamble is an integral part of the Constitution, and the Constitution should be read and interpreted in the light of grand and noble vision expressed in the Preamble. Article 14 provides that State shall not deny to any person equality before the law and equal protection of the laws. Mr. M. C. Setalwad, who was the first Chairman of the Law Commission of post independence of India observed:

> “Article 14 of the Constitution provides that the State shall not deny to any person equality before law or the equal protection of the laws. Equality in the administration of justice can thus be said to form the basis of our Constitution.”\(^{32}\)

Equality before the law essentially involves the concept that all persons must have an equal opportunity to have access to the court. A person who is unable to go to the court due to poverty cannot defend himself in a civil or criminal case, in which case justice becomes unequal and the very purpose of the laws meant for his protection stands defeated. Unless some provision is made for the assistance of the poor and indigent persons by providing free legal aid, such a person is denied of the equality in seeking justice. Rendering of legal aid to the poor litigant is, therefore, not a minor problem of procedural law but a question of a fundamental character.\(^{33}\) Therefore, discrimination in delivery of justice on the ground of poverty should also be considered as a violation of

\(^{30}\) It reads, “We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity, and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the nation.”

\(^{31}\) AIR 1973 SC 1461.


\(^{33}\) *Ibid.*
Article 14. Equal justice demands access to law and justice to both the poor and the rich equally, and unless concession is provided to the poor persons, Article 14 will be futile and a mockery.\(^{34}\) Therefore, Article 14 must be interpreted in a progressive way in order to convert legal equality into social equality.

Article 21 of the Constitution of India guaranteed the right to life and personal liberty which may be taken away only according to a procedure established by law. Such a procedure has to be fair and reasonable to satisfy the requirements of due process. A procedure may be said to be fair and just only when it fulfils the demands of natural justice. Right to hearing is an integral part of natural justice.\(^{35}\) After the *Maneka Gandhi* the Supreme Court of India in *Sunil Batra v. Delhi Administration*,\(^{36}\) has laid down that right to free legal services is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence, and is a Fundamental Right under Article 21. The Court further held that an accused is entitled to legal aid fewer than two situations. First to seek justice from the prison authorities second challenge the decision of such authorities in the Court. Therefore, the requirement of legal aid is brought about not only in judicial proceedings but also in proceedings before the prison authorities which are administrative in nature. This was reiterated in *Hussainara Khatoon (IV) v. Home Secretary, State of Bihar*\(^{37}\) wherein the Court held that, it is an essential ingredient of a reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court’s process that he should have legal services available to him.


\(^{35}\) *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

\(^{36}\) (1978) 4 SCC 494.

\(^{37}\) (1980) 1 SCC 98.
Free legal service to the poor and the needy is an essential element of any ‘reasonable, fair and just procedure’. After this case the Apex Court went one step ahead in *Khatri and Ors. v. State of Bihar*\(^{38}\) and held that the State Government cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative liability. The State is under constitutional mandate to provide free legal aid to an accused who is unable to secure legal services on account of indigence and that is an absolute obligation. The Supreme Court has further held that the free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty.\(^{39}\) This fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21.

Article 22(1) of the Constitution directs that no person who is arrested shall be denied of the right to consult, and to be defended by a legal practitioner of his choice. This right is akin to “Due Process of Law” contemplated in USA. The same right is also available in Section 303\(^{40}\) of the *Code of Criminal Procedure, 1973*\(^{41}\) (hereinafter referred to as Cr.P.C.). In *M. H. Hoskot v. State of Maharashtra*\(^{42}\) a three-judge bench of the Supreme Court applying the rule of *Maneka Gandhi’s*, reading Articles 21 and 39-A, Article 142 and Section 304 of Cr.P.C. together affirmed that the Government is under duty to provide legal services to the accused persons. Justice Krishna Iyer observed that Indian socio legal milieu makes free legal services, at trial and higher levels, an

\(^{38}\) AIR 1981 SC 928.

\(^{39}\) *Sukdas and others v. Territory of Arunachal Pradesh*, AIR 1986 SC 991.

\(^{40}\) Section 303 of Code of Criminal Procedure, 1973 provides that, right of person against whom proceedings are instituted to be defended. Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code, may of right be defended by a pleader of his choice.

\(^{41}\) Act No. 2 of 1974.

\(^{42}\) AIR 1978 SC 1548.
imperative procedural piece of criminal justice. The Apex Court has held that legal aid is required even in appellate stage of case and observed:

“...If a prisoner sentenced to imprisonment is virtually unable to exercise his Constitutional and statutory right of appeal, inclusive of special leave to appeal, for want of legal assistance, there is implicit in the court under Article 142 read with Articles 21 and 39-A of the Constitution, power to assign counsel for such imprisoned individual for doing complete justice”.43

Apex Court has again reiterated the ratio of M.H. Hoskot after two years in Khatri v. State of Bihar.44 In Francis Coralie v. Union Territory of Delhi45, the petitioner, a British National, was detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.46 Petitioner felt considerable difficulty in finding a lawyer for her defence for which she moved the Supreme Court. Bhagwati, J., while relying on the view taken in M. H. Hoskot, extended the right to legal aid even to foreigners and that too in detention cases. In the opinion of the learned Judge, the preventive detention law should also satisfy the test of Article 21.

Subsequent question regarding legal aid was whether the accused has to demand for a lawyer or a lawyer should be made available without demand? This question arouse in Khatri (III) v. State of Bihar47, the Court opined that the Magistrate or the Sessions Judge before whom an accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal aid at the cost of the State. Court further gave a general direction to every state in the country, to make provision for grant of free

44 AIR 1981 SC 928. Supreme Court held that the right to free legal aid is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it is implicit in the guarantee of Article 21.
45 (1981) 1 SCC 608.
46 Act No. 52 of 1974.
47 (1981) 1 SCC 635.
legal service to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situations. The same principle was adopted in *Suk Das v. UT of Arunachal Pradesh*.48 In *Kadra Pahadiya and others v. State of Bihar*,49 the main question was what should be the qualification of the lawyer to be appointed for defence of the poor. The Supreme Court held that an under-trial prisoner should be provided with a fairly competent lawyer at the State expense. Bhagawati, J., in *Sheela Barse v. State Maharashtra*,50 speaking through Court observed, that the legal assistance to a poor or indigent accused that is arrested and put in jeopardy of his life or personal liberty is a constitutional imperative mandated not only by Article 39-A but also by Articles 14 and 21 of the Constitution.

In connection with payment of fees to a lawyer for free legal service, the Apex Court in *State of Maharashtra v. M. P. Vashi*,51 while interpreting Article 39-A of the Constitution held that in a fit case the Court can direct the Government to carry out the Directive Principles of State Policy even though these are stated to be non-justifiable in a court of law. Further, when there is inaction or slow action by the Government and administrative officers, the judiciary must intervene. The Government cannot plead paucity of funds against such directions. An ironic question cropped up before the Supreme Court, in *Ashok Kumar v. State of Rajasthan*52 whether the rich people can also claim the legal aid. It was held that the right to free legal aid shall be rendered to the indigent persons and it shall not be extended to the rich persons, who can employ advocates at their own expenses.

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48 AIR 1986 SC 991.
49 AIR 1981 SCC 939.
50 AIR 1983 SC 378.
52 1995 Cr. L.J. 1231 Raj.19.
7.4.2 Provisions in *Code of Criminal Procedure, 1973*

The penalizing wing of the legal order is criminal law which affects the life and liberty of human beings. Therefore, special attention is to be given to the administration of criminal justice. In connection with this Justice V.R.Krishna Iyer rightly said ‘to sensitize the criminal process to the wavelength of the poor is the strategy.’\(^5\) The legal process, without legal aid to the poor, may be a guarantee of lawlessness and not of order. There was no specific provision in the earlier *Criminal Procedure Code, 1878* for the appointment of a pleader for a poor accused at the State cost even though Section 340 of that code provided that the accused may be represented by a pleader. In *Janardhan Reddy v. State of Hyderabad*\(^5\) while interpreting the said section 340(1) of *Criminal Procedure Code, 1878* the Court held that the American rule founded on “due process of law” is not applicable in India, hence, an accused has no absolute right to be supplied with a lawyer by a State.

In order to provide legal aid to poor accused as a matter of right specific statutory provision was needed.\(^5\) The Law Commission of India emphasized on the right of accused to be represented by a lawyer of his own choice at the Government cost which should be placed on statutory footing in relation to trials for serious offences, and as a first step in this direction, the Commission proposed that such a right should be available in all trials before the Court of Sessions.\(^5\) The Commission further recommended that the State Government should extend this right gradually to every class of trials before other courts in the State. Section 304 of the Cr.P.C. gives effect to the recommendation of the

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54 AIR 1951 SC 217.
55 Supra note 2, at p. 92.
Law Commission by conferring on the accused the right of legal aid at the expense of government in cases triable by Court of Sessions and empowering the State Government to extend this facility in other cases. Legal Aid provisions in criminal matter under Section 304 of Cr.P.C. \(^{57}\) are made available to the accused not only at trial but even at appeal and in special leave to appeal.\(^ {58}\)

Section 304 of Cr.P.C. is a laudable step in the right directions of providing free and competent legal aid to the accused who are unrepresented.\(^ {59}\) In a nutshell, when an accused is produced or appears before a court, the court should inform the accused that he has a right to be represented by a lawyer.\(^ {60}\) The right to be defended by a lawyer of his own choice was extended to appeal in *Tika v. State of U.P.*\(^ {61}\) The scope of legal aid was widened in *Abdul Azeez v. State of Mysore*,\(^ {62}\) wherein the Court held that it is a statutory obligation of presiding officer of the Court to safeguard the legitimate interests of the accused even though the accused has refused to have legal aid because he may not be well versed with law. However, the judge in such eventuality must be cautious that his conduct should not be prejudicial to the trial. Mere providing of legal aid is not enough, what is required is that such legal aid service must be qualitative. Hence, the legal aid to

57 Provides, that Legal aid to accused at State expense in certain cases,
(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.
(2) The High Court may, with the previous approval of the State Government, make rules providing for-
(a) the mode of selecting pleaders for defence under sub- section (1);
(b) the facilities to be allowed to such pleaders by the Courts;
(c) the fees payable to such pleaders by the Government, and generally, for carrying out the purposes of sub- section
(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub- sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before Courts of Session.

58 Supra note 43.


60 Supra note 2, at p. 94.

61 (1975) Cr. L. J. 337.

the indigent accused will be of tiny use where competent lawyers are not provided to defend the accused is the opinion of Apex Court in *Annu Pujary v. State of Karnataka.*

The accused to be represented by advocates must be experienced and skilled. A duty is cast upon the Sessions Judge while selecting and appointing legal practitioners as standing counsel to appoint legal practitioners of real and marked ability and of sufficient experience to defend an accused in a trial before the Court of Sessions especially in capital cases. The Supreme Court observed that in above mentioned circumstances Court should appoint *amicus curiae*, where the accused is not represented by counsel.

**7.4.3 Provisions in the Code of Civil Procedure, 1908**

So far as civil adjudications are concerned, in most of States there were no statutory facilities for the grant of legal aid other than those provided under order XXXIII and XLIV of the *Code of Civil Procedure, 1908* (herein after referred to as C.P.C.).

These orders provide legal aid to the indigent person who is unable to pay the court fees. Another change, which has been made in C.P.C. is regarding eligibility for indigence. Previously a person was not entitled to sue in *forma pauperis* if he was having property worth Rs. 100 or more. The Law Commission of India had recommended that this limit should be hiked to Rs. 1000 which is given effect by the *Civil Procedure (Amendment Act)*, 1976 which amended the Rule 1 Order XXXIII and eligibility limit for indigence has been raised to Rupees 1000.

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65 Act No. 5 of 1908.
67 The word ‘pauper person’ is replaced by the ‘indigent person’ by the *Civil Procedure (Amendment Act)*, 1976 because the 54th report of Law Commission of India suggested to that effect. The Law Commission of India thought that the word ‘pauper’ is not appropriate because it degrades the human being.
68 14th and 27th Report, of the Law Commissions of India.
The term “sufficient means” used in Rule 1 Order XXXIII of C.P.C. means a person shall be considered as indigent when he does not possess sufficient means to pay court fee. What is contemplated in the expression is not possession of property, but sufficient means, i.e., capacity to raise money to pay the court fee. In A.A. Haja Muniuddin v. Indian Railways, the Supreme Court has observed that access to justice cannot be denied to an individual merely because he does not have the means to pay the prescribed fee. Subsequently in Union Bank of India v. Khadar International Construction, the Apex Court while interpreting Order XXXIII of the C.P.C. held that Order XXXIII is an enabling provision which allows filing of a suit by an indigent person without paying the court fee at the initial stage. If the plaintiff ultimately succeeds in the suit, the court would calculate the amount of court fee which would have been paid by the plaintiff had he not been permitted to sue as an indigent person and that amount would be recoverable by the State from any party ordered by the decree to pay the same. It is further provided that when the suit is dismissed, then also the State would take steps to recover the court fee payable by the plaintiff and this court fee shall be a first charge on the subject matter of the suit. So there is only a provision for the deferred payment of the court fees and this benevolent provision is intended to help the poor litigants who are unable to pay the requisite court fee to file a suit because of their poverty. It is not altogether wiped off. Explanation I to Rule 1 Order XXXIII states that an indigent person is one who is not possessed of sufficient amount (other than property exempt from attachment in execution of a decree and the subject matter of the suit) to enable him to pay the fee prescribed by law for the plaint in such suit. It is further provided that where

69 Supra note 2, at p. 99.  
70 (1992) 4 SCC 736.  
no such fee is prescribed, if such person is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree and the subject-matter of the suit he would be an indigent person.

In *R.V. Dev v. Chief Secretary, Govt. of Kerala*,72 the Court answered what constitutes indigence. The right to sue in *forma pauperis* is restricted to indigent persons. A person may proceed as poor person only after a court is satisfied that he or she is unable to prosecute the suit and pay the costs and expenses. A person is indigent if the payment of fees would deprive one of basic living expenses, or if the person is in such a state of impoverishment that it substantially and effectively impairs or prevents the pursuit of a court remedy. However, a person need not be destitute. Factors considered while determining litigant as indigent are similar to those considered in criminal cases, and include the party’s employments, status and income, including income from government sources such as social security and unemployment benefits, the ownership of unencumbered assets, including real or personal property and money on deposit, the party’s total indebtedness, and any financial assistance received from family or close friends. Not only personal liquid assets, but also alternative sources of money should be considered. Recently in *Mathai M. Paikeday v. C.K. Antony*73 the Supreme Court has held that a property acquired by the plaintiff after filing the application for leave to sue as indigent person and before the determination of such application shall be taken into consideration for determination of indigence. The Central and State Government may make supplementary provisions for free legal service to such indigent person.74 High Courts may also make rules for carrying out the supplementary provisions made by the

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74 Under Rule 18 clause 1, Order XXXIII of the Code of Civil Procedure.
Central and State Governments.\textsuperscript{75} In appeals, help to indigent may be given under Order XLIV of the CPC.\textsuperscript{76} Almost all the States have framed legal aid rules or formulated legal aid schemes for rendering legal services to the poor in different types of cases.\textsuperscript{77}

### 7.5 Compensation Justice under Writs

Changes within a legal system may come in various ways. It may be due to changes in the environment, in economic and political circumstances and in legal reasoning. Indian judiciary cannot be an exception to this process. Justice Frank who was a pioneer of realism has said that judiciary must be innovative in improving the process of Court to meet out the justice to the people.\textsuperscript{78} The Supreme Court of India also thought that its process of justice delivery should match the aspirations of people otherwise credibility of judiciary would be eroded. Legal aid by the State has enabled the disadvantaged people to knock the doors of the Courts. Thereafter the responsibility of providing justice shifts to the shoulders of judiciary. The judiciary invented new ideas to reform the process of justice delivery to make it real and meaningful and one of such process is introduction of awarding compensation under writ jurisdiction.

Providing many Fundamental Rights under the Constitution is meaningless unless effective judicial remedies are provided for their enforcement. Article 32 of the Constitution provides for the enforcement of the Fundamental Rights by means of the

\textsuperscript{75} Under Rule 18 clause 2, Order XXXIII of the Code of Civil Procedure.
\textsuperscript{76} Provides Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as an indigent person, subject, in all matters, including the presentation of such application, to the provisions relating to suits by indigent persons, in so far as those provisions are applicable.
specified writs. Articles 32 and 226 of the Constitution are meant to ensure observance of rule of law and prevent abuse or misuse of power. They are designed to ensure that each and every authority in the State, including the Government, acts bona fide and within the limits of its powers and that when a Court is satisfied that there is an abuse or misuse of the power and its jurisdiction is invoked, it is incumbent on the court to afford justice to the individual.

In the past, mechanic and archaic distinction between sovereign and non-sovereign function had blocked the blossoming of sound principles of constitutional torts. Recently Article 32 has been applied to implement the rule of law notions of compensation and penalty for, and prevention of, public wrongs. In *Nagendra Rao* Sahai, J. has observed that, “From sincerity, efficiency and dignity of State as a juristic person, propounded in 19th century as a sound sociological basis for state immunity, the circle gas gone round and the emphasis now is more on liberty, equality and the rule of law”. Wide powers given to the Supreme Court under Article 32 which itself is a fundamental right which also imposes constitutional obligation on the Court to create

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80. *Supra* note 79, at p. 3708.
82. Article 32 of the Constitution guarantees the right to move the Supreme Court to enforce Fundamental Rights through appropriate proceedings. Provides, that (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed (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 (3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2) (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.
such new tools, which may be necessary for doing complete justice for enforcing the fundamental rights guaranteed under Constitution.

A major contribution made by the judiciary in the post *Maneka Gandhi*\(^8\) period has been the development of compensation jurisdiction of the Supreme Court and the High Court’s under Articles 32 and 226 of the Constitution. The writ jurisdiction of the Supreme Court under Article 32 is not merely protecting the fundamental right but uphold the dignity of the human being. Therefore Supreme Court has expanded the scope of writ jurisdiction by awarding monetary compensation for the violation of fundamental rights. The Apex Court made a departure from the ordinary civil law, where the right to claim compensation was available only through a civil suit filed by the aggrieved party before the court of the first instance. Through judicial decisions it is well established that the doctrine of sovereign immunity is not applicable against the remedy under Article 32 and 226 of the Constitution. Right to Monetary compensation is an internationally recognized principle which is not alien to concept of enforcement of constitutionally guaranteed rights.\(^8\)

Compensation through writs is of recent origin and is an extension of the prerogatives of the Supreme Court and the High Courts in the area of Constitutional remedies, because Article 32 itself does not expressly empower the Courts to award such relief. Seeds of compensation for the violation of the rights implied in Article 21 were first sown in *Veena Sethi v. State of Bihar*,\(^8\) One of the question raised in that case was that if the state deprived a person’s right to life or personal liberty, is the Court helpless to

\(^8\) *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.
\(^8\) Article 9 (5) of the International Covenant on Civil and Political Rights provides that “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”.
\(^8\) AIR 1983 SC 339.
grant relief by awarding compensation who has suffered such deprivation? For this question, Bhagwati J., observed that “the question would still remain to be considered whether these prisoners are entitled to get compensation from the State Government for their illegal detention”. Immediately after this case in *Khatri v. State of Bihar (II)* the Supreme Court initiated the jurisdiction of payment of monetary compensation under public interest litigation to the victims on violation right to life or personal liberty. Bhagwati J., while delivering the judgement for the Court observed: “The courts can certainly injunct the state for depriving a person of his life or personal liberty except in accordance with the procedure established by law. If life or personal liberty is violated otherwise than in accordance with such procedure, is the court helpless to grant relief to the person who has suffered such deprivation? Why should the court not be prepared to forge and devise new remedies for the purpose of vindicating the most precious of the precious Fundamental Right to life and personal liberty? Otherwise Article 21 would be reduced to a nullity, a “mere rope of sand”. The Court described this issue as of greatest Constitutional importance involving exploration of new dimension of the right to life and personal liberty. Power to award compensation through writs was initiated by the Supreme Court in *Rudul Sah v. State of Bihar*, wherein the Apex Court exercising its jurisdiction under Article 32 ordered for payment of monetary compensation in connection deprivation of personal liberty. In this case, the petitioner was detained in a jail for 14 years despite of the acquittal order, passed by the court, the Court regarded mere order of release unsatisfactory. The Court awarded Rs. 35,000/- as an ‘interim

88 AIR 1981 SC 928.
89 Ibid. at p. 930.
90 AIR 1983 SC 1086.
measure’ without disturbing the victim’s right to claim compensation through ordinary suit. Further in this case Y. V. Chandrachud, C.J. observed for the Court as under:

“Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the powers of this Court were limited to passing orders to 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 compensation. Administrative sclerosis leading to flagrant infringement of fundamental rights cannot be corrected by any other method open to the judiciary to adopt”.91

The decision of the Apex Court in the above case made it very clear that, through the writ jurisdiction, the Supreme Court or High Courts have the power to award compensation for the violation of fundamental rights. The principle of the above case is followed by the Supreme Court and High Courts in similar situation for the violation of right to life and personal liberty of a person.

Supreme Court in Devaki Nandan Prasad v. State of Bihar,92 even though petitioner has not explicitly claimed the compensation yet the Court awarded the damages to the petitioner as exemplary costs for the “intentional, deliberate and motivated” harassment caused by the officers because the Court thought that non execution of writ of mandamus for 12 years is serious and deliberate lapse on the part of government authority.93 The situation was not the same in Sebastian M. Hongray v. Union of India.94 In this case, two persons were whisked away by the 21st Sikh Regiment were found missing. Sebastian M. Hongray, a political science student of the Jawaharlal Nehru University filed a petition seeking the writ of habeas corpus under Article 32. The Court

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91 AIR 1983 SC 1086 at p. 1089.
92 AIR 1983 SC 1134.
94 AIR 1984 SC 1026.
issued *habeas corpus* commanding the respondents – Union of India, State of Manipur and Commandant, 21 Sikh Regiment – to produce these persons before it on the specified date. The Court found from the record that the respondents had misled it and thus committed a wilful disobedience of its writs. It treated this as a civil contempt under section 2 (b) of the *Contempt of Courts Act*, 1971. The consequences of civil contempt are imprisonment as well as fine. The Court imposed neither of them and instead awarded rupees one lakh each in the form of ‘exemplary costs’ to the wives of two individuals who had disappeared after being taken into custody. The Court observed as

> “Now in the facts and circumstances of the case, we do not propose to impose neither imprisonment nor any amount as and by way of fine, but keeping in view the torture, the agony and the mental oppression through which Mrs. C. Thingkhilia, wife of Shri. C. Daniel and Mrs. Vangamlia, wife of Shri. C. Paul had to pass and they being the proper applicants, the formal application being by Sebastian M. Hongray, we direct that as a measure of *exemplary costs* as is permissible in such cases, respondents Nos 1 and 2 shall pay Rs. 1 lakh to each of the aforementioned two women within a period of four weeks from today”.

In *Bhim Singh v. State of Jammu & Kashmir*96 the petitioner was an MLA arrested and detained in police custody and was deliberately prevented from attending sessions of the Legislative Assembly. The police officers acted deliberately and *mala fide* and Magistrate and the Sub-judge aided them either by colluding with them or by their casual attitude. The Apex Court followed the principles laid down in *Rudul Sah* and *Sebastian cases*, and awarded a sum of Rs. 50,000/- to the petitioner as compensation under Article 32 for the violation of his right of personal liberty under Article 21 and 22(1) of the Constitution. Further, the Court observed that “When a person comes to us with the complaint that he has been arrested and imprisoned with mischievous or malicious intent

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95 AIR 1984 SC 1026.
96 AIR 1986 SC 494.
and that his Constitutional rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free”. In *appropriate cases*, the court has the jurisdiction to compensate the victim by awarding suitable monetary compensation. We consider this an appropriate case”.

It is to be noted that the Court in *Bhim Singh* advocated the doctrine of ‘appropriate cases’ for awarding monetary compensation for violation of fundamental rights. However, the Court did not elaborate the case which can be considered as ‘appropriate’ for compensating the victims of state lawlessness.\(^97\) The trinity of the Supreme Court cases – *Rudul Sah, Sebastian* and *Bhim Singh* – set the law in motion by recognising the responsibility of the state to pay monetary compensation for its acts of illegal detention of persons in violation of their rights to life and personal liberty.\(^98\)

The Supreme Court reiterated the doctrine of ‘appropriate cases’ in *M.C. Mehta v. Union of India*.\(^99\) The Court asserted its right to award compensation for breach of fundamental rights by ruling that its jurisdiction under Article 32 is both preventive and remedial and that the remedial relief may include the power to award compensation in ‘appropriate cases’. Unlike *Bhim Singh*, the *Mehta* Court made a modest attempt to explain the doctrine of appropriate cases by articulating illustrations where compensation can be awarded for breach of fundamental rights.\(^100\) According to the Court in *Mehta*, an

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99 *AIR 1987 SC 1086*.
appropriate case is one where the infringement of the fundamental right must be gross, patent, incontrovertible, *ex facie* glaring and its magnitude must be such so as to shock the conscience of the court. This articulation of appropriate cases is not a conclusive one but is inclusive in nature since it is open for the court to consider each case on its own merits so as to determine the appropriateness to award monetary compensation to the victims of state violence.  

101 In *Peoples’s Union for Democratic Rights v. Police Commissioner, Delhi*  

102 a labourer was taken to the police station for doing some work. He was severely beaten when he demanded wages and ultimately succumbed to the injuries. The Court awarded Rs. 75,000/- as monetary compensation to the family of the deceased under Article 32 of the Constitution to be appropriate case. The Court directed the Government to pay the compensation for the wrong committed by the police authorities.  

Similarly, in *Saheli, A Women’s Resource Center v. Commissioner of Police, Delhi,*  

103 where a child of 9 years age died because of malicious arrest and merciless beating by the police in course of unlawful eviction of a family from a rented house, the Court awarded a monetary compensation of Rs. 75,000/- to the family of the deceased boy. The Court further observed that Delhi Administration might take appropriate steps for recovery of the amount paid as compensation from the officers who would be found responsible for the death of the child.  

104 In *Sunil Gupta v. State of M.P.*  

105 arbitrary and humiliating handcuffing of political agitators, who were educated social workers, was held to be violative of Article 21 and gave rise to suitable and adequate compensation

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101 Supra note 97, at p. 174.  
103 AIR 1990 SC 513.  
104 Ibid., at p. 516.  
105 (1990) 3 SCC 119.
enforceable against erring officials. Also in *Bhagawan Singh v. State of Punjab*,\(^{106}\) the Supreme Court evolved a presumption of police involvement of cases of lock-up death of prisoners. The Court directed the police officers to pay the half of the award personally.

In all these cases neither the earlier judgement in *Kasturilal’s* case has been referred to nor any principle contra thereto has been enunciated, except recognising the right of the victim to claim damages against the State for the tortious acts of the public servant affecting life and liberty of the individual, which is obvious from a conspectus of all these judgements.\(^{107}\) Ever since *Rudul Sah*, claims for compensation have become a regular feature under Article 32 as well as under Article 226 and they have been invariably upheld. But it was being done without any refinement of the principles of liability or form of remedy.\(^{108}\)

After a decade from *Rudul Sah*, the Supreme Court found it necessary to make certain clarifications in *Nilabati Behera v. State of Orissa*,\(^{109}\) in view of the observations made in *Rudul Sah* that ‘the petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial’ and that ‘Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced officiously through the ordinary process’. Because these observations raise a doubt about that the remedy under Article 32 may not be available if the claim was factually controversial, the Court thought it fit to clarify this doubt. The court observed:

“[The observations in *Rudul Sah*] may tend to raise a doubt that the remedy under Article 32 could be denied ‘if the claim to compensation was faculty

\(^{106}\) AIR 1992 SC 1689.


\(^{108}\) Supra note 97, at p. 176.

controversial’ and, therefore, optional, not being a distinct remedy available to the petitioner in addition to the ordinary process. The latter decision of this court proceed on the assumption that monetary compensation can be awarded for violation of constitutional rights under Article 32 or Article 226 of the Constitution, but this aspect has not been adverted to. It is, therefore, necessary to clear this doubt and to indicate the precise nature of this remedy which is distinct and in addition to the available ordinary process, in case of violation of fundamental rights”.\(^{110}\)

The Court distinguished the liability of the state for violation of the fundamental rights from the liability in private law for payment of compensation in action on tort. The case of *Nilabati Behera v. State of Orissa*\(^{111}\) is a landmark case in this sphere. Here, the issue of award of compensation against the State in case of loss of life in police custody and the question of ultimate liability of wrongdoers was resolved. In this case the petitioner wrote a letter to the Supreme Court under Article 32 of the Constitution by way of public interest litigation complaining about custodial death of her son due to multiple injuries and barbarous act of the police in putting the dead body on railway track to fabricate the story of escape and suicide. The police denied the custodial death. The Court ordered an inquiry by the local District Judge. The report of the judge revealed that there was torture of the deceased with eleven external injuries and confirmed the death as custodial death. The Apex Court awarded compensation of Rs. \(1,50,000/-\) to the petitioner – the mother of the victim.

The Court in the course of its reasoning made reference to Article 9(5) of the *International Covenant on Civil and Political Rights*, 1996, which has direct impact on the Indian legal system since there is no enabling Act making its provisions enforceable in India. The Court distinguished its earlier judgement in *Kasturilal’s* case as under:


\(^{111}\) *Supra* note 109.
“In this context, it is sufficient to say that the decision of this Court in *Kasturilal* (AIR 1965 SC 1039) upholding the State’s plea of sovereign immunity for tortious acts of its servant is confined to the sphere of liability in tort, which is distinct from the state’s liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional scheme, and is no defence to the constitutional remedy Articles 32 & 226 of the Constitution which enables awards of compensation for contravention of fundamental rights, when the only practicable mode of enforcement of the fundamental rights can be the award of compensation. The decisions of this Court in *Rudul Sah* (AIR 1983 SC 1086) and others in that line relate to award of compensation for contravention of fundamental rights, is the constitutional remedy under Articles 32 and 226 of the Constitution. On the other hand, *Kasturilal related to value of goods seized and not returned to the owner due to the fault of Government servants, the claim being of damages for the tort of conversion under the ordinary process, and not a claim for compensation for violation of fundamental rights, Kasturilal is, therefore, in-applicable in this context and distinguishable*.”

The Court further regarded that Article 32 imposed constitutional obligation to forge such new tools like monetary compensation for doing complete justice. According to the Court, “[T]his remedy in public law has to be more 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”. In the concurring opinion A. S. Anand, J. observed: “The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizens.”

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Supreme Court also struck down the doctrine of sovereign immunity in the arena of public law.

Now it is well established that the claim of monetary compensation for the violation of right to life and personal liberty under Article 21 through the writ petition under Article 32 or 226 of the Constitution. In *Kewal Pati v. State of U.P.* the Court awarded compensation to the widow of a convict who was killed in jail by a co-accused while serving his sentence under Section 302 of Indian Penal Code as it resulted in deprivation of his life contrary to law and in violation of Article 21. A prisoner does not cease to have constitutional right except to the extent he has been deprived of it in accordance with law. His death was caused due to the failure of jail authorities to protect him. Accordingly, the Court directed the Government to pay a compensation of Rs.1,00,000/- to the widow and children of the deceased.

Subsequently in *People’s Union for Civil Liberties v. Union of India*, the petitioner, an association, filed a writ petition under Article 32 of the Constitution for issuing proper direction for instituting judicial inquiry into the fake encounter by police in which two persons were killed, to take proper action against the erring officials and to award compensation to the family members of the deceased persons. The police authorities denied the allegation of “fake encounter”. But the Supreme Court held that killing of two persons in fake encounter by the police was clear violation of the right to life and personal liberty guaranteed under article 21 of the Constitution and the defence of sovereign immunity does not apply in such cases. The Court awarded Rs.1,00,000/- as compensation for each deceased. Following the *Nilbati Behra* principle the Court held

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113 (1995) 3 SCC 600.  
114 AIR 1997 SC 1203.
that the provisions of Article 9(5) of the *International Covenant on Civil and Political Rights*, 1966, which provides that “anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation for enforcing fundamental rights, are enforceable”.

In *Chairman, Railway Board v. Chandrima Das*,¹¹⁵ a practising advocate of the Calcutta High Court filed a writ petition under Article 226 of the Constitution against various railway authorities for claiming compensation for the victim, a Bangladeshi national who was gang raped by the employees of the Railways in a room at Yatri Niwas of the Eastern Railway. The Supreme Court on appeal from the High Court held that where a foreign national was gang raped, compensation can be granted under Public Law for violation of fundamental rights, in the exercise of Domestic Jurisprudence based on constitutional provisions and Human Rights Jurisprudence. Further it was contended by the Railway Board that the victim should have gone to the civil court for damages and should not have come under Article 226 of the Constitution. The Supreme Court negative the contention and held that where a rape was committed by railway employees in a building belonging to railways a writ petition filed by the victim against the Government for compensation is maintainable under article 226 of the Constitution. Subsequently the High Court of Delhi in *Poonam Sharma v. Union of India*¹¹⁶ redefined the expression of “life and personal liberty” to mean right to live with human dignity, and held that it would necessarily include a right to compensation for unlawful arrest, torture and custodial violence under Article 21 of the Constitution.

¹¹⁵ AIR 2000 SC 988.
¹¹⁶ AIR 2003 Delhi 50.
Under the commonly held view that the fundamental rights are available only against the State, for long it is believed that Article 21 could not be invoked against the violation of life or personal liberty by private individuals or by non-State entities. Hence remedy for violation of personal liberty by private individual lies under the ordinary law and not under Article 21.\textsuperscript{117} However sometimes, the authorities of government fail to act against erring private individual which has become major reason for violation of fundamental right of people. Obviously people would file writ petition against government as well as private person for violation of their fundamental rights which has been acknowledged by Apex Court and the notion that Article 21 is available only against the State has been diluted in numerous cases on environment pollution caused by private persons and corporations. In leading \textit{Shriram Foods and Fertilizer},\textsuperscript{118} leakage of chlorine gas from the plant occurred for the second time, which resulted in death of one person and caused hardship to workers and residents of the vicinity. The authorities had the knowledge about chemical operation and its leakage but did not act. The Supreme Court held that if by the action of private corporate bodies a citizens fundamental right is violated the Court would not accept the argument that it is not ‘State’ within the meaning of Article 12 and, therefore, action cannot be taken against it. If the Court finds that the Government or authorities concerned have not taken the action required of them by law and this has resulted in violation of the right to life of the citizens, it will be the duty of the Court to intervene.

\textsuperscript{118} \textit{M.C. Mehta v. Union of India}, (1986) 2 SCC 176.
Again the Supreme Court in *Indian Council for Enviro-Legal Action v. Union of India*\(^{119}\) reiterated the principle laid down in the *Shriram Foods and Fertilizer*. The defendant chemical company had spread the wastage of chemical substance in surrounding area of its location which had polluted the fertile agricultural land and converted it into barren land. Further, the water in the well was contaminated and was rendered unfit for consumption. The government and Pollution Board did not take any action against the defendant company, hence people had filed writ petition against government as well as private chemical company. The Apex Court admitted the writ and ordered the government to recover cost of correcting the pollution, and compensation payable to farmers and villagers surrounding the place of the defendant company. It rejected the defence of the defendant company that Court cannot issue writ and order the payment of compensation under writ against private person. The Court held that when the inaction of government has enabled the private person to violate the fundamental rights of people, the Apex Court cannot be a mute spectator on technical ground that a writ cannot be issued to private person. Moreover the Court has ordered the government to recover the cost of undoing the pollution and compensation from respondent company and distribute to the affected people.

In *M.C.Mehta v. Kamal Nath*\(^{120}\) is another landmark case on this issue. Span Motel Private Ltd. had encroached upon the forest land and diverted the flow of Beas River which had caused wide spread flood that resulted into heavy loss of property. The government could have taken action against Span Motel Private Ltd. but regularized that encroachment as a Central Minister was involved. The Court held that it was a matter of

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\(^{119}\) (1996) 3 SCC 212.

\(^{120}\) (1997) 1 SCC 388. (passed order in Writ Petition (civil) 182 of 1996 on 15\(^{th}\) March 2002.)
enforcement of rights under Article 21 of the Constitution and held that if those rights are violated by disturbing the environment, it can award damages not only for the restoration of the ecological balance, but also to the victims who have suffered due to that disturbance.

Thus, the judiciary has acknowledged that the protection of environment is basic requirement of a life under Article 21. Therefore, it has awarded compensation even in case of environmental pollution which has affected the quality of a life. Further the Court has awarded the compensation for the disturbance of ecological imbalance caused by the industries which are in the control of private entity. These ratios suggest that where the inaction of the authority leads to violation of fundamental right by the private entity may lead to issue of writ to private person for claiming the compensation. Till this point of a time issue of a writ was considered to be against state but not against a private individual. These are the welcome precedents because they have provided relief even against the unlawful action of private persons which is the result of non action of the authority.

7.5.1 Awarding of Compensation in Special Leave Petition

The Apex Court has awarded compensation in special leave petition also. The Supreme Court decision in State of Haryana v. Smt. Santra\textsuperscript{121} provides an illustration. In this case, a sterilisation operation was performed on the respondent, a labourer woman and a certificate to that effect was also given to her, under the signature of the medical officer. The sterilisation operation failed and the respondent gave birth to a child. The respondent filed a suit for recovery of Rs.2 lakh as damages for medical negligence, which was decreed for a sum of Rs.54,000/- with interest. Two appeals were filed. Both

the appeals-one filed by the state and the other by the respondent-were dismissed. The State approached the Supreme Court by special leave.

The State contended that the sterilisation operation performed upon the respondent was done carefully and there was no negligence on the part of the doctor who performed that operation. The state also contended that the negligence of the medical officer in performing the unsuccessful sterilisation operation would not bind the state government and the state government would not be liable vicariously for any damages to the respondent. The Supreme Court rejected these contentions and dismissing the appeal observed as under:

“"The contention as to the vicarious liability of the state for the negligence of its officers in performing sterilisation operation cannot be accepted in view of the law settled by this Court in N.Nagendra Roa v. Union of India and Ors, AIR 1994 SC 2663; Common Cause, A Regd. Society v. Union of India & Ors., AIR 1999 SC 2979; and Achutrao Haribhau Khodwa & Ors. v. State of Maharashtra & Ors, 1996 ACJ 505. The last case, which related to the fallout of a sterilisation operation, deals, like the two previous cases, with the question of vicarious liability of the state on account of medical negligence of a doctor in a government hospital. The theory of sovereign immunity was rejected”.

7.5.2 Sovereign Immunity-Not a Defence in Civil Law Proceedings

An anomalous situation was created by the Supreme Court’s distinction between public law remedy or constitutional remedy and private law remedy or civil law remedy in Nilabati Behera. The Court in that case had observed that award of compensation under Articles 32 and 226 was a remedy available under public law and the principle of sovereign immunity did not apply to it, while it may be available as a defence in a private law in an action based on tort. This distinction does not appear proper. The question of
applicability or non-applicability of doctrine of sovereign immunity should be with
reference to the nature of rights violated and not the form of remedy.\footnote{122}

In this context a highly prognostic decision of the Andhra Pradesh High Court
which was destined to be affirmed by the Supreme Court, is to be appreciated.\footnote{123} The
decision was delivered in the case of \textit{C.Ramakonda Reddy v. State of A.P.}\footnote{124} In this case
the plaintiffs (appellants) were the sons and wife of late Challa Chinnappa Reddy. The
deceased and the 1st plaintiff were accused, arrested and remanded to judicial custody.
They were lodged in cell no.7 of sub-jail of Koila Kuntla. On the night of 5/6 May, 1997
at about 3.30. a. m. some miscreants gained entry into the sub-jail, hurled bombs into cell
no.7 and killed the deceased. The plaintiffs contended that the loss of the deceased being
grievous and fatal to the prospects of his children and family, the damage suffered by
them was estimated at Rs.10 lakhs. The state denied its liability for any damages, as
maintenance of jails is a sovereign function of the state. The learned subordinate judge
accepted the contention of the state and dismissed the suit.

On appeal the Andhra Pradesh High Court held that the sovereign immunity is no
bar to a private law suit for compensation for the violation of the fundamental right to
life. Holding that the fundamental rights are sacrosanct, basic, inalienable and
indefeasible, the court allowed the appeal and decreed the suit a sum of Rs.1,44,000/- and
said that this is the only mode in which the right to life guaranteed by Article 21 can be
enforced in such cases. An appeal was preferred against the above decision by the State
of A.P. to the Supreme Court. When the appeal was pending it is interesting to note that

\footnote{122} G.S.I. Sandhu, “Monetary Compensation for violation of Human Rights-Its Developments and Prospects
in India” in B.P. Singh Sehgal (ed.), \textit{Human Rights in India: Problems and Perspectives}, (New Delhi: Deep
the view taken by the Andhra Pradesh High Court has been approved by the Supreme Court in the landmark judgement of *State of A.P. v. Challa Ramakrishna Reddy*. The Court that the maxim ‘king can do no wrong’ or that the Crown is not answerable in tort has no place in Indian jurisprudence where the power vests, not in the Crown, but in the people who elect their representatives to run the government, which has to act in accordance with the provisions of the Constitution and would be answerable to the people for any violation thereof. Further the Court observed as under:

“Right to life is of the basic human rights. It is guaranteed to every person by Article 21 of the Constitution and not even the State has the authority to violate that right. A prisoner, be he a convict or under trial or a detene, does not cease to be a human being. Even when lodged in jail, he continues to enjoy all his fundamental rights including the right to life guaranteed to him under the Constitution. On being convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners still retain residue of constitutional rights.

This Court, through a stream of cases, has already awarded compensation to the persons who suffered personal injuries at the hands of the officers of the Government including police officers and personnel for their tortious conduct. Though most of these cases were decided under public law domain, it would not make any difference as in the instant case, two vital factors, namely, police negligence as also the Sub-Inspector being in conspiracy are established as a fact. Moreover, these decisions... would indicate that so far as fundamental rights and human rights or human dignity are concerned, the law has marched ahead like a Pegasus but the government attitude continues to be conservative and it tries to defend its action or the tortious action of its officers by raising the plea of immunity for sovereign acts or acts of the State which must fail”.

Holding so the Apex Court, dismissed the appeal. Thus, at the end of this path-breaking decision, compensation can be awarded by the trial courts in suits – a civil law or private law remedy – for violation of fundamental rights. This vindicates the

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fundamental rights of millions of have-nots who do not have wherewithal’s to approach the High Court and Supreme Court to avail the public law remedy.\textsuperscript{127}

\textbf{7.5.3 Awarding of Compensation in Criminal Appeals}

Awarding compensation in Criminal appeals is another innovation made by the Supreme Court in \textit{Jwala Devi v. Bhoop Singh},\textsuperscript{128} the Court awarded compensation to an aged lady for alleged police misbehaviours in a criminal appeal which reached the court under Article 136. Further the Supreme Court in \textit{Daulat Ram v. Haryana},\textsuperscript{129} in appeal acquitted appellants and reversed the order of one year rigorous imprisonment imposed by the Sessions Judge under the \textit{Arms Act}. The Court held the state liable to pay compensation of Rs. 5,000/- to the appellants.

\textbf{7.6 Conclusion}

Access to justice and availability of qualitative professional assistance are of great importance to secure justice to an individual. Therefore, legal aid has become an important component of justice. The absence of it amounts to negation of justice because it would be difficult for poor litigant to enforce their fundamental rights. It is a well known fact that realisation of justice is a costly affair. Because, of this the judiciary has interpreted the ‘procedure established by law’ of Article 21 in such way that denial of free legal aid to poor persons would not be called a fair and just procedure.\textsuperscript{130} Thus, the Supreme Court’s interpretation that Article 21 includes right to free legal aid has given justice to millions of under privileged people to enforce their fundamental rights under

\textsuperscript{127} \textit{Supra} note 97, at p. 190.
\textsuperscript{128} \textit{AIR} 1989 SC 1441.
\textsuperscript{129} (1996) 11 SCC 711; this Case raises certain basic questions: 1. Can the state be made liable in the cases where a person is acquitted? 2. Should the persons concerned not be required to prove in a separate civil suit that there was malicious prosecution?
\textsuperscript{130} \textit{Sunil Batra v. Delhi Administration}, (1978) 4 SCC 494.
Article 32 of the Constitution. Further, the Supreme Court has extended the scope of free legal aid even to administrative proceedings.\textsuperscript{131} The Court’s refusal to accept the State Government’s defence as lack of financial resources for legal aid is appreciable and laudable.\textsuperscript{132} The Court has gone one step ahead by observing that the free legal aid must be qualitative.\textsuperscript{133} The judiciary has gone to the extent of providing the protection of free legal aid to even foreigners.\textsuperscript{134} The decision of the Apex Court which has imposed the obligation of providing legal aid on the Magistrates has strengthened the right to free legal aid at the cost of State.\textsuperscript{135}

Further, the Supreme Court has strengthened the concept of justice by awarding the compensation under writ jurisdiction. Earlier the claim of compensation was allowed only in private law but not in public. This had caused great hardship to the poor litigants who desire to enforce their fundamental rights, as they had to file another civil suit to claim compensation. This hardship is mitigated by the series of Supreme Court decisions awarding compensation in writ proceedings.\textsuperscript{136} The judiciary has further strengthened the award of compensation by observing that the defence of sovereign immunity is untenable where the servant of government has violated the fundamental rights.

\begin{footnotes}
\footnote{Hussainara Khatoon (IV) v. Home Secretary, State of Bihar (1980) 1 SCC 98}
\footnote{Khatri and Ors. v State of Bihar AIR 1981 SC 928}
\footnote{Sheela Barse v. State Maharashtra AIR 1983 SC 378}
\footnote{M.H. Hoskot v. State of Maharashtra, AIR 1978 SC 1548}
\footnote{Khatri (III) v. State of Bihar, (1981) 1 SCC 635.}
\end{footnotes}