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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

RIGHT TO COMPENSATION AS FUNDAMENTAL RIGHT OR MEANS TO ENFORCE FUNDAMENTAL RIGHT

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1. Introduction

Protection of fundamental/basic rights is always a burning issue through-out the world. All written constitution of the democratic nations defines the fundamental/basic rights and sufficiently empowers the Courts, usually the higher Courts to enforce them. One of the most effective mean to enforce the rights is the award of Compensation. This is perhaps a reason behind Article 9 (5) of International Covenant on Civil and Political Rights 1966 to provide compensation for illegal arrest and detention as a right itself.¹ In India the Courts especially after *Maneka Gandhi*² has started to award compensation but still the roots of right to compensation has not firmly settled in India. Again there is a difference of approach towards right to compensation a careful study reveals that the Court especially the Supreme Court has used it as a means for enforcement of the fundamental rights and not as a right unto itself. It is within the discretion of the Court to grant compensation and therefore the Court used the word “*the infringement of the rights must be gross and patent*”³ if not the claim for the compensation may not be granted. It is very sad to note that in India as of now there is no tort legislation covering the excesses of the state authorities. Moreover the Supreme Court could not develop a robust jurisprudence for the granting the relief in the form of compensation. And the person has to go to civil court for the claim of compensation if it is fitting in any of the legislation and therefore there are hardly cases wherein the person would have claimed compensation for violation of her/his fundamental right if the violation is not very grand, they get satisfied with the preventive remedy in the form of writs. The claim of compensation should not be left at the complete discretion of the Court. There has to have legislation in place. Even in absence of legislation it must be granted on the basis of principle of *ubi jus ibi*

¹ <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

² *Maneka Gandhi v Union of India* 1978 SCR (2) 621

³ *Rudul Shah v. State of Bihar* AIR 1987 SC 1091

idem remedium at list in the cases of violation of right to life and liberty. It should become a right unto itself. There are supporters of the arguments that violation of the Fundamental rights to be enforced by means of compensation and proponents of the compensation as right unto itself. After a violation of some of the fundamental right the victim must be entitled to claim not only injunctive remedy but compensation should be awarded in cases of violation of few fundamental rights like under Article 19, 20, 21 and 22. Here is an attempt to explore the evolution and application of right to compensation in Indian scenario. This paper aims at exploring right to compensation for violation of rights other than right to property. The fundamental rights which are usually violated due to excess of State action is the focus of this paper.

2. Right to life and personal liberty

The Preamble to the Constitution of India 1950 promises justice, liberty and fraternity and that's why Part III espouses the fundamental rights from Article 12 to 35. But in all these provisions there are basically six rights guaranteed i.e. right to equality (Article 14 to 18), right to certain freedoms (Article 19 to 22) right against exploitation (Article 23 & 24), right to freedom of religion (Article 25 to 28) cultural and educational rights (Article 29 & 30), and right to constitutional remedies (Article 32)⁴. A close look at Article 32 reveals obvious link between the right to compensation and violation of fundamental rights. Article 32 which not only empowers the Supreme Court to enforce fundamental right but it is right unto itself and therefore it is a bounden duty of the Supreme Court to enforce fundamental rights. This beauty of article 32 has been regarded as very heart and soul of the Constitution by none other than the chief architect of the Constitution i.e. Dr. B. R. Ambedkar. One of the important features of these rights is that some of them are for individual and some of them are only for citizens. Article 13 and 32 read together makes these rights enforceable against the actions of the State which is defined in Article 12. Judicial ingenuity has added new dimensions to many of these rights. Not only the rights in part III but even the Court has interpreted the provisions in part IV in such as manner so as to make them justiciable.

The Supreme Court of India navigates course of justice. It is very natural also because it is the Court of last resort. According to Article 141 its verdicts operates as a binding precedent

⁴ Right to property under Article 19 (1) (f) and Article 31 has be repealed by the 44th Constitutional Amendment Act 1978

not only over all the courts in India but it also binds all the authorities of the State. Therefore whatever has been the frame of mind of the Court becomes the law of the land. Right to Compensation has been also dependant on this frame of mind and this probably may be a reason for why the right to compensation in India could not settle its legs firmly. During initial days of the working of the Constitution the Supreme Court has shown more trust towards the Government in the office and accepted the interpretation offered by it in the infamous case of *A. K. Gopalan v. State of Madras*⁵ to deny procedural fairness in the matter of violation of right to life and liberty under Article 21. The Court failed to see the vivid connection between the preamble and part III in general and Article 21 was read as an island without any relation with Article 14 and 19 in particular. The claim for compensation for violation of fundamental right started with the cases of right to property and the Court in all leading cases⁶ has shown more concern for the compensation for acquisition of property despite various constitutional amendments to Article 31 limiting down the scope for the compensation. The same Court in the same time frame was not so much zealous for the protection of right to life and liberty forget about the compensation for violation of it. Here is an attempt to explore right to compensation for violation of rights under Article 19 to 24. Though the scope is limited down to these provisions but it will be inevitable to espouse dimensions of Article 14 at relevant places. There are two perspectives from which claim for compensation can be founded;

- i. Under Article 32 or Article 226 which empowers the Supreme Court and High Courts to enforce the fundamental rights respectively; and
- ii. Under the tortious liability of the State

This paper is limited to right to compensation for violation of right to life and personal liberty which is just reflected by Article 21 and not granted by it. Right to life is a natural right it cannot be granted by any constitutional or legal provision. It is a *sui generis*. It has been subjected to the dynamic interpretation by the Supreme Court of India in catena of cases. And the aspect of tortious liability is the area of independent research not touched by this paper except for common plea of State liability and the violation of right to life and personal liberty.

⁵ 1950 SCR 88

⁶ Starting from *Kameshvar Singh v. State of Bihar* (1952) 1 SCR 889 to *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461 the Supreme Court has shown deep concerns for granting compensation in cases of acquisition of property but the Court was not so much interested in enforcement of life and personal liberty which is evident from case of *A. K. Gopalan* which was only overruled in *Maneka Gandhi v Union of India* 1978 SCR (2) 621

Before going to discuss the aspect of compensation it is imperative to have a look at drafting history of Article 21. Sir B. N Rau, Constitutional adviser to the Constituent Assembly, prepared the draft on the basis of recommendations of various committees of the Constituent Assembly it contained Article 16 which is reproduced below as it is.

“No person shall be deprived of his life or personal liberty without due process of law, nor shall any person be denied equality before the law within the territories of the federation⁷.”

And after deliberation in the house and meetings of the various committees of the Constituent Assembly the drafting Committee prepared a draft which amended this provision. Below is the verbatim provision which was there in the draft constitution.

“Article 15: No person shall be deprived of his life or personal liberty except according to procedure established by law, nor shall any person be denied equality before the law or the equal protection of the laws within the territory of India⁸”

Now the new form of right to life and liberty had a significant omission. That omission was “*due process*.” But it had an added advantage of “*equal protection of the laws*”

It is generally said that draft Article 15 had used the phrase of due process, but actually draft provision didn't had this phrase. It was the draft of Sir B. N. Rau which used it and the discussion on draft Article 15 wherein some of the members of the Constituent Assembly wanted to have the phrase “*due process*”⁹ which was similar to Fifth Amendment to the US Constitution. It was Sir. B. N Rau, who used the term “*due Process*” and it was he again who wanted to avoid it on the basis of the advice of US Supreme Court judge, Justice Felix Frankfurter because this term has been used by the American judges to mean what they want to mean and it has resulted in wrong interpretation, like in the case of *Lochner v. New York*¹⁰ the US Supreme Court had invalidated the law prohibiting more than sixty Hours of work weekly in bakeries and confectionaries by using “*due process*” argument. There are many cases in the US wherein “*due process*” had been wrongly interpreted by the US Supreme Court¹¹ and hence Justice Felix Frankfurter advised him that, “*the power of judicial review implied in the due process clause, of which there is a qualified version in section 16 of the Indian draft constitution, is not only undemocratic (because it gives a few judges the power of vetoing legislation enacted by the representatives of the nation) but also throws an unfair*

⁷ B. Shiva Rao, The Framing of India's Constitution (New Delhi: Universal Law Publishing Co.Pvt. Ltd 1967) Vol 3 p 9

⁸ Ibid at 523.

⁹ Constituent Assembly Debates, vol 3 (Lok Sabha Secretariat 1986) 441, 29 April 1947

¹⁰ (1905, 198 U. S. 45)

¹¹ Dred Scott v. Sandford, (1856, 60 US 393), Adkins v. Children's Hospital (1923, 261 U. S. 525),

*burden on the judiciary*¹².” He also met with Justice Hand who too considered, “*that it would be better to have all fundamental rights as moral precepts than as legal fetter in the constitution*”¹³. Accordingly Mr. B. N. Rau persuaded the member of the Constituent Assembly to omit the phrase “*due process*” and accordingly the Constituent Assembly accepted the provision as it stands in Article 21 which is more akin to Article 31 in the Japanese Constitution¹⁴.

3. Right to compensation *vis a vis* enforcement of right to life and personal liberty:

In case of violation of right to life and personal liberty, the question before the Court would be how to redress such violation. The traditional remedy is the writ petition under Article 32 or 226. What the Court can normally do is restrict the State from further violation of right to personal liberty. But this was not sufficient to alleviate the plight of the person. That’s why the Supreme Court had to tailored new remedy in the form of compensation. It was doubted at times can Court do it under Article 32. Justice P. N. Bhagawati raised this question in *Khatri v. State of Bihar would the State be liable to pay compensation for acts of its servants outside the scope of their power and authority affecting the life and personal liberty of a person and thus infringing Art 21?*¹⁵ The Court avoided direct and conclusive answer to this question and granted the relief to in the nature of housing those people, who were blinded by in the prison, to the blind home in Delhi. This case paved the way for the new thought of granting compensation to the victims of State excesses. No wonder the it was justice P. N. Bhagawati again in the case of *Rudul Shah v. State of Bihar*¹⁶ a case where a person was kept in prison for no reason for 14 years. This was such a colossal violation of right to life and personal liberty under Article 21 and the Supreme Court didn’t shy away from rejecting the state submission that it is not liable to pay compensation to the victim and the Court not only released *Rudul Shah* but also granted compensation of r 35,000/- But again the Court avoided to answer the fundamental question raised by Justice P. N. Bhagawati in *Khatri*.

*In the case of S.M. Hongray v. Union of India*¹⁷ two Christian priests were taken to army

¹² B. N.; Rao Rau, B. Shiva, Editor. India's Constitution in the Making (1960) 303

¹³ id

¹⁴ https://www.constituteproject.org/constitution/Japan_1946.pdf?lang=en

¹⁵ AIR 1981 SC 928

¹⁶ AIR 1983 SC 1086

¹⁷ AIR 1884 SC 571

camp for interrogation and they never returned back. On the basis of letters of their wives, Court issued *habeas corpus* to produce them before the Court but the authorities failed. Presuming their deaths the Court awarded a compensation of ₹ 1,00,000/- to each of the widows. Here the Court rejected the claim of sovereign immunity in clear words. The trend set by the Court to award compensation went on in the case of *Bhim Singh* who was an MLA and suffered grave violation of right to life and personal liberty under Article 21 and the protection under Article 22.¹⁸ The Court awarded compensation of ₹ 50,000/- Further the Supreme Court rejected the claim of sovereign immunity and held that there cannot fundamental rights overrides such claim and awarded a compensation of ₹ 1,44,000/- for the death of undertrial prisoner in the jail¹⁹. It is pertinent to note little bit about the defence of sovereign immunity was enunciated in the case of *Peninsular Oriental Steam Navigation v. Secretary to the State of India*²⁰ The classification of the function as sovereign and non-sovereign is followed to the present day also but the Court has rejected it when it is a violation of fundamental rights. The case of *State of Rajasthan v. Vidyawati*²¹ though predates the activist mood of the Supreme Court, held the state vicariously liable, because a government driver killed the plaintiff's husband in an accident and it is a non-sovereign function. But within few years the Court retreated from such interpretation and in *Kasturilal v State of Uttar Pradesh*²² held that the State is not liable for loss of gold of the appellant which was kept in the Malakhana of the State police. Maintaining a malakhana was held to be a sovereign function and whatever wrong happens to the goods kept therein will not be ground for anyone to claim compensation. All the cases after *Maneka Gandhi* wherein the Supreme Court had awarded compensation, the State had take a defence on the basis of *Kasturilal* but the Court rejected it and held that the defence of sovereign function cannot withstand for the claim of protection of right to life and personal liberty. These cases had virtually overruled *Kasturilal* but the Court didn't said it categorically in any of these cases. One of the reason for such silence is that all these case had been decided by the smaller benches and the *Kasturilal*'s case was decided by a larger bench of 7 judges. It is not good that the court avoided overruling it in clear terms, because it is not impossible to have larger bench of 9 judges. Had there such a categorical judgement the message would have been more loud and clear that the claim of sovereign immunity cannot be raised in the case of

¹⁸ *Bhim Singh v State of J and K* AIR 1986 SC 494

¹⁹ *State of Andhra Pradesh v. C. R. Reddy* AIR 2000 SC 2083

²⁰ *Bombay High Court Reports* Vol. V, 1868-69

²¹ AIR 1962 SC 933

²² AIR 1965 SC 1039

violation of right to life and personal liberty. And the case of infraction of right to life and personal liberty with sovereign immunity is a very vital question of constitutional interpretation and warrants such a larger bench. But now the trend is settled to have smaller benches in such cases and neglecting *Kasturilal's* defence on the ground that *Kasturialal* was not a case dealing with right to life and liberty per say and hence its ratio can be avoided.

In *Boma Charan Oraoii v. State of Bihar*²³ the Supreme Court directed the respondent to pay a sum of r15000 to petitioner because he was illegally detained in a lunatic asylum for six years despite the fact that he was certified as fit for discharge. The Court said that anyone deprived illegally of his life or personal liberty can come before the court and ask for compensation for violation of his fundamental right under Article 21.

*Saheli, A Women's Resources Centre v. Commissioner of Police, Delhi Police*²⁴ a 9 year old boy was beaten to death Police. The Court awarded a compensation of r 75,000 to the mother of the deceased child and allowed the Delhi Administration to recover of the amount paid as compensation from the officer responsible for death of the child.

In *People's Union for Democratic Rights v. State of Bihar*²⁵ the Supreme Court awarded a sum of r20,000 for the death of a person who succumbed to the injuries sustained in police firing. The object behind the award of compensation was to rehabilitate the dependants of the deceased and it must be noted that the state itself came forward to give compensation. The States willingness may be a result of the jurisprudence of compensation which the Court has been developing for the protection of life and personal liberty.

*People's union for Democratic Rights v. Police Commissioner, Delhi Headquarter*²⁶, a worker was taken to police station for doing some civil work. Police beat him for his demand of lawful wages and consequently he succumbs to the injuries. The State was held liable to pay compensation of r 75,000/- to his family.

²³ The Hindustan Timet, 13 August 1983 referred in K.D. Gaur 'Poor Victim of Uses and Abuses of Criminal Law and Process in India', JILI, 1993, Vol. 35, p. 218

²⁴ AIR 1990 SC 513

²⁵ AIR 1987 SC 355.

²⁶ (1989) 4 SCC 730.

Again in the case of *Arvinder Singh Bagga v State of U. P.*²⁷ the Supreme Court didn't hesitate to award a compensation for the callous approach of the police because of which petitioners were illegally detained and humiliated for no fault of theirs. The Court further directed the State to recover the amount of compensation from the erring police officers personally.

The Supreme Court set another benchmark in the case of *Nilabati Behara*²⁸ wherein son of the petitioner died in the police custody and his body was thrown on railway track. The Court awarded exemplary damages of ₹ 1, 50, 000/- to the mother of the deceased and held that the Court has to forge new tools to do complete justice in such cases. The Court cannot be helpless to the hapless victims of State excess.

*Kewal Pati v. state of U.P.*²⁹ is the notable case wherein the Supreme Court awarded compensation of ₹ 1,00,000/- to the petitioner because her husband was killed by a co-accused while the deceased was serving his sentence. The Court held that failure of jail authorities to protect him resulted in his death and hence the State is liable to pay compensation. The notable point is that the person undergoing a sentence for an offence under section 302 of Indian Penal Code is also entitled to the protection and she/he is not completely stripped of right to life and liberty. *Shakuntala Devi v. Delhi Electricity Supply Undertaking* compensation of ₹ 1,00,000/- was awarded for the death of her husband when he came into contact with the live electric wire while he was returning from the place of his employment and got electrocuted.

*Delhi Domestic Working Women's Forum v. Union of India*³⁰ Public Interest Litigation was filed to espouse the pathetic plight of four domestic servants who were raped by seven army personnel in a running train in Muri Express. Neither the central government nor the state government paid any attention for rehabilitation and compensation to the victims. It was the Apex court who was empathetic to award an interim compensation of ₹ 1000 per month to the victims of rape until charges are decided by the trial Court.

Again in *Bodhisatta Gautam v. Shubhra Chakraborty*³¹ the Supreme Court came to the rescue

²⁷ AIR 1995 SC 117

²⁸ Nilabati Behera v. State of Orissa AIR 1993 SC 1960

²⁹ (1995) 3 SCC 60

³⁰ (1995) 1 SCC 14

³¹ (1996) 1 SCC 490

respondent who was the victim of rape on the false promise of marriage. The Court following the line of *Delhi Domestic Working Women's Forum* awarded compensation of ₹1000 per month till the trial court decides the charges.

4. State's response to Right to Compensation

On this score the situation is very sordid. There is no proper legislation in India. Many leading common law countries have such legislation. Crown Proceedings Act 1948 is there in England,³² Federal Tort Claims Act 1946 in the US, these are proper legislations which allows the people to sue the state for wrongful acts of its employees. The State rather preferred to avoid liability in cases of violation of right to life and liberty. It is evident from many cases wherein the State contested on the archaic ground of sovereign function which is not all fit in to the road map of the constitution which is based on equality, justice, liberty and fraternity. In the case of state of *Maharashtra v. Ravikant S. Patel*³³ the Bombay High Court awarded compensation for violation of right life and personal liberty but the State of Maharashtra preferred an appeal before the Supreme Court of India and contested no liability on the ground of sovereign function, but the Supreme Court upheld the decision of the High Court and confirmed the order of Compensation with certain modifications. Again in *State of A. P. v. C. R. Reddy*³⁴ the High Court granted the compensation for violation of life and personal liberty and categorically rejected the claim of sovereign function, still the State preferred an appeal to contest no liability to pay compensation, but the Supreme Court upheld the order of the High Court. It is no wonder the National Legal Service Authority, State Legal Service authority and many District and Taluka Level Legal Service Authorities are working under the patronage of the Judiciary. All these authorities are working for the victims as well as offenders of crime. They sound like state authorities but they are not. Finally it dawn on the Parliament of India to come up with certain amendments to the Code of Civil Procedure and inserted Section 357 and 357-A which provides for victim compensation.³⁵ These sections do provide for the compensation to be paid to the victim in case the fine recovered is scanty to alleviate plight of the victim or the offender is untraceable. The discretion to decide the amount of compensation is dependent on the discretion of the District Legal Services Authority or the State Legal Services Authority.

³² <http://www.legislation.gov.uk/ukpga/Geo6/10-11/44/contents>

³³ (1991) 2 SCC 373

³⁴ AIR 2000 SC 2083

³⁵ Code of Criminal Procedure 1978 amended by Criminal Procedure (Amendment) Act 2008

These authorities are working with the patronage of the Judiciary and hence there is a cold tension between the Government and these authorities over the credit of such welfare scheme. Even in judiciary many judges fees that the work of these authorities is an additional burden on the judiciary and it should be better handled by the Government and there are opposite views also which doubts the credentials of the Government officers and think that such schemes should be taken care of by the judiciary only through such authorities. It is also a fact that those judges who are not good on the bench are sent to these authorities to do non-judicial work of course there are exception too, but by and large it is a fact. Therefore it is need of the time to come up with a proper legislation to redress the plight of the victims of crime.

5. Concluding remarks

The Supreme Court played a palliative role for the victims of state excesses and awarded compensation. There is no dearth of the cases court granting compensation. One conspicuous vacuum is in the form of a robust legislation laying down the structure for the right to compensation and therefore every time victims has to knock the doors of the Supreme Court or the High Court. These Courts have also shown empathy too but every victim cannot afford to travel to the Delhi or cities housing the High Courts. Many people even don't know that they can get compensation for the violation of their rights and hence it is highly essential to have a legislation in this regard empowering the lowest Court to grant compensation. The schemes under section 357 and 357A of Code of Criminal Procedure 1978 are not complete legislation and there is need of comprehensive legislation covering the liability of the State and providing for the compensation. The service rendered by the Supreme Court is phenomenal but the justice should become more local, easily accessible and cost effective. This what the need of rule of law in the present time.