CHAPTER 1
INTRODUCTION

Human beings, endowed with reason and free will are said to be the crown of creation. In his natural constitution, he is subjected to various needs and interests. The purpose of life, whether it is perfection or happiness largely consists in the pursuit and realization of these needs and interests. Being a "social animal", he has to pursue his interest in a social setup. A certain amount of security and freedom from attack from other members of the society become necessary to enable a human being for this realization. The interests to be so protected and the means for that purpose give rise to the concept of the protection of human right.

This could be achieved, provided these interests or moral attitude in relation to them were legally recognized by the organized society. According to the 'Social Contract Theory', the origin of state is attributed to the need for protecting these human rights. The state, which represented the general will of the people, appeared as an organism which would protect the members of the community and

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settled conflicts between them. The civil law and criminal law were developed for this purpose. In due course it became evident that the problem of protection of human rights was not solved by the evolution of state. The possibility of the state itself violating the rights of those to be protected by it became real. So the question of asserting one’s liberty against the state and the procedures and the principles for this purpose became necessary.

In a civilized community, there must be a firm legal system acceptable to the people. An ideal state has to protect the rights and liberties of the people by law and at the same time, give only limited power to the state. Inspired by the natural law’s ideal, the supreme, authority of the state came to be limited by law and various constitutional devices and declarations of rights were resorted to. The United Nations charter reaffirmed the already existing guaranteed legal rights against the abuse of power by the state. There were several other declarations accepted by the Great powers with the hope of keeping peace and preserving human rights and justice in the world.

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   Dr HH Menasen, “Public International Law”, AIR 2000 jur. Joint declaration by the President Franklin D. Roosevelt of United States and the Prime Minister Winston Churchill of the United Kingdom on August 14, 1941 in a document, the Atlantic Charter declaration was signed by 26 states including USA, UK, USSR and China, on January 1, 1942, at Washington; Moscow Declaration 1943, Tehran Declaration 1943, Dumbarton Oaks Conference 1944
Judicial review of constitutional limitations became an important device for this purpose. That the human right could be seriously affected not merely by state action in the domestic sphere but also by the action of the state in the external sphere became evident.

The development of international law attempted to meet this problem, by discouraging the tendency to resort to war in settling international conflicts and promoting fairer relations among the states. As far as the theoretical aspect of international human rights was concerned, Hugo Grotius said that even without law of god, law of nature itself would offer, a basis, for just relation in the international sphere. He supported just war, by distinguishing it from unjust war, implicit in this was the need, for recognition of the rights and freedom of the individuals in the state. International law which was described as law between states gradually developed a focus for human right, as the central attention of the ultimate purpose of the international order.

The world wars during the twentieth century amply demonstrated that the state continued to fight against each other in utter disregard for human rights. The founding of the League of Nations, the International Labor Organization and the United Nations had been prominent steps in

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and in San Francisco Conference 1945 several delegates expressed the need of establishing Bill of Rights

the recognition of human rights at the international level. The Second World War was fought to protect the human freedom which became a casualty because of military adventure of some state. In addition, states like Germany under the leadership of Hitler ignored the natural law principles resulting in gross human right violation and made it obvious that the community of states could not be indifferent to human rights. Desire of the state parties of the United Nations, to attain peace at the international level, led the Economic and Social Council, to set up a committee, to draft the declaration for the protection of human rights. This committee prepared a draft regarding the Universal Declaration of Human Right, which was submitted before the General Assembly of the U.N. and this was adopted in 1948. This was not an instrument which was legally binding. Because of the lack of agreement among the countries, it remained as non-binding in nature. So the United Nations Commission prepared and drafted two covenants, one was Economic, Social and Cultural Rights and the other was on Civil and Political Rights. These covenants were finally adopted by the General Assembly.

11 Oppenheim's, International law volume 1.(1992) p. 988. Before the International labor organization 1946 there were number of other convention in 1914 & 1919. ILO re-organized in 1944 in the light of Philadelphia declaration which gave thrust to human dignity and freedom. In short ILO 1946 when dissolved in to League of Nations it was a step towards the human rights.
12 Ibid League of Nations was established by the American President Woodrow Wilson to prevent war but could not succeed. So resulted in to the Second World War.
in 1966\textsuperscript{14}. But the implementation of binding general rules of international law for the protection of human rights and fundamental freedom by adequate machinery for their enforcement remained as a mere promise. The subsequent declarations of human rights afforded standards for protecting human rights. Conventions like the European convention\textsuperscript{15}, the American conventions etc were intended to protect human rights in those areas. The development in the international sphere is not being made the subject of the present study. This study is confined to the protection of human rights in the domestic and national sphere with particular reference to India.

As far as India is concerned the Constitution adequately reflects the spirit of the prevailing international human right standard\textsuperscript{16}. When it was made, it provided for an enforceable bunch of human rights as fundamental rights and the non-enforceable bunch of human rights as directive principles of state policy which the state is bound to realize in practice. The subsequent developments have generally been in keeping with the constitutional standard. The judiciary has also been making

\begin{itemize}
\item \textsuperscript{14} International Covenant on Civil and Political Rights 1966 Article 9 (5) Any one who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
\item \textsuperscript{15} European Convention for the Protection of Human Rights and Fundamental Freedoms Article 5 (5) everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.
\item \textsuperscript{16} a) Article 51 of the Constitution provides that the state shall endeavor to (a) promote international peace and security (b) maintain just and honorable relation between nations (c) foster respect for international law and treaty obligation in the dealings of organized people with one another ; and (d) encourage settlement of international dispute by arbitration.
\end{itemize}
important contributions to achieve this standard of protection of human rights, available within the constitutional provision under Article 32\textsuperscript{17} and 226\textsuperscript{18}. In addition to these, India has also signed and ratified several agreements and conventions to promote human rights jurisprudence\textsuperscript{19}.

Though the constitutional scheme in India for the protection of human right has been well laid down, it cannot be claimed that this subject has been fully realized in practice. The legal order based on the British Common Law system suffers from inadequacy in the recognition of the principles and in their development in some respect. In India we continued to apply the common law system, based on 'King can do no wrong'. The amendment by the Crown Proceedings Act 1947, to the common law principle has not been fully adopted in India. In any

\textsuperscript{17} Article 32 deals with remedies for enforcement of rights conferred by this part. Article 32 (1) confers the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed.

(2) Deals with the power of the Supreme Court to issue directions or orders or writs including writs in the nature of habeas corpus mandamus prohibition and quo warranto and certiorari whichever is appropriate for the enforcement of any of the rights conferred by this part.

\textsuperscript{18} Article 226 deals with the power of High Courts to issue certain writs

Article 226 (1) Notwithstanding anything in article 32 every High Court shall have powers throughout the territory in relation to which it exercises jurisdiction to issue to any person or authority including in appropriate cases any government within those territories direction orders or writs including writs in the nature of habeas corpus mandamus prohibition quo warranto and certiorari or any of them for the enforcement of any of the rights conferred by part 111 and for any other purpose.

(2) The power conferred by clause (1) to issue direction, orders or writs to any government authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action wholly or in part arises for the exercise of such power, notwithstanding that the seat of such government or authority or the residence of such person is not within those territories.

democratic country Governmental activities are sometimes likely to violate fundamental rights protected in the Constitution\textsuperscript{20}. Certain activities of the government would give rise to liability of state in tort. These constitute breaches of human right. Failure on the part of the state to enforce the directive principles also may contribute to violation of human rights, though indirectly, in a big way.

In this study, it is proposed to examine the problem posed by direct violation of human right by state action. So it will be limited to liability of the state arising out of violation of Part III rights and torts committed through its servants. This study is undertaken in the belief that for the proper protection of human rights adequate remedies must be given. Once the rights are violated, mere glorification of the rights and emphasis for the need of protection will not suffice. By and large, remedies may be available for breach of human rights through writ petition, through civil action sounding in torts and through criminal prosecution. A welcome trend is the grant of monetary compensation along with writ remedies and in criminal prosecution. These issues will be examined in the body of the thesis.

This thesis is divided into eight chapters, chapter one as already seen serves as a general historical introduction about the origin and development of human rights at the international and national level.

broadly highlighting the problem involved in the protection of human rights. How the formation of the state and the establishment of legal orders have served the protection of rights has been briefly discussed.

The second chapter deals with keynotes of the problems arising out of state actions and the concept of state liability in International and national level.

The next chapter is devoted to torts and the liability arising out of it in the human rights perspective, origin of constitutional torts in India and its application.

Next chapter deals with the developments in India for the protection of human rights by enforcing liability of the state through recognition of constitutional torts in writ proceedings. The difficulties involved in giving full compensation in these summary proceedings have been pointed out and in such cases, the law is analyzed. The need for establishing special benches in the High Courts and in the Supreme Court for dealing with cases of violation of human right for which compensation may be awarded in the writ proceedings has been pointed out. That the relief provided by way of ex-gratia payments and interim relief have to be maintained without limiting the scope of compensation on the ground of res judicata has been pointed out.

The Fifth chapter is devoted to the liability of the state in tort. This has been studied in the historical and comparative perspective. The
developments from the days of the East India Company have been examined. The principles in England the USA and France have also been referred to.

In the Sixth chapter the scope of enforcing liability under section 357 of Criminal Procedure Code \(^2\), which provides for some relief to the victim at the discretion of the court, through criminal process is examined.

In the following chapter the role of National Human Rights Commission in enforcing liability is dealt with. After an examination of the present working of the Commission in the light of an analysis of the annual reports presented by them, it has been suggested that a greater role be assigned to the Human Rights Commission to play a supportive role for the enforcement of liability whether it would be in suit or writ or criminal proceeding or in the alternative role assigned to human rights courts. The Commission could be made to function as the key agency in enforcing liability for violation of human rights by public authority.

\(^2\) Section 357 "the trial court, the appellate court, or the revisional court may when a fine is imposed and it forms a part of any sentence including a sentence of death and not otherwise order at the time of passing judgment the whole or any part of the fine recovered to be applied a) in defraying the expenses properly incurred in the prosecution b) in payment to any person of compensation for any loss or injury caused by the offence when he can recover compensation in a civil court c) in paying compensation to person entitled to damages under the Fatal Accidents Act 1855 d) in paying compensation to a bonafide purchase of property for the loss of the same which being the subject of theft, criminal misappropriation cheating etc is ordered to be restored to the person entitled to it. Apart from these section 357 (3) even where fine does not form the part of the sentence that is where imprisonment alone is awarded the court can award compensation to the person who has suffered any loss or injury by reason of the act for which the accused person has been sentenced".
In the concluding chapter various suggestions that have emerged from the study have been collected and presented. These include, adoption of principles of liability of the state in tort either by judicial activism or legislative intervention, suitable changes in the writ procedure which deal with constitutional torts, suitable change in the Criminal Procedure Code for affording greater relief to the victims and increased role of the Human Rights Commission and human rights courts and ratification of the convention which supports human rights protection and to include this in our national laws.