

## REMEDY OF COMPENSATION UNDER ARTICLE 32 OF CONSTITUTION OF INDIA

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### Abstract

In this Article 1 discuss how the opening of writ jurisdiction as a source for monetary compensation in cases of Human Rights infringements has led some very arbitrary amounts being awarded as compensation, especially in the absence of any set rules or jurisprudence. The problem is discussed through some specific case laws. The victims of any wrong generally seek compensation under the law of torts at the local civil courts. This process is tedious and insufficient at most times but the damages awarded under torts are well defined and categorized under the heads of Compensatory, Nominal and Punitive. The least amount courts provide is the direct financial loss suffered by the victim in terms of medical cost or the cost to repair the property or any such similar loss.

The Indian Supreme Court has time and again invented new methods for securing fundamental rights under Article 32. The Article 32 (2) provides the Supreme Court with power to issue directions, orders or writs for enforcement of any fundamental right. The powers of the Supreme Court under Article 32 are not subject any limitations and the court has used these powers to both prevent and remedy the violations of fundamental rights. In the past few decades, India witnessed the birth of a new mechanism for damages in specific cases of Human Rights infringement. The rise of this new jurisprudence of compensation with respect to Human Rights is a welcome step from the constitutional courts but the various amounts awarded by the highest court has started a new debate.

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## INTRODUCTION

Compensation to victims is a recognised principle of law being enforced through the ordinary civil courts. Under the law of torts the victims can claim compensation for the injury to the person or property suffered by them. It is taking decades for the victims to get a decree for damages or compensation through civil courts, which is resulting in so much hardship to them.

The emergence of compensatory jurisprudence in the light of human rights philosophy is a positive signal indicating that the judiciary has undertaken the task of protecting the right to life and personal liberty of all the people irrespective of the absence of any express constitutional provision and of judicial precedents.

The renaissance of the doctrine of natural rights in the form of human rights across the globe is a great development in the jurisprudential field in the contemporary era. A host of international covenants on human rights and the concern for effective implementation of them are radical and revolutionary steps towards the guarantee of liberty, equality and justice. The concept is new, and these rights have been recognised since ages and have become part of the constitutional mechanism of countries. India recognised these rights under Part III of the Constitution providing remedies for enforcement of such rights.

Although, there is no expressed provision for awarding compensation under Article 32 of the Constitution of India. The compensatory jurisprudence introduced by the Supreme Court of India by invoking powers under Article 32 gained tremendous importance in recent times due to the increase of the incidents of State lawlessness<sup>1</sup>, police lawlessness<sup>2</sup>, custodial violence<sup>3</sup>, violence in jails<sup>4</sup>, unlawful detentions<sup>5</sup> medical negligence<sup>6</sup> environmental pollution<sup>7</sup> and other violations. The citizens are entitled to appropriate relief under the provisions of Article 32 of the Constitution, provided it is shown to the satisfaction of the Court that the Fundamental Right of the petitioner had been violated<sup>8</sup>. This innovation made by the Supreme Court is not only reducing the multiplicity of litigation but also helping the courts to render speedy justice to victims of the infringement of right to life and personal liberty. This Court has a constitutional duty to protect the Fundamental Rights of Indian citizens.<sup>9</sup>

Dr. Ambedkar, the person who is attributed with the fatherly rights over the Constitution of India, declared at the time of adoption of the Constitution that if there was one most

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<sup>1</sup> Rudul Sah v. State of Bihar, (1983) 4 SCC 141

<sup>2</sup> Saheli v. Comm. of Police, (1990) 1 SCC 422

<sup>3</sup> Sudha Rasheed v. Union of India, (1995) 1 Scale 77

<sup>4</sup> (1993) 2 SCC 746

<sup>5</sup> Arvinder Singh Bagga v. State of U.P. (1994) 6 SCC 565

<sup>6</sup> Paschim banga Khet Mazdoor Samity v. State of West Bengal AIR 1986 SC 2426, (1996) 4 SCC 37

<sup>7</sup> M.C.Mehta v. Union of India (2001) 9 SCC 520

<sup>8</sup> Daryao & Ors. v. State of U.P. & Ors. AIR 1961 SC 1457

<sup>9</sup> M.C.Mehta v. Union of India AIR 2006 SC 1325

important provision in the Constitution, it was Article 32 thereof. This Article referred to “as the very soul of the constitution” by Dr. Ambedkar, provides for constitutional remedies. This Article 32 confers the right to every citizen to approach the highest court of the country i.e. the Supreme Court of India, for enforcement of his fundamental rights. The scheme of the Constitution is such that the right to approach to the Supreme Court for such cause is in itself a fundamental right.

## CONSTITUTIONAL PROVISION

Article 32, Remedies for enforcement of rights conferred by this Part:

- 1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed,
- 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 clauses (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) (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

Article 32(1) provides for the right to move the Supreme Court by appropriate proceedings for the enforcement of the fundamental rights. The Supreme Court under Article 32(2) is free to devise any procedure for the enforcement of fundamental right and it has the power to issue any process necessary in a given case.

Article 32 of the Constitution gives an extensive original jurisdiction to the Supreme Court in regard to enforcement of Fundamental Rights. It is empowered to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari to enforce them. Supreme Court or the High Courts may issue five kinds of writs.

In view of this constitutional provision, the Supreme Court may even give remedial assistance, which may include compensation in “appropriate cases”.

A question regarding the awarding of monetary compensation through writ jurisdiction was first raised before the Supreme Court in *Khatril (II) v. State of Bihar*<sup>10</sup> In this case, Bhagwati, J. Observed that “*Why should the court not be prepared to forge new tools and devise new*

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<sup>10</sup> (1981) 1 SCC 627

*remedies for the purpose of vindicating the most precious of the precious fundamental right to life and personal liberty.”*

In *Sant Bir v. State of Bihar*<sup>11</sup> the question of compensating the victim of the lawlessness of the State was left open.

In *Veena Sethi v. State of Bihar*<sup>12</sup> also the Court observed that the question would still remain to be considered whether the petitioners are entitled to compensation from the State Government for the contravention of the right guaranteed under Article 21 of the Constitution.

This dynamic move of the Supreme Court resulted in the emergence of compensatory jurisprudence for the violation of right to personal liberty. The Supreme Court of India in *Rudul Sah v. State of Bihar*<sup>13</sup> brought about a revolutionary breakthrough in human rights jurisprudence by granting monetary compensation to an unfortunate victim of State lawlessness on the part of the Bihar Government for keeping him in illegal detention for over 14 years after his acquittal of a murder charge.

Till the pronouncement made in the above case, the Supreme Court was hesitating to recognise the principle of monetary compensation for violation of fundamental rights while acknowledging the inadequacy of conventional judicial remedies in this type of cases. The concern of the Apex court to do justice rather than mechanically applying the law based on precedents is reinforcing the credibility of the judiciary among the public.

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

In India, the judgment in *Rudul Sah v. State of Bihar*<sup>14</sup> added a new dimension to judicial activism and raised a set of vital questions, such as, liability of State to compensate for unlawful detention, feasibility of claiming compensation from the State under Article 32 for wrongful deprivation of fundamental rights, propriety of the Supreme Court passing an order for compensation on a habeas corpus petition for enforcing the right to personal liberty.

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<sup>11</sup> (1982) 3 SCC 131

<sup>12</sup> (1982) 2 SCC 583

<sup>13</sup> (1983) 4 SCC 141

<sup>14</sup> (1983) 4 SCC 141

The Supreme Court had taken a different view in *Jiwan Mal Kochar v. Union of India*<sup>15</sup> by holding that the petitioner could not be granted the damages and compensation under Article 32 of the Constitution.

The power of the Supreme Court to deviate from traditional concepts and to formulate new rules for granting effective relief for violation of fundamental rights is traceable to Article 32. Regarding the ambit of clause (1) of Article 32, Bhagwati, J. in *Bandhua Mukti Morcha v. Union of India*<sup>16</sup> observed that there is no limitation in regard to the kind of proceeding envisaged in Article 32(1) except that the proceeding must be “appropriate” and this requirement of appropriateness must be judged in the light of the purpose for which the proceeding is to be taken, namely, enforcement of a fundamental right. Article 32(2) also expressly provided that the Court may grant “appropriate” remedy for enforcing the rights. Hence the power can be traced to “appropriate” remedy under Article 32(2) of the Constitution of India.

The Supreme Court in *M.C. Mehta v. Union of India*<sup>17</sup> reiterated its stand taken in *Rudul Sah*, that apart from issuing directions it can under Article 32 forge new remedies and fashion new strategies designed to enforce the fundamental right. The Court went on to say that the power under Article 32 was not confined to preventive measure when the rights were violated. The court further observed that a contrary position would rob Article 32 of the entire efficacy and render it impotent and futile.

The most important point considered by the Bench was whether the Supreme Court could entertain claims for damages in respect of violation of fundamental rights and it was held that the Court had the power to award compensation in appropriate cases where: (SCC p. 408, para 7)

The power given to the Supreme Court under Article 32, which itself is a fundamental right, imposes a constitutional obligation on the Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enable the award of monetary compensation in appropriate cases, where that is the only mode of redress available. If the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law is to be real, the enforcement of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the facts of each case. This remedy in public law has to be made readily available when invoked by the have-nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies, where more appropriate.<sup>18</sup>

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<sup>15</sup> (1984) 1 SCC 200

<sup>16</sup> AIR 1984 SC 802

<sup>17</sup> (1987) 1 SCC 395

<sup>18</sup> Punjab & Haryana High Court Bar Assn. v. State of Punjab, (1996) 4 SCC 742

*Sebastian M. Hongray v. Union of India*<sup>19</sup>, *Bhim Singh v. State of J&K*<sup>20</sup>, *Saheli v. Commr. of Police*<sup>21</sup> and *Nilabati Behera v. State of Orissa* are some of the cases in which the Court made the State liable for compensation in the form of public law remedy.

In *Nilabati Behera*'s case the Supreme Court observed, *"It may be mentioned straight away that award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort."*<sup>22</sup>

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

The Supreme Court categorically observed that the defence of sovereign immunity is inapplicable and alien to the concept of guarantee of fundamental rights. There is no question of defence being available for constitutional remedy. It is a practical and inexpensive mode of redress available for the contravention made by the State, its servants, its instrumentalities, a company or a person in the purported exercise of their powers and enforcement of the rights claimed either under the statutes or licence issued under the statute or for the enforcement of any right or duty under the Constitution or the law.<sup>23</sup>

In the hands of the Supreme Court public interest litigation in India has taken multidimensional character. The age-old adversarial system has been given a go-by. With the advent of judicial activism, letters<sup>24</sup>, newspaper reports<sup>25</sup>, complaints by public-spirited persons<sup>26</sup>, social action groups<sup>27</sup> bringing to the notice of the Court regarding violation of fundamental rights were dealt with treating them as writ petitions and the relief of compensation was also granted through writ jurisdiction under Article 32 of the Constitution. In respect of writ petitions of disputed facts the Supreme Court developed a theory of fact-

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<sup>19</sup> (1984) 3 SCC 82

<sup>20</sup> (1985) 4 SCC 677

<sup>21</sup> (1990) 1 SCC 422

<sup>22</sup> at p. 758, para 10

<sup>23</sup> para 14

<sup>24</sup> *D.K. Basu v. State of W.B.*, (1997) 1 SCC 416

<sup>25</sup> *Parmanand Katara v. Union of India*, (1989) 4 SCC 286

<sup>26</sup> *M.C. Mehta v. Union of India*, (1987) 1 SCC 395

<sup>27</sup> *Common Cause v. Union of India*, (1996) 6 SCC 593; *Shiv Sagar Tiwari v. Union of India*, (1996) 6 SCC 599

finding commissions<sup>28</sup>. Usually the Supreme Court or High Courts do not take up the issues relating to disputed facts in writ proceedings. In cases of claim for compensation through public law remedy under Article 32, the Supreme Court instead of making the petitioner to resort to private law remedy invented the process of fact-finding commissions to inquire into the disputed facts and submit reports before the Court to consider the correctness of the facts placed before the Court. By taking the aid of such reports the Court is coming to a conclusion whether there is infringement of the right to life and personal liberty and whether it is a fit case to award compensation in writ proceedings.

## **LIMITATIONS OF ARTICLE 32**

Like fundamental rights themselves, the right to constitutional remedies under Article 32 is not without limits. The constitution visualizes there situations when fundamental rights may be denied but constitutional remedies will not be available i.e. Article 32 will not be applicable.

- 1) Article 33 empower the Parliament to modify application of fundamental rights to armed forces and the Police to ensure proper discharge of their duties.
- 2) Under Article 34, during the operation of Martial law in any area, the Parliament may indemnify any person in the service of the central or a state government for acts for the maintenance or restoration of law and order.
- 3) During emergency proclaimed under Art 352 of the constitution, the fundamental rights guaranteed to the citizens, will remain suspended. Article 358 authorizes the Parliament to restrict fundamental rights guaranteed by Art 19 during the pendency of an emergency under Article 352.
- 4) Article 359 empowers the President to suspend the right to move the courts for the restoration of fundamental rights. In other words, Article 359 empowers the President to suspend Art 32 of the constitution. Such an order however is to be submitted to the Parliament, and the Parliament has the right to disapprove the Presidential order.

## **CONCLUSION**

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

In several parts of the Constitution, duties to make certain provisions for the benefit of the citizens are imposed on the State in terms which bestow rights upon the citizens and, unless some contrary provision appears in the Constitution, the Constitution must be deemed to have

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<sup>28</sup> Death of Sawinder Singh Grover, In re, 1995 Supp (4) SCC 450; People's Union for Civil Liberties v. Union of India, (1997) 3 SCC 433



created a remedy for the enforcement of these rights. It follows that, where the right is one guaranteed by the State, it is against the State that the remedy must be sought if there has been a failure to discharge the constitutional obligation imposed. Though not expressly provided constitution, it permitted an order for monetary compensation, by way of redress for contravention of the basic human rights and fundamental freedoms.

There are several cases in which the Supreme Court and the High Courts made the State liable to pay compensation as a public law remedy ignoring the plea of the State about its immunity from liability.

If by adjudication by a Court of competent jurisdiction, the right claimed has been negated, a petition under Article 32 of the Constitution is not maintainable. It is not generally assumed that a judicial decision pronounced by a Court may violate the Fundamental Right of a party. Judicial orders passed by the Court in or in relation to proceeding pending before it are not amenable to be corrected by issuing a writ under Article 32 of the Constitution. Explaining the significance and the ambit of the rights available to the citizens to approach the Supreme Court directly in matters affecting the exercise of fundamental rights guaranteed by the Constitution, discussed the scope of Article 32 of the Constitution granting such right.