

Constitutional Foundation of Compensatory Jurisprudence in India and Judicial Response



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Abstract

The concept of compensatory jurisprudence has evolved and flourished, among various aspects of legal discourse in contemporary legal system. Compensatory jurisprudence in India is a judicially evolved framework where the Constitutional Courts award payment of compensation for the gross defilement of fundamental rights, particularly under Art. 32 and Art. 226. This work unravels the intricate tapestry of compensatory jurisprudence in India, where the Constitution and the Judiciary play pivotal roles in shaping and defining the landscape of compensation in general and justice in particular. The mechanism primarily addresses those whose fundamental rights have been infringed by the arbitrary state action and rehabilitates them. The paper focuses on in-depth understanding of how the Judiciary navigates the delicate balance between individual rights and state responsibility allowing the victims to seek compensation in a case of violations of their fundamental rights by the state and its instrumentalities.

Key Words: *Compensation, Constitution, Court, Fundamental Rights.*

I. Introduction

The compensatory mechanism to provide the compensation^{1,2} for the victims

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¹Money given to compensate loss or injury. Black's Law Dictionary as cited in Mounita Roychoudhury v. Abhijit Chatterjee, AIR 2014 Ori 5, para 12(5).

²Compensation means reimbursement given to make things equivalent, to amend the loss, recompense, remuneration or pay. It therefore need not necessarily be in monetary terms. State of Gujarat v. Shantilal Mangal Das, AIR 1969 SC 634 at p. 644; SRTC v. Mahadeva Shetty, (2003) 7 SCC 197, para 11; Nathmul v. Commissioner Civil, Supplies, Rajasthan, AIR 1952 Raj 72. The word compensation has been held to mean a full and fair money equivalent of the property taken. Veernath v. State of Hyderabad, AIR 1957 AP 1034: 1037; A 'compensation' may be held to be payable on a periodical basis, as part from the compensation, other terms and conditions can also be imposed. Entertainment Network (India) Ltd v. Super Cassette Industries Ltd, (2008) 13 SCC 30: 73, para 127.



is an accepted concept of law being implemented by the Criminal Justice System and the ordinary Civil Courts. Under the law of torts, victims can seek compensation for the injuries caused to his individual or property. Traditionally, when there was no distinction between wrongs and tort, the liability was strictly upon the wrongdoer himself. There were no crimes, but only wrongs committed against the other. The Halsbury's Law of England defines torts in technical terms as, "*those civil rights of action which are existing for the recovery of damages which are unliquidated, by person or persons who have suffered injury or loss from acts, statements or omissions of others in breach of duty or infringement of right conferred by law are rights of action in tort.*"³

Historically, King held the sovereignty and was a divine being, he could do no wrong, nor could he authorize one. He held 'immunity'⁴. But, with time the King's divinity and glory diminished and with setup of democratic establishment across nations, Constitutional governments were established in most of the countries. The material question worth enquiry will be whether the government of the people, for the people and by the people will hold the same sovereignty and immunity for its wrongs and that of its delegates? In this background the paper will explore the Doctrine of Sovereign Immunity, Constitutional Foundation of Compensatory Jurisprudence in India and how judiciary explore and evolve the compensatory jurisprudence in India.

II. Justification for Compensatory Jurisprudence

The justification for compensatory jurisprudence lies at the heart of the fundamental debate between state immunity on one hand and the welfare, security, and rights of the people on the other. Sufficient justifications for initiating compensation programs have enlarged the dimension of compensatory jurisprudence. These justifications obligate the state to compensate for the gross violations of fundamental rights of its subjects by the abuse and misuse of sovereign power.

The concept of Justice is the supreme argument to justify the idea of compensatory jurisprudence. The impression of libertarians like Robert Nozick and Rawls profound Justice to be a claim or an entitlement. Since the state

³Para 141 of the judgement in Kaushal Kishor v. State of UP, (2023) 4 SCC 1.

⁴Sovereign immunity is a legal doctrine holding that a sovereign state or government cannot commit a legal wrong and is immune from civil suits or criminal prosecution without its consent. It is based on the latin maxim '*rex non potest peccare*', king can do no wrong.



failed in its obligation to protect its subject and violated their fundamental rights, the subject has an entitlement or claim for the compensation against such failure. This jurisprudential justification regarding compensatory framework is even supported by the argument of JS Mill, who laid down the philosophical foundation of the Harm Principle⁵, which provides that the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. Since the instrumentalities of state acting on the behalf of the state exercised the power arbitrarily, abusing and misusing the power thereby harming the common citizenry, the principle here obligates the state to pay off its obligation by compensating the wronged.

Yet another justification is the ‘theory of state’⁶. The emergence of state is a result of social contract. The theory postulates that the two agreements *pactum union*⁷ and *pactum subjection*⁸ requires the surrender all their rights, except right to life, liberty and property. This surrender is under a social contract between the subjects and the state whereby the state was duty bound to protect its citizens from any kind of victimization⁹ caused by even state itself or any of its subjects.¹⁰

⁵The harm principle was first articulated by the English philosopher John Stuart Mill, in his work ‘On Liberty (1859)’.

⁶‘State’ is a complex of rulers and ruled, a political conceived, territorially organized, seeking by the conferment of powers on the rulers the effective maximization of the individual and social welfare of the ruled.

⁷*Pactum union* talks about that the people should unite and live in a society; a union need to be formed.

⁸*pactum subjection* that the so united people will now surrender all their rights (except right to life, liberty and property) and it will be due to this surrender a social contract will be entered into between the subjects and the state, and state was duty bound to protect its individuals from any kind of victimization.

⁹Victimization is a process of being victimized or becoming a victim. There are different theories of victimization which are – Primary victimization, Secondary victimization, Re-victimization and Self-victimization. See generally, Stephen Schafer, The victim and his criminal - "victimology", The President's Commission on law enforcement and administration of justice (1968), where he gave the concept of “functional responsibility” according to the concept, the victimization occurs as a result of the functional interplay of causative elements. He believed that the responsibility of the victim is a critical issue in the problem of crime, some victims often contribute to crime by their acts of negligence, precipitation or provocation.

¹⁰State attains its purpose through enactment of laws and forces conformity to the laws by authority. The authority is a capacity to produce the intended results. If the intended results cannot be produced in respect of any law, the state has to assume responsibility for the loss, pain, or damage caused to any law-abiding citizen by someone’s disobedience of the law.



It is universal fact that state is '*parens patriae*', as a father figure state has moral and ethical duty to protect its citizen from any arbitrary action and misuse and abuse of sovereign power but also have an empathetic concern for the loss suffered. This concern in the form of compensation has intrinsic moral values of its own, since the legal machinery of the state did abuse of power, it must make good the loss.

Another justification for the compensatory regime is 'welfare theory'. The theory suggest that the Government exist and functions for the citizen. This approach conclude that, state has a caring duties towards unprivileged, disabled, poor, and so on and so forth it has a duty towards the victims of crime and victims of state action, that is misuse of sovereign function. However, this duty is based not on any contractual obligation on the part of the state, but on the social concerns of its rulers and its citizenry.

In conjunction with welfare theory, the mercy theory justifies the compensatory mechanism by advocating that the state has authority to "deal mercifully with certain individuals". Therefore, the victims due to arbitrary discharge of sovereign power by state functionaries or its instrumentalities are at the mercy of the sovereign for the grant compensation. The mercy of the government theory is less general and inclusive than the Welfare theory.¹¹

There is also penological justification on the point why the state shall pay compensation. The consequentialist approach primarily focuses not on punishing the wrongdoer and reforming the offender but to compensating the victim for his victimization, be it primary victimization at the hands of perpetrator or secondary by the state action and inaction.¹²

Unconditionally, the state has the power to perform sovereign function but during its performance the instrumentalities abused and misused the power thereby violating the constitutional established right and justice. Compensation is therefore, a consequence of such failure on the part of state. The trinity has to be taken into account, firstly the constitutionally protected right of citizen, secondly, performance of sovereign function and lastly, abuse and

¹¹Although modern jurisprudence accounts for individual deviance as being no fault of the State, it supports the factum that the State must assist the vulnerable as matter of public policy.

¹²*Also See:* The 154th Law Commission Report, 1996 which observed that "one of the recognised methods of victim protection is compensation of victim of crime; the compensatory theory of Justice or restitution is the backbone of victim compensation, the penological dimension is yet another factor for victim compensation."



misuse of power and the Constitutional Courts ought to find harmonious balance between this intricate trinity.

Despite having these healthy justifications in favour of compensatory jurisprudence, the state always tried to escape its burden of not discharging the constitutional mandate of redressing the person by way of compensation by pleading unreasonable defences. These defences are in the form of sovereign immunity¹³, doctrine of pleasure¹⁴ and sometimes as victim blaming¹⁵, penal couple¹⁶ and victim precipitation¹⁷. These defences are not just irrational and unappealable to the common prudent mind but are also against the foundational basis of compensatory jurisprudence.

The defence Doctrine of Sovereign Immunity is a common law doctrine based on the Latin maxim “*rex non potest peccare*” meaning “king can do no wrong”. Prior to the Constitution, 1950 the sovereign was enjoying absolute immunity. With the adoption of Constitution in 1950, the long-drawn protection to the sovereign in the name of sovereign immunity was diluted. Article 21 the ‘Right to life and personal liberty’ came forward to address the concern of the common citizenry.

For the first time in the matter of *P&O Steam Navigation Co. v. Secretary of state for India*¹⁸ a distinction was made between sovereign

¹³*Supra* note 4

¹⁴The Latin maxim “*durante bene placito*”, during pleasure was used as defence for not paying compensation for wrong. But, post independent this was not accepted as defence. The case of *State of Bihar v. Abdul Majid*, AIR 1954 SC 245 a government employee who had been fired but later reinstated brought a lawsuit to recover unpaid wages. The doctrine of pleasure was cited by the State as a defense, but the Apex Court rejected it and observed that the grounds doesn’t apply to India.

¹⁵Victim blaming is blaming the victim for the causation of crime/ wrong and holding him responsible for his own victimization. For instance, when victimologists argue that the victim of the offence of rape contributes to the aggravation when she resists, for such resistance is likely to make the offender more violent, and that if she does not resist, she contributes to the offence by being a willing victim.

¹⁶Penal couple theory argues that when crime takes place, it has two partners, one the offender and second the victim, who is providing opportunity to the criminal in committing the crime.

¹⁷Victim precipitation theory proposes that certain actions, behaviours, or characteristics of the victim may initiate or escalate the criminal act. It can be divided into two main types: active precipitation and passive precipitation.

¹⁸(1861) 5 Bom HCR 1 APP.



and non-sovereign function by Justice Peacock¹⁹ to ascertain the fact in what cases sovereign is immune and in what cases it is not. The Court categorically held that 'sovereign functions' are those which can be performed strictly by the government and its officials. The maintenance of the army, government ministries, war, foreign relations, printing of the currency notes, and management of the country falls specifically under the State's sovereign function. The state while performing purely sovereign function is immune but when it comes to non-sovereign function, they are those which if committed by a private person he would have been held liable then if the same act is performed by the government through their servants the state cannot enjoy sovereign immunity and must be held responsible for such wrongful act.

III. Doctrine of Sovereign Immunity: Applicability and Scope of Defence

The position in the case of *P&O Steam Navigation Co. v. Secretary of state for India*²⁰ was settled regarding difference concerning the Sovereign and non-sovereign function. However, significant changes were made in government structure to provide remedy to victims of unlawful acts of the State.²¹ Particularly after the independence, the Law Ministry decided to examine whether or not legislation along the lines of the *Crown Proceedings*

¹⁹Justice Peacock was the first time to difference concerning sovereign function & non-sovereign function of the government according to him sovereign functions are those which the government alone and no one else can perform which cannot be allowed to perform by the private individuals for example; war, foreign relations, printing of the currency notes, acquisitions of the territory etc. are those means the government alone can perform and no private person can be assigned to perform them. But if the nature of the act is such that if it is committed by a private person he would have been held liable then if the same act is performed by the government through their servants there is no reason why they should not be held liable. In other words, such act being non sovereign function the government will be held liable for the injuries resulting therefrom.

²⁰*Supra* note 18

²¹This was done by adopting Government of India Act, 1935 and particularly Section 176(1), which provided that the Federation may sue or be sued by the name of Federation of India. A Provincial government may sue or be sued by the name of the province. Section further provides that without prejudice to the subsequent provisions of this chapter may, subject to any provisions made by the law (ACT) of the Federal or a Provincial Legislature legislated by virtue of power conferred to that legislature. The Constitution of India, in its Article 300 states same provision. Art. 300 allows that the Government of India may sue or be sued in the name of the Union of India. Similarly, the Government of a State may sue or be sued in the name of the State.



Act of 1947 of UK²² is necessary and, if so, to what extent. The Law Ministry forwarded the subject to the First Law Commission for consideration and recommendation.²³ The report of the first Law Commission categorically suggested that State's accountability would no longer be determined by using the outdated difference between 'sovereign' and 'non-sovereign' functions, or between 'governmental' and 'non-governmental' functions.

However, in absence of the proper legislation, the Courts had a tremendous amount of responsibility to construct the law through its judicial precedents. In the case of *State of Rajasthan v. Vidhyawati*²⁴, a case involving a compensation claim by the widow of a person who was fatally struck down by a jeep owned and maintained by the State. The State pleaded sovereign immunity. The court, held that the State will be liable like a general employer for wrongful acts of its agents committed during the discharge of function and it stems from Article 300 of the Indian Constitution.²⁵

²²The Crown Proceedings Act, 1947 dealt with sovereign immunity in UK. As per this Act, no case could be brought against sovereign.

²³First Report of The Law commission of India on "Liability of State in Tort" submitted on May 11, 1956. Chapter VIII contains the conclusions and recommendations. The recommendations and suggestions were-

- i. that it's crucial to develop a fair relationship between an individual's rights and the state's obligations in the framework of a welfare state;
- ii. that the subject of whether the Union and the States should be held accountable for the tortious acts of their servants or agents was left for future legislation when the Constitution was drafted;
- iii. that it is vital to make the law as certain and definite as possible, rather than leaving it to courts to evolve the law based on the judges' opinions; and
- iv. that the State's accountability should no longer be determined by using the outdated difference between 'sovereign' and 'non-sovereign' functions, or between 'governmental' and 'non-governmental' functions.

Also see: Paragraph 66 of the Report of the Law Commission outlined the guidelines for how suitable law should be developed. A bill titled as the "*Government (Liability in Torts) Bill*" was laid in the house in 1965 and 1967 respectively based on the First Report of the Law Commission, but the Bill was never got the shape of the Law.

²⁴1962 AIR 933.

²⁵The Supreme Court also stated that "*when the rule of immunity in favour of the Crown, based on common law in the United Kingdom, has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution.*" The Supreme Court in *Vidhyawati* categorically observed, This case also meets the second branch of the argument that the State cannot be liable for the tortious acts of its servants, when such servants are concerned with an activity connected to the affairs of the State.



However, this view was diluted in *Kasturi Lal v. The State of Uttar Pradesh*²⁶ where the Court retracted from its earlier stand and held, the act which is tortious in nature committed by the government officials in exercise of statutory functions as a result of delegation of the sovereign powers, the action for compensation for loss by such tortious act will not lie, and if the tortious act has been committed by a government official in exercise of duties not assigned to him by virtue of the delegation of any sovereign power, an action for damages would lie.²⁷

Decisively, in *N. Nagendra Rao & Company v. State of Andhra Pradesh*²⁸, the Apex Court settled all the propositions to its finality. Court observed that the concept of sovereign immunity has lost its place in the present Indian Constitution. The state has shifted from the state having rights and power to the state having duties and responsibilities. Moreover, the function of the state has now become diversified therefore, the extreme degree of freedom of action and protection in the name of sovereign immunity cannot be allowed.²⁹

²⁶*Kasturi Lal Ralia v. The State of Uttar Pradesh*, 1965 SCR (1) 375. In this case, a partner of a bullion-dealing firm was carrying gold and silver which were seized by the police. The partner was later released, but the Head Constable who arrested him misappropriated the gold and went away to Pakistan in 1947. The suit instituted by Kasturi Lal for recovery of the gold's value was resisted by state as it was not a case of negligence on part of the State's servants. Moreover, if negligence was proved against the police officers the state could not be held liable.

²⁷Here the Court upheld that, "*if a tortious act is committed by a government servant and it gives rise to a claim for damages, the question for us is to ask was the tortious act committed by such servant in discharge of statutory functions, and are they ultimately based on the delegation of the sovereign powers of the State to such government servant? If the answer is in the affirmative, the action for compensation for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in performing duties assigned to him not by virtue of the delegation of any sovereign power, compensatory action may be taken.*"

²⁸(1994) 6 SCC 205. Here the appellant was conducting legitimate commerce in fertilizers and food grains. Under the Essential Commodities Act, his premises were investigated and commodities seized. On June 29, 1976, the proceedings were concluded in his favour, and the confiscation order was annulled. The Collector ordered the items to be released, but subordinates delayed it, causing the products to rot and decay in quality and quantity. The Appellant then requested compensation, which was rejected, so he filed a lawsuit, and the State claimed sovereign immunity.

²⁹In this case the Court limited the expansion of sovereign immunity by declaring that the state can claim immunity only in the matter of administration of justice, maintenance of law and order and reparation of crime.



Thus, at present the position is very clear, if a tortious wrong is committed and it does involve the violation of fundamental rights even for the performance of sovereign function or where the act was resultant from the performance of ‘non-sovereign function’, the defence of sovereign immunity can’t be pleaded. But, the question of whether the doctrine of sovereign immunity applies or not should be determined by the nature of the rights violated rather than the type of remedy.

IV. The Distinction between Private Law remedy and Public Law Remedy

Public law serves to both civilized public power and provide citizens with the assurance that they are subject to a legal system that works to uphold their rights and safeguard their interests³⁰. Therefore, when the Court grants compensation under Article 32 or 226 of the Constitution of India requiring the enforcement of fundamental rights, so done under the public law by punishing the wrongdoer and placing responsibility for the public wrong on the State that has disregarded its obligation to protect the citizens’ very fundamental rights.³¹

The distinction between a public law remedy and a private law remedy is that a public law remedy allows for the use of sovereign immunity as a defense, whereas a private law remedy does not. Constitutional law serves to civilize governmental authority in addition to providing citizens with the assurance that they are subject to a legal system that works to uphold their rights and safeguard their interests.

Unlike private law actions, public law proceedings have a distinct goal in mind. The order for monetary relief granted by the Apex Court under Art. 32 and by the HCs under Art. 226 of the Indian Constitution is via the prerogative writs. These writs are the main source of the public law procedures. The Courts have authority under public law to award damages for violations of Article 21. Its purpose is to punish the perpetrator and place

³⁰Prakash Chandra Mishra, Victim Compensation Scheme: An Aspect of Modern Criminology (2014) Cri. L. J. 138.

³¹Articles 32 or 226 of Indian Constitution, which grant wide power to higher courts to protect the fundamental right. The public law/ constitutional law proceeding serves some other purpose than a private law proceeding. The relief is of monetary compensation or an exemplary damage, in proceeding under Art. 32 by Supreme Court or under Art. 226 by the High Court, for establishing infringement of the right guaranteed under Art. 21.



responsibility for the public wrong on the state for failing to uphold its obligation to defend citizens' basic rights.

The Supreme Court has judicially developed the Constitutional remedy through the imposition of judicial conscience, despite the fact that there is no clear constitutional provision for the award of compensation when the right to life is violated. In order to maintain and defend the rule of law, it is the only feasible way to enforce fundamental rights.³²

V. Judicial Response on Abuse of Power: Exploring Dimensions of Constitutional Tort in India

The Indian Constitution, enunciates no specific provision for victims. However, Part IV, Directive Principle of State Policy and Part V, Fundamental Duties³³ lay down the duty of the state to protect the right of public assistance in cases of impairment and in other cases of undeserved want³⁴ and to have compassion for living creatures³⁵ and to develop humanism³⁶ respectively.

The Apex Court is continuously evolving the idea regarding 'dynamic constitutional jurisprudence' with the help of Article 21. The question, however, is whether the Court can Award compensation to one who may have unduly underwent detention or bodily harm at the hands of the employees of the state and whether the victim can move a writ petition for this purpose rather than taking recourse to an ordinary civil suit in matters of constitutional tort.³⁷

In *Kaushal Kishor v. State of Uttar Pradesh*³⁸ observed, “A constitutional tort is a violation of one’s constitutional rights, particularly fundamental rights, by an agent of the government, acting in his/her official capacity. The alleged constitutional violation creates a cause of action that is distinct from any other available state tort remedy. It

³²Sharita Sharma, *Tortious Liability of Government in India: Evolution of Judicial Doctrine and Emerging Trends*, PhD Thesis, Department of Law, University of North Bengal, 2018, at pages 35-60.

³³Article 51A of the Constitution of India - Fundamental duties.

³⁴Article 41- Right to work, to education and to public assistance in certain cases – The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

³⁵The Constitution of India, Art. 51A (g).

³⁶The Constitution of India, Art. 51A (h).

³⁷MP Jain, *Indian Constitutional Law 1331* (Lexis Nexis, 9th edition, 2025).

³⁸(2023) 4 SCC 1.



however, carries with it, the essential element of tort law, which seeks to redress a harm or injury by awarding monetary compensation by a competent court of law.”³⁹

The principle of Constitutional tort has been conceived in *Nilabati Bahera v. State of Orissa*⁴⁰ where Court provided unliquidated damages in monetary terms which led to emergence of compensatory jurisprudence through judicial mechanism.⁴¹

The aspect of Constitutional tort’ is particularly dealing with Article 21 of the constitution. Expression ‘*procedure established by law*’ in Article 21 has been judicially the construed as meaning a procedure which is reasonable, fair and just.⁴² The liberal interpretation of Article 21 amounting to judicial activism paved the path to ensure that there is no abuse of power or negligence on the part of organs of the State or any other authority and if so happens the victim gets proper remedies under Article 32 and Article 226 under writ jurisdiction.

However, there has been no specific provisions of providing remedies in the form of compensation in the Constitution. But the Supreme Court considered that in certain cases compensation is the only form of remedy available and suitable for rehabilitation of victims. The Court invoked power granted to it under Article 32(2)⁴³ and ordered monetary compensation in cases of gross violation of indefeasible rights under Part III of the Indian Constitution.

The compensatory jurisprudence has gained global acknowledgement with the adoption of *United Nations Declaration of Basis Principles of Justice for Victims of Crime and Abuse of Power 1985*.⁴⁴ The said declaration

³⁹Para 47 of the judgement in *Kaushal Kishor v. State of UP*, (2023) 4 SCC 1.

⁴⁰(1993) 2 SCC 746.

⁴¹In case of *Nilabati Bahera v. State of Orissa*, the Apex Court’s division bench made distinction between public Law remedy (Constitutional remedy) and Private Law remedy (Civil Law remedy) created an abnormal scenario. In the decision, the Court stated that awarding compensation under Art. 32 and Art. 226 was a remedy available under public law and that the principle of immunity to sovereign did not apply to it, whereas it may be available as a defence in private law tort suit.

⁴²*Post Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

⁴³The Constitution of India, Art. 32(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.*”

⁴⁴Resolutions adopted on the reports of the Third Committee, 96th plenary meeting 29 November 1985, 40/34. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985.



devotes Article 18 and 19 about Victim of abuse of power and their redressal.⁴⁵ Further, the declaration seeks its member states to assimilate their municipal law with the provisions of the declaration aiming to positively address the victim concerns. The declaration in its Article 12 and 13 titled as ‘Compensation’⁴⁶ urges the member states to opt for State sponsored compensation model in their respective national laws.

The Declaration, 1985 is not complied in its essence when it comes to victims of abuse of power resulting from the arbitrary state action which amount to substantial impairment of Fundamental Rights. The victims are still at the mercy of the state for their rehabilitation and compensation. There is only Constitutional framework, particularly Article 21 that comes to their rescue by providing compensation in case of misuse and abuse of power by state agencies and instrumentalities.

*Post Maneka Gandhi*⁴⁷ development wide opened an expansive regime of compensatory jurisprudence in India. The Supreme Court is reading different dimensions and facets of rights in Article 21. This Compensatory approach of the Court for the substantial impairment of fundamental rights may be explained in following heads: -

⁴⁵ Victim of abuse of power (Art. 18 and 19).

Art. 18 – “Victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.

Art. 19 – States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.

⁴⁶ “Article 12 – *When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to: (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; (b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimisation.*

Article 13 – *The establishment, strengthening and expansion of national fund, for compensation to victims should be encouraged. Where appropriate other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.*”

⁴⁷Supra note 42.



A. Police Torture/ Custodial Death

There has been increase in instances of custodial violence or torture attributed to misuse of police machinery by those at the helm of affairs to settle to settle personal scores.⁴⁸ In *Francis Coralie Mullin v. Union Territory of Delhi*⁴⁹, the court condemned cruelty or torture as being violative of Art. 21.⁵⁰

The issue of compensation for unnatural deaths in custody is no longer *res integra*⁵¹. In *Sheela Barse v State of Maharashtra*⁵², it was directed to ensure protection against torture and maltreatment of women in police lock-up. For example, there should be separate lock-ups for female suspects guarded by female constables; interrogation of females should be carried out only in the presence of female constables.⁵³

In the matter of *Nilabati Behera v. State of Orissa*⁵⁴ the person was taken into police custody for investigation relating to theft. He was found dead near a railway track the next day. On the basis of injuries suffered during custody and the handcuffs on his wrists, the Court concluded that this is a clear case of custodial death and compensation was a due measure under Art. 32.⁵⁵

An unnatural death in judicial custody was the subject matter of discussion in *Kewal Pati v. State of Bihar*⁵⁶ where a person was killed by another co-prisoner. It was held that just because a convict is imprisoned, the prisoner does not cease to have constitutional rights. He or she may be only deprived

⁴⁸Munshi Singh Gautam v. State of M.P., (2005) 9 SCC 631; AIR 2005 SC 402.

⁴⁹Francis Coralie Mullin v. Union Territory of Delhi, AIR 1981 SC 746; (1981) 1 SCC 608.

⁵⁰The Court observed, no law which authorises and no procedure prescribed by law, which leads to such torture or cruel, inhuman or degrading element can ever stand the test of reasonableness and non-arbitrariness.

⁵¹*Res integra* is a Latin term meaning “an entire thing” or “untouched matter”.

⁵²Sheela Barse v. State of Maharashtra, AIR 1986 SC 1773; (1986) 3 SCC 596.

⁵³*Supra* note 37 at page 1321.

⁵⁴(1993) 2 SCC 746.

⁵⁵It was held that a constitutional law remedy is always available to claim compensation for the contravention of human rights elevated to the status of fundamental rights which are protected as a guarantee by our Constitution. A reference was also made by the Court to Article 9(5) of the International Covenant on Civil and Political Rights, 1966 which allowed anyone who has been the victim of unlawful arrest or detention to mandatorily have an enforceable right to compensation.

⁵⁶(1995) 3 SCC 600.



of them in accordance with law. Therefore, even a prisoner is entitled to protection. On being killed while in prison, it results in a deprivation of his life contrary to the law, for which the next of kin are entitled to compensation.

One of the very earliest cases where the Apex Court went on to give compensation in a petition under Art. 32 of the Constitution is *Rudul Shah v. State of Bihar*⁵⁷. This Court took the view that the refusal to order for compensation would be doing nothing more than a mere lip service to the fundamental right of liberty available to petitioner under Art. 21 of the Constitution which the State Government has completely violated.⁵⁸

*Ajab Singh v. State of Uttarpradesh*⁵⁹ and *Rohtas Kumar v. State of Haryana*⁶⁰ highlight that custodial death is patent violation of the prisoner's rights under Art. 21 of the Constitution. The relief could be moulded by granting compensation to the next of kin of the deceased.

A little later, Hon'ble Supreme Court in *Sebastian Hongray v. Union of India & Ors.*⁶¹ concerned itself with the disappearance of some persons while in custody⁶². The Court was convinced that the two missing persons had actually met a tragic end in an encounter amounting to an unnatural death. The Court ordered the registration of an offence and an investigation against the guilty officials. The Court also directed the payment of compensation to the next of kin.

In the recent case of, *In Re Suo Moto Custodial Violence and other matter relating to prison conditions v. State of Meghalaya & others*⁶³, the *suo moto* PIL was initiated pursuant to a direction issued by the Supreme Court in the judgement reported at (2017) 10 SCC 658 *Re Inhuman Condition in 1382 Prisons*. The present case was relating to death due to custodial

⁵⁷AIR 1983 SC 1086.

⁵⁸This case dealt with the issue of illegal detention even after acquittal in a full-fledged trial. The Supreme Court rejected the stale and sterile objection of the State Government and held that the petitioner was entitled to compensation for the illegal detention. The court also observed that "if civilization is not to perish in this country as it has perished in some others, it is necessary to educate ourselves in accepting that, respect for the rights of individuals is the true bastion of democracy".

⁵⁹AIR 2000 SC 3421.

⁶⁰(2013) 14 SCC 434.

⁶¹AIR 1984 SC 571.

⁶²The Court was convinced that *enabling the respondents to trace or locate the two missing persons at such a late stage would be to shut its eyes to reality and to pursue a mirage.*

⁶³2023 Meghalaya HC, PIL No. 9 of 2017, Date of order: 28.08.2023.



violence and the Court while allowing a compensation of 15 lacks rupees to the next and kin of the victim, categorically observed that the quantum of compensation should be such that it would acts as a deterrent.⁶⁴

B. Illegal Arrest

The occurrences of ruthless police conduct to persons detained on suspicion of committed crimes is routine matter. The Court has taken a very positive stand against police atrocities, illegal arrest and torture. The Court has characterised the same as violation of principle of human dignity. The Supreme Co has ruled that it is a well-recognised right under Article 21 that a person detained lawfully by the police is entitled to be treated with dignity.⁶⁵

In the very landmark decision in *D. K Basu v. State of West Bengal*⁶⁶, the Apex Court laid down mandatory guidelines for police arrests and detentions to prevent custodial torture and deaths. The issue of rising custodial violence triggered the Court to rule that such acts violate Art. 21 and 22 of the Constitution. The Court in addition to the Constitutional and statutory safeguards, issued a list of guidelines to be followed in all cases of arrest and detention.⁶⁷

⁶⁴ The Court observed that a death in custody is a slur on a civilized state and completely unacceptable. Court remarked, “*for custodial deaths the compensation has to be pegged at a level where the state will bleed to make the payment and not what the state is happy to pay off*”.

⁶⁵ *Supra* note 37 at page 1334.

⁶⁶(1997) 1 SCC 416.

⁶⁷ “The Guidelines are as follows:

1. The officers who make the arrest and handle the arrestee’s interrogation should wear accurate, visible, and legible identification and name tags with their designations.
2. At the time of the arrest, the police officer carrying out the arrest must file an arrest memo including the time and date of the arrest, which must be attested by at least one witness and countersigned by the arrestee.
3. A person who has been arrested or detained has the right to have one friend, relative, or another person informed that he has been arrested.
4. As soon as he is placed under arrest or detained, the person arrested must be informed of his right to have someone notified of his arrest or detention.
5. An entry must be made in the diary of police station about the arrest of the suspect, and details of the police officers in charge of the arrestee.
6. If the arrestee demands it, he should be checked at the time of his arrest, and any major or minor injuries found on his/her body should be reported at that time.
7. During his detention in custody, the arrestee should be examined by a qualified doctor every 48 hours.
8. Copies of all documents including the arrest memo referred be sent to the local Magistrate for his record.
9. During interrogation the arrestee might be allowed assistance of counsel, but not during the process of interrogation.
10. A police control room should be installed at all district and state headquarters, where information about the arrest and the arrestee’s place of detention should be conveyed by the officer who made the arrest within 12 hours of the arrest.”



In the matter of *Dr. Rini Johar & Anr. v. State of M.P. & Ors.*⁶⁸, wherein Justice Dipak Misra and Justice Shiva Kirti Singh penalized police officers for misusing their arrest powers and for holding the petitioner in custody for no cause. This utter disregard for law and personal liberty led to a judgment by the courts in favour of the petitioners and to the granting of a compensation of 10 lacs rupees.

C. Unlawful Incarceration

In *Ankush Maruti Shinde v. State of Maharashtra*⁶⁹, The bench of 3-judges of the Hon'ble Apex Court comprising of Dr. AK Sikri, SA Nazeer and MR Shah, JJ. has acquitted 6 death row convicts and has directed reinvestigation in a crime that was committed in June, 2003. The Court said that there was a grave failure on the part of the investigating agency and therefore, the fundamental rights of the accused guaranteed under Art. 20 and 21 of the Constitution of India have been violated. The Court directed the Maharashtra government to pay a sum of Rs. 5,00,000/- to each person by way of compensation.

In the case of *Chandanji @ Gato Chhahaji Thakor v. State of Gujarat*⁷⁰, the Gujarat High Court had already released the applicant on regular bail but despite that the applicant was incarcerated in jail for 3 years due to negligence of jail authorities failing to comply with the bail order of the High Court. Considering the plight of the applicant, the Court granted compensation for his illegal incarceration in the jail for almost three years. The Court held that in the interest of Justice and in order to see that the applicant is appropriately compensated for the negligence of jail authorities, the Court directed the state to grant him a compensation of 1 lakh rupees and the same required be paid to him within 14 days.

In the recent case of *Ramkirat Munilal Goud v. State of Maharashtra & Ors.*⁷¹, the Apex Court of India has recently issued notice for State intervention, wherein three petitioners who were acquitted by it in May 2025 after being on death row have sought compensation for their wrongful conviction, along with twelve years of incarceration. The writ petition⁷², filed under Article

⁶⁸(2016) 11 SCC 703; AIR 2016 SC(CRI) 1025.

⁶⁹AIR 2019 SC 1457, decided on 5th March, 2019.

⁷⁰2023 SC, Date of order: 22.09.2023, Criminal Misc. Application (For Regular Bail) No. 2 of 2023 In R/Criminal Appeal No. 424 of 2020.

⁷¹2025 INSC 702.

⁷²The petition states that he was falsely accused, illegally arrested, and subjected to a tainted investigation and unfair prosecution. His life, reputation, and family have been destroyed.



32, contends that Goud's wrongful conviction and incarceration amounted to a grave violation of his fundamental rights.

The Judicial attitude towards construction of right to personal liberty under Art. 21 has moved from restricted interpretation to the broader interpretation. In the light of the interpretation of Art. 21 by the Indian courts, relevant and coherent approach of compensatory jurisprudence is not only the challenging task of the day but is also in consonance with the constitutional spirit.⁷³

VI. Compensation to Crime Victims

The expansive scope of Art. 21 is not merely limited to providing compensation where the State or its functionaries are guilty of an act or omission. It is also interpreted to rehabilitate the victim or his family where crime is committed by an individual without any role of the State functionary. In the case of *Bijoy @ Guddu Das v. the State of West Bengal*⁷⁴, the Court observed, the philosophy of awarding compensation by the State is in the nature of a reparation to the victim of crime on its failure to discharge its sovereign duty to protect and preserve sanctity and safety of the individual from the ravages of such crime.

Despite the concept of compensating the victim by way of public law remedy under writ jurisdiction, need was felt for incorporation of a specific statutory provision for compensation by criminal justice system. The compensatory jurisprudence with regard to victims of crime per se is dealt under Section 395⁷⁵ and 396⁷⁶ of the *Bharatiya Nagarik Suraksha Sanhita* (BNSS). The Legislative framework as governed by the said statute is also guided by the directions of the Apex Court in numerous matters.

For instance, *Swarn Singh v. State of Punjab*⁷⁷, The Court held that Section 357(3) of the Code⁷⁸ enables to pay Compensation out of the fine that would have been imposed under the law. In those cases where the Court imposes a sentence, of which fine does not form a part, the Court may direct

⁷³Sanjay Sindhu, New Dimensions of Compensatory Jurisprudence in India: A Critical Analysis of Judicial Decisions, <http://hdl.handle.net/10603/127849>, last visited 15th January, 2026.

⁷⁴Calcutta HC, decided on 2 March, 2017.

⁷⁵BNSS, S.395 - Order to pay compensation.

⁷⁶BNSS, S.396 – Victim compensation scheme.

⁷⁷AIR 1978 SC 1525.

⁷⁸Now BNSS, S.395(3).



the accused to pay compensation.⁷⁹ The Apex Court in *Hari Singh v. Sukbir Singh*⁸⁰, held that the power of the Courts to award compensation under Section 357 is not ancillary but in addition to other sentences. The Court remarked that courts have seldom invoked S. 357 CrPC perhaps due to the ignorance of the object behind it. The said S. 357 is intended to assure the victim that he was never a forgotten entity in the administration of criminal justice.⁸¹

In the case of *Suresh v. State of Haryana*⁸², the court awarded the victim with an interim compensation and the state was also ordered to provide a compensation to the victim's family of 10 lakh rupees who were abducted and then killed.

Three Judge Bench of the Delhi High Court of Delhi in *Karan v. State NCT of Delhi*⁸³, The Delhi High Court, has devised a formula of Victim Impact Report to determine the quantum of compensation to the victim in conjunction with the paying capacity of the accused. The Victim Impact Report is to be filed by the Delhi State Legal Services Authority (DSLSA)

⁷⁹ Here the apex court held that while awarding compensation court should first determine whether it is a fit case for awarding the same. If it is found that compensation may be awarded, the court should consider whether the accused is capable of paying the compensation, as otherwise it would not serve any purpose. Court also held that while awarding compensation under Sec 357 several factors like the nature of offence, capacity of the accused, justness of the claims of the victim etc. and other relevant factors must be taken into consideration and has laid down that the amount of fine out of which compensation is to be paid shall not be excessive.

⁸⁰(1988)4 SCC 551.

⁸¹The court recommended that the power of the courts to award compensation this section be exercised in each case to bring victim and accused to justice.

⁸²(2015) 2 SCC 227; 2014 AIR SCW 6810, the Court set out the following directions in this particular case:

- i. The Courts must adequately determine problems such as the proper identity of the victim and the immediate financial circumstance and conditions of the victim.
- ii. If the Courts are satisfied, they must award compensation on a temporary basis while the final decision remains pending.
- iii. It is obligatory on the part of the Court to comply with the rules on compensation and to register their reasons, regardless of the decision taken.
- iv. The financial requirements of the victim and the gravity of the case in question can be the deciding factors for such awards. Additional variables may also have a role to play in deciding the damages.

⁸³ 2020 SCC Online Del 775.



in each criminal case on conducting a summary inquiry. The Court in this case came up with functional guidelines.⁸⁴

In matter of *Bodhisattwa Gautam v. Subhra Chakraborty*⁸⁵, the Court observed that compensation to victim shall be justified even if the accused was not convicted. It emphasized on the right of the Court to award interim compensation. The payment of interim compensation would prevent undue delay in delivery of justice to victim. The court in the present case on having been satisfied about the prima facie culpability of the accused, ordered him to pay a sum of Rs.1000 every month to the victim as interim compensation along with arrears of compensation from the date of the complaint.⁸⁶

In *Laxmi v. Union of India*⁸⁷, the Supreme Court in its order dated 18.7.2013 directed that the acid attack victims shall be paid compensation of at least Rs.3 lakhs by the concerned State Government/ Union Territory as after care and rehabilitation cost. The court ordered that the compensation deciding authority in cases of acid attack victim, shall be Criminal Injury Compensation Board which must be inclusive of Ld. District & Sessions Judge, DM, SP, Civil Surgeon/CMO of the district having jurisdiction.

In *Parivartan Kendra and Anr. v. Union of India and Ors.*⁸⁸, the SC observed that the State and Union Territory concerned can give even

⁸⁴After the conviction of the accused, the trial Court shall direct the accused to file the affidavit of his assets and income within 10 of crime on the victim, the expenses incurred on prosecution as well as the paying capacity of the accused. A summary inquiry is conducted to ascertain the impact the capacity to pay the compensation or the compensation awarded against the accused is not adequate for the rehabilitation of the victim, the Court shall invoke Section 357-A of the CrPC to recommend the case to DSLSA to award compensation from the Victim Compensation Fund under the Delhi Victims Compensation Scheme, 2018.

⁸⁵AIR 1996 SC 922.

⁸⁶The Supreme Court observed, “*Rape is not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushed her into deep emotional crises. It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim’s most cherished of the fundamental rights, namely, the right to life contained in Article 21.*”

⁸⁷AIR 2015 SC 3662.

⁸⁸Decided on 7.12.2015, Writ Petition (Civil) No. 867 of 2013.



more amount of compensation than Rs.3.00,000/- as was directed in Laxmi's case.⁸⁹

The Supreme Court in *Nipun Saxena & Anr. v. Union of India & Ors.*⁹⁰ directed to prepare Model scheme for Victim Compensation where case deals with sexual offence and acid attacks. Accordingly, the compensatory scheme was prepared and presented before the Hon'ble Bench of the Supreme Court which was pleased and accepted the Scheme. The Court directed all the State and UTs to implement the same in their respective States/UTs.

Therefore, the Courts while considering the problem of penology should not overlook the plight of victimology. The idea of victim compensation scheme under the BNSS is complete and ideal on principle, however, the courts have bounded duty to pass orders for compensation, based on the facts and circumstances of every particular case. Once the order for compensation is ordered, the duty shifts onto the bureaucracy, for dispersal of compensation to victims.

VII. Conclusion and Suggestions

It is but natural that the notion of indefinable rights as enshrined under part III of the Indian Constitution would become meaningless, unless the Constitution is interpreted as requiring some affirmative remedy for their gross violation. If rights are violated, the violation cannot be undone, and often the only practicable and effective mode to redress the victim's suffering is by awarding compensation. The conventional remedies do not meet the ends in several circumstances, and this virtually necessitates compensation.⁹¹

The advent of compensatory jurisprudence in the light of fundamental rights theory is a hopeful sign that the judiciary has undertaken the mission of preserving the right to life and personal liberty, irrespective of the absence of any express constitutional provisions for compensation. Furthermore, a review of judicial response regarding protection of crime victims indicates that the proactive judiciary addressed the victim concerns and widened the arena of compensatory jurisprudence.

⁸⁹An important direction was also given in this case that all the States and Union Territories should consider the plight of such acid attack victims and take appropriate steps with regard to inclusion of their names under the disability list.

⁹⁰Judgment dated 11.12.2018, W.P.(C) No. 565 of 2012

⁹¹Sushila Rao, Constitutional Rights Violations and Compensatory Jurisprudence in India and U.S.A.: Justifications and Critique, 18(1) NATIONAL LAW SCHOOL OF INDIA REVIEW 96 (2006).



Conclusively, it is essential to note that compensatory jurisprudence in India operates with specific restrictions. The amount of compensation awarded remains a challenge, often leading to variations from one case to another. Further, the compensation isn't available in all instances of violations constitutionally protected rights, and the scope of such claims is limited. The unique status accorded to the fundamental rights, which were meant to play a pivotal role in the social revolution envisaged by the Constitution-makers are now meant to merely keep a check on arbitrary state action. These restrictions and nuances make the landscape of constitutional compensation a complex and evolving field within Indian jurisprudence.

In order to overhaul the present compensatory jurisprudence, following suggestions may be incorporated:

1. Inclusion of “Right to Compensation (Art. 32A)” as a new provision in the Constitution of India. This is to mitigate the discretion-based compensation system. There is a compelling need to introduce a distinct ‘Right to Compensation’ in the Constitution.⁹² This Constitutional provision would delineate explicit and well-defined guidelines for awarding compensation.
2. Developing a Scientific Compensation Criterion, the development of a standardized and scientifically sound criterion for determining compensation amounts is essential. This approach would introduce clarity and consistency into the compensation process, ensuring that victims receive compensation in proportion to their losses.
3. Holistic Victim Rehabilitation, the emphasis should shift from not only providing compensation but also to holistic victim rehabilitation. This broader approach should encompass not only financial restitution but also psychosocial support, medical care, and other aspects that facilitate the comprehensive recovery and reintegration of victims of crime.

⁹² Art. 32A - Right to Compensation: “Any violation of fundamental rights mentioned under Part III of the Constitution by the State or its authorities shall lead to enforceable right of compensation from the state by the victim or his dependents”