Protection of human rights has got a wide recognition in the present day world of human rights revolution. Human rights jurisprudence gets power only if the concept of social justice is promoted according to the socio economic development of the state. The change in the administration of a state from Laissez faire to welfare system, and inclusion of the declaration of rights in the constitutions of most of the countries after the Second World War, increased the responsibility of the states in protecting the human rights of the people. But when it comes to enforcing these rights against the state for its violations the principle and procedure seems to be inadequate.

Ever since human rights had been recognized by the organized communities as moral principle this was known in the name of natural right. Later these rights were protected by civil law and criminal law. The problem of protecting the human right increased after evolution of state because of the possibility of the state itself violating the guaranteed rights of the citizens. Due to world wars, UN Charter reaffirmed the importance of human rights and prepared UDHR. The desire of the state parties to protect human rights of the people the U.N. Commission prepared two conventions one is Economic

442 See Chapter 1, Supra.
Social and Cultural Rights and the other is Civil and Political Rights. Thus an attempt was made at the international level to protect the human rights of the people.

As far as India is concerned, precious rights are recognized and guaranteed by the Constitution in the form of fundamental rights. Means to achieve these rights are provided under Article 32 and 226 of the Constitution. The judiciary has been contributing to human rights jurisprudence to protect human rights of the people. In addition to this, India signed and ratified several agreements and conventions to promote human rights jurisprudence.

Even though basic rights of the citizens of India are protected by the guaranteed rights under Part III of the Constitution, her reluctance to give up the Common Law principle based on 'King can do no Wrong', failed to give full protection of human rights.

The liability of the state for the tortuous actions of its servants and agents is governed by the provisions of the Constitution by Article 300. But it refers back to the Government of India Act 1935, 1915 and 1858. Government of India Act 1858 says that the liability of the state would be like that of the liability of the East India Company. So in order to understand the liability of the state in torts for the actions of its servants and agents, it is necessary to find out of the liability of the state prior to the Government of India Act.

443 See Chapter 1 Supra.
444 ibid
445 ibid
1858. During the reign of East India Company in 1831, the Supreme Court of Calcutta, was bold enough to reject the plea of exemption from suit raised by the company on the ground of sovereign immunity in *Bank of Bengal v. United Co*\(^4^6\). But in *P&O Steam Navigation Company's case*, the court distinguished the function as sovereign and non-sovereign, for determining the liability of the state. This distinction is made without any rationality but it still lingers in the legal system of India as the basis for determining the liability of the state. In *Vidhyawathi v. State of Rajasthan* the need to give up this difficult situation was further exaggerated. Application of this principle also results in obscurity due to lack of guidelines in distinguishing the function. In *Kasthuri* the court supported the immunity of the state on the ground of sovereign function. Till now this principle has not been overruled.

Reference given in the judgment of *P&O Steam Navigation case* to an alleged immunity for sovereign function and illustration of such immunity is confined to what is usually called Act of state led in to different interpretations by different courts. In *Nobin Chander Dey v. Secretary of state and Secretary of state v. Hari Banji*, according to the interpretation given in, the liability of the state can be determined on the basis of the function of the state as sovereign and non-sovereign. In the case of sovereign function, state would not be liable but in the case of non-sovereign, state would be liable.

\(^4^6\) See Chapter 11.
According to the decision in Hari Banji the immunity of the state should be limited to the 'Act of state'. Thus in Hari Banji, the court compared the sovereign act with 'Act of state' and the suit filed against the state for the imposition of excess duty for the transit of salt was maintainable before the court.

In most of the cases the court could not fix the liability of the state on the ground of sovereign immunity because this principle of immunity is not abrogated. No legislative enactment is made to overrule this principle of state of affairs. Even though these imperfections continue in different cases, the courts repeatedly expressed the fact that the remedy lies in the hands of the legislature and not in the hands of the judiciary. Even though the judiciary decries the principle to express its helplessness as it is still haunted by this old doctrine. The law being the mechanism to regulate the behavior of the people it is necessary to make it as a predictable working system.

The Law Commission in its report recommended to modify the existing law and introduced the bill to amend the law to make the state liable like any other ordinary person. It asked why the government should not be placed in the same position like that of a private employer subject to the same rights and duties imposed by the state. After evaluating similar laws existing in different countries, the government introduced a bill in the Parliament on August 31st 1965 but it lapsed and this was reintroduced in 1967, 1969. If there is a failure

117 See Chapter V.
on the part of parliament to introduce reforms through legislation, it would appear quite feasible for the supreme court in its present face of activism to overrule the lingering old principle and to do away with the so called immunity for sovereign functions.\textsuperscript{448}

It is necessary to go through the similar laws existing in U.K, USA and in France.\textsuperscript{449} It may be recalled here that in England the Crown Proceedings Act 1947 and in America the Federal Tort Claims Act 1946 provided for the liability of the state.

In France they developed their law and procedure and established special courts, suited to the present day world. They categorized the service as service fault and personal fault and those are dealt with in different courts and the liability also varies according to the nature of fault. If there is difficulty to separate the service fault and personal fault it is dealt with in Cumul. The liability of the state and officials vary according to the responsibility for the damage committed by the officials and the state. The social responsibility of the state arises out of the various activities. For example certain activities of the state create risk which results in loss or injury of an individual. Risk arising from dangerous operations, risk in the course of employment, risk arising out of judicial decisions and risk arising out of legislative acts and risk in case of statutory acts.\textsuperscript{450} The role of Conseil d'E'tat is commendable which is...

\textsuperscript{448} See Chapter V.
\textsuperscript{449} ibid
\textsuperscript{450} See Chapter V
administered by experts, well trained judges. It ensure proper mechanism for the needs of public administration. It is therefore submitted that the legislative intervention for judicial correction to make the state completely liable in torts in India should not be further delayed.

The Writ court in India began to recognize constitutional torts under Article 32 and 226 of the Constitution. Even though this is a welcome feature; there are difficulties in giving full compensation to the victim in the writ proceedings. In some cases the courts grant ex-gratia payments or interim relief and direct the victim to approach the lowest competent court for further remedial measures. The writ court itself expressed that receiving interim relief would not preclude them from claiming compensation from the competent court but expressed its doubt of getting compensation from civil court where the theory of sovereign immunity is a defence, in private law remedy. Such a hurdle is faced by the victims of human rights violation.

These defects invite the attention of establishing special bench in the High Court and Supreme Court for dealing with cases of human rights by which compensation may be awarded in the writ proceedings itself.

India claimed that safety measures are provided in the constitution through its various provisions like Article 21 and 22. The case of Bhim Singh v. State of Punjab reveals that even a member of legislative assembly was

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451 See Chapter Vsupra.
452 NitaBatt Behera alias Lalita Behera v. State of U.P.
illegally arrested and detained thereby denying his two precious rights that of attending assembly session and producing before the Magistrate within the requisite time. There is no express provision in the constitution to grant compensation in case of violation of human right. While ratifying International convention on Civil and Political Rights, India made a specific reservation to the Article 9 (5) which provides to grant compensation in case of human rights violation by the state, the writ court through its judicial activism began to grant ex-gratia payments in case of constitutional torts so that reservation of Article 9 (5) has lost its relevance. The Writ court used Article 21 of the Constitution to enforce rights guaranteed to the people and began to grant compensation in case of violation of human rights and it also clarified in a number of cases that the sovereign immunity is not a defence in case of public law remedy. Relief of interim or ex-gratia is a solace to the victims to meet the unexpected injury and the suffering and this has to be maintained without limiting the scope of the compensation on the ground of res-judicatae.

The difficulty faced by the writ court is that its directions were not complied by the administrative authorities. The court would only reiterate its directions. In D.K.Basu v. State of West Bengal and Joginder Kumar v. State of U.P. directions were issued by the court to the authorities to comply with the formalities, while arresting and handcuffing. But this seems to have been

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453 See chapter 1 IV & V.
repeatedly violated by the authorities\textsuperscript{454}. The failure of the court in enforcing its own direction given to the administrative authorities would affect the rights of the people\textsuperscript{455}.

The role of the sessions court in conducting elaborate trial is important which would help in determining the liability of the state as well as the liability of the accused. Section 357 of the Criminal Procedure Code which provides to impose fine and to compensate the victim but this is not used against the accused who violated the human rights of the people. There were instances where the Apex court reminded the judicial officers to exercise their discretion to protect the rights of the victim which was dealt with in Hari Kishan and others v. Suk Bir Singh.\textsuperscript{456} the Difficulty faced in the trial of police atrocities is that the prosecution side is represented by the state and the other side by the employee of the state.

The victim is not party as our system for administration of criminal justice is accused oriented and not victim oriented\textsuperscript{457}. They and their grievance are completely ignored. The victim is used to give information regarding the incident. In most of the cases the victims of custodial rape had to face psychological problem and mental and physical tribulations because of lack of law. They are not represented by seniour Advocate but by prosecutor and

\textsuperscript{454} See Chapter IV Supra
\textsuperscript{455} See Chapter IV Supra.
\textsuperscript{456} See Chapter V Supra
\textsuperscript{457} See Chapter I V supra.
Government pleaders. Moreover the cases are adjourned without any relevant cause. In most cases they are treated as witnesses.

Due to the application of the accusatorial system, the burden is on the state till the alleged crime is proved, but getting evidence in case of human rights violation which happened within the detention cells is a difficult task. Lack of evidence will help the accused to escape from punishment or fine.

The mental element of the accused is considered to ascertain criminal liability; it would be difficult to prove it with evidence because torture happens within the detention cells. Insisting mens rea principle to ascertain criminal liability would defeat the very purpose of imposing liability on the accused and it in turn would affect the determination of liability of the state.

In case of custodial torture, lack of evidence was the main problem. Most of the cases relating to torture happen within the four walls of the detention cells. Most of the witnesses may belong to their own fraternity. No one comes forward or dare to say a word against the department of the enforcement agencies. Non-cooperation from the part of witnesses to give evidence against the officials would also affect the case.

In the case of custodial rape, the only question considered by the court is whether she had consented to it or resisted it. This would help the accused than protecting the victims of custodial rape. In the case of custodial rape, the victims are often warned by the officials reminding them of the publicity and
the future consequences they would have to face and hence discourage them from filing a complaint against the officials.

Delay in conducting enquiry and trial would affect the decision and it in turn can result in loss of faith in the judiciary. Meanwhile the alleged officers might be placed in a high position. Departmental enquiry would not help to find out the truth instead they can easily manipulate the diary.

If a wrong is committed by the public official and in order to take action against him prior sanction from the authority is required under section 197 of the Criminal Procedure Code. No court can take cognizance of an offence alleged to have been committed by a public servant or a member of the armed force while acting or purporting to act in the name of official duty except with previous permission of the central government or state government though the law commission recommended to amend this law. Section 4(a) of the Armed Forces Act confer power on the security forces giving official sanction and at the same time section 7 of the Armed Forces Act gives virtual immunity to the armed forces and these two provisions expressly deny the human rights of the citizens and so it affects the guaranteed rights of the people. This procedure also makes delay in prosecuting the accused officials of the state.

The purpose of constituting National Human Rights Commission is to promote human rights. Report shows that most of the cases brought before it relate to human rights violation by the police. Till 1995 it was acting as a

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458 See Chapter VI, supra.
watchdog for protecting the guaranteed rights of the people, afterwards it began to issue direction to compensate the victim by granting interim relief by the state or for conducting proper investigation, in case of violation of the guaranteed rights. Otherwise the departmental enquiry would have been conducted and could have resulted in the dismissal of the case. If the state failed to comply with the direction issued by NHRC it cannot take any action on the state. The main defect of this system was criticized that it can bark but it cannot bite. But the merit of the system is that the victim can easily approach NHRC without complying with any complicated procedure as seen in the court.

In the normal course the victim has to approach the writ court for getting immediate remedy. The writ court directs the victim to approach the civil court for claiming compensation. The compensation is determined according to the wrong committed by the accused so that the victim has to depend upon the session's court. Now NHRC is the authority which can watch and see whether the victim get a remedy or not and if not it can call for the report from the secretary of that state and order an immediate remedy. Its supportive role in enforcing liability through the writ, civil and sessions court is commendable. It also helps in finding out the truth by conducting an impartial enquiry. It acts as the key agency and helps in providing interim relief to the victims. In criminal case the criminal proceeding is instituted by the state if the accused is an influential person or interested party of the state
there is a chance of closing the case because in the case of human rights violation by the state it might be done on behalf of the state so there is a rare chance of taking action against the accused if the NHRC is active and independent they can act for the benefit of the victim and can recommend to the state to initiate action against the accused as in the case of killing of Harjinder Singh in Punjab.\textsuperscript{459} There are cases where the recommendation is not complied by the government in such case the only remedy available to the NHRC is by filing a suit before the High Court.

Its first annual report of 93-94 indicated co-operation from the central government, the state government, the district authorities, the NGO, the research and the academic institutions for the smooth functioning of it. Its second annual report of 1994-95, the commission continued its work more effectively and efficiently and its directive was substantially complied with by the district authorities. Certain cases were dismissed in liminie because the events happened more than one year before the complaint, or complaint regarding matters was sub-judicial and vague, and anonymous or complaints which went outside the purview of the commission. It recommended to the Union government the accession to the 1984 convention against Torture and other form of cruel inhuman and degrading treatment or punishment and to amend the Protection of Human Rights Act 1993 regarding its competence and autonomy. During 1999-2000 the number of deaths in police custody has gone

\textsuperscript{459} Report from NHRC1995-96.pp.46-68.
down by 50. The commission had recorded a marginal fall in the total number of custodial deaths reported during 2000-to 2001. In this period 1037 deaths in custody were reported to NHRC of which 127 in police custody two deaths were also reported to have occurred while in custody of army personnel.\textsuperscript{460}

One of the merits of the system is that the ordinary people is very well aware about the action taken by the NHRC and they are interested to know what actions are taken by the government on the basis of annual report. The Annual Report 2000-2002 indicated the action taken on the cases reported in the annual report of 2000-2001\textsuperscript{461} Annual report 2002-2003 also gives an indication regarding the action taken by the government on Annual report 2001-2002\textsuperscript{462}.

After going through the cases brought in and determined by the writ court, civil court, Sessions Court, and NHRC, it was revealed that the existing implementation mechanism cannot serve the purpose of protecting human rights.

Now the Judiciary has begun to give compensation by considering the plight of the victim. In the cases of riot in R. Ghandhi and Others \textit{v.} Union of India and others\textsuperscript{463} and M/S Inder puri Genetal Stove and others \textit{v.} Union of India and another\textsuperscript{464}, The same way in Rudul shah \textit{v.} State of Bihar\textsuperscript{465}, Bhim

\textsuperscript{460} NHRC of India, News letter June 2001.p.2.
\textsuperscript{461} See NHRC Annual Report 2001-2002 pp.188-204.
\textsuperscript{463} AIR1989 Mad 205.
\textsuperscript{464} AIR1992 J&K11.
sigh .v. State of J&K⁴⁶⁶ for the illegal arrest and detention court granted exemplary damages. In Nilabeti Behera .v. State of Orissa⁴⁶⁷, State of Andhra Pradesh .v. C. Ramakonda Reddy⁴⁶⁸ and The Chairman, Railway Board and others .v. Mrs. Chandrima Das & others public law remedies have been extended to the realm of tort committed to a foreigner, who suffered personal injuries at the hands of the officers of the government. The Court granted interim relief to the victim even though there was no express provision for granting compensation in case of violation of human rights by the state.

The administration of the criminal justice system should be in conformity with the rapid change in the society. Most of the countries came forward to change their law according to the needs of the time. The conclusion from the present study throws light upon where change in the law and the implementation mechanism is needed. We paid little attention to the victim and a change is needed in this line of thinking to make administration of criminal justice possible by making it victim oriented. The higher courts in India started giving compensation in case of violation of human rights. But there is no rationality in fixing the compensation. Now the compensation is considered on the facts and the circumstances of each case and it is determined by taking into account the nature of the crime, the justness of the claim by the victim, the ability of the accused to pay.

⁴⁶⁵ AIR 1983 SC 1087.
⁴⁶⁶ AIR 1986 SC 494.
⁴⁶⁸ AIR 2000 SC 2083.
After conducting the study I would like to present a model implementation mechanism which would be suited to the present day world in promoting and protecting human rights of the people and certain suggestions are also included to make reforms in law in this regard.

Suggestions

The existing legal system in India is not adequate to uphold and implement human rights. In order to make India, a role model or an ideal state which enforces human rights in its true sense and spirit before the whole world; it has to modify the existing law in this respect. For minimizing the human rights violation by the state authorities, modification of the existing law in this area with the following points are suggested.

A.1. India must ratify Convention against Torture\textsuperscript{469}, ICCPR\textsuperscript{470}, without any reservation. After ratifying these covenants it should be incorporated into the Constitution, as an express provision to grant compensation in case of human rights violation by the state. So that the claim by the human rights victim become a right of the victim and can avoid the present system of leaving the victim at the mercy of the court. Thus the state would become statutorily bound to pay compensation to the victim.

\textsuperscript{469} See Chapter 1\textsuperscript{V}
\textsuperscript{470} ibid
2. There is no need of applying sovereign immunity while applying Article 300 of the Constitution in case of human rights violation by the state. Even though this is recognized by the courts due to its activism it is necessary to get statutory recognition, and the liability arising out of it must be based on the statute. Even in civil cases privilege cannot be extended to the negligent acts and in case of abuse of power.

3. If the discretionary power under section 357 is not exercised by the judicial officers while dealing with cases of human rights violation, it must be made mandatory that the judicial officer should state the reasons for not applying for the relevant provision.

4. Law relating to rape, results in the accused going scot-free from liability because of the loopholes existing in the system So it is necessary to take urgent steps to modify the law suit to the present day world.

5. Section 197 of the Criminal Procedure Code requires getting prior sanction from the concerned authority for prosecuting the officials who committed human rights violation. Such a privilege has to be abrogated as early as possible.

6. Statutory time limit for disposal of case relating to human rights violation should be fixed.

7. Liability should be apportioned among the state and the officials.
8. Directions issued by the court should be carried out from time to time. Otherwise it is necessary to take contempt proceedings against the concerned authority.

9. Our criminal law based on accusatorial system has to be modified. Inquisitorial aspect when the judge will be more concerned into the evidence and the truth of the matter and a suitable adjustment of burden of proof have to be adopted.

10. It is necessary to make administration of criminal justice as victim oriented.

11. Imparting human rights awareness among the judicial officers, public officials and the citizens, and encouraging NGO’s would help to prevent human rights violation.

12. Appointment of able and senior advocate as ‘Special prosecutors ‘considering the nature and seriousness of the offence so as to conduct the trial more effectively.

**Suggestion to improve implementation mechanism**

B. In order to implement law, the present mechanism has to be improved by following the French system.

1. If the human rights Appellate authority is established, the case relating to human rights violation can be determined in one court so that liability can be determined at one trial and it would save time and expenditure.
Relief in the form of interim or ex-gratia should continued to be provided without limiting it on the ground of resjudicata.

2. The establishment of Criminal Injuries Compensation Board is essential for the speedy disposal of compensation.

3. There must be effective feedback after submission of report by NHRC, which would make the government more responsible.

4. Surprise visits to detention cells by the NHRC and designated judicial officers will help to prevent torture.

Establishment of human rights cell in every district under the supervision of NHRC would help the victims of human rights violation by the enforcement agencies. They can avoid approaching the very same authority who committed the wrong for filing complaints against them.

C. Certain methods are also suggested for improving the investigation.

1. Investigating officers must get special training and skill both psychological and scientific methods in conducting the investigation so that it would help them to conduct investigation effectively.

2. Witness of human rights violation has to be statutorily protected.
An Alternative Implementation Mechanism - in case of human rights violation by enforcement agencies.

The present implementation mechanism has to be modified to promote and protect the human rights of the citizens in India. This can be done by removing the difficulties which exist in the present system like denial of justice due to delay in conducting trial and uncertainty of law, so that the remedy would be within the reach of the aggrieved.

In the case of human rights violation by the enforcement agencies, at present the aggrieved has to approach the very same authority for submitting complaint. This can be avoided by establishing human rights cell at District level and State level under the supervision of NHRC. Its endeavour would be to take action in urgent cases by taking preventive measures, by providing interim relief, by helping the writ court with its supportive role for conducting impartial enquiry in to the incident. Defect of the present NHRC has to be rectified by giving additional power to it for enforcing its direction given to the concerned authority. Approaching the writ court by the NHRC in case of failure to comply with its direction by the authority can be avoided in this way.

Establishing Special courts for Human rights at the High Court and the Supreme Court is another requirement. At least three members are essential to preside over this Appellate Authority, out of which one must be a woman. One must be a sitting judge, other a member qualified to become a judge of the
High Court and one woman member is also essential. They must be experts in law especially in human rights and psychology. Granting relief by way of interim relief and ex-gratia payments after conducting summary trial can be continued by the very same Authority. After conducting elaborate trial, this Authority can grant full compensation without directing the victim to approach the lowest competent civil court. By this method, the victim can also be represented and remedy is not left at the mercy of the court. Thus the hurdles faced by the victim in approaching different courts for getting remedy can be avoided.

Setting up of an administrative office attached with the special Human Rights Appellate Authority would be helpful to implement the directions of the court effectively. Otherwise this Appellate Authority has to be entrusted with power to take contempt proceeding against the officials.

**Merits in the alternative implementation mechanism**

1. The victim can submit their complaints of human rights violation to the enforcement agencies without approaching the very same authority who has committed the wrong.

2. Without approaching different courts they will get immediate remedy from this mechanism.
3. Interim relief and full compensation can be awarded by this appellate authority after conducting trial.

4. Speedy remedy is possible because the tribunal is presided by human rights experts.

5. Victim can be represented to present his grievance.

6. People from the lowest economic strata can approach the human rights cell so that justice is within the reach of every category of people.

7. Statutory time limit can be imposed in disposing of the case if such special tribunal is established.

8. In case of urgent matters the writ court can immediately interfere to take preventive measures.

9. If the case is heard by the Human Rights Appellate Authority the liability of the state and the accused can be apportioned according to the responsibility for the damage committed by the state and officials.

10. It can avoid the non-registration of case by the police department against the same fraternity.

11. The administrative department attached to the Human Rights Appellate Authority can consider whether the direction issued by the court from time to time is carried out or not.
12. It helps to minimize the backlogging of the docket system in the writ court. The departmental enquiry can be avoided and instead an impartial investigation can be conducted by the NHRC.

13. This can avoid the plea of Sovereign immunity.