This paper examines the position regarding Constitutional Torts and payment of compensation for the violation of Constitutional Rights in the U.S.A., in order to provide a comparative framework for contextualising the introduction of the same in India. Further, the paper outlines the policy rationales for waiving governmental immunity, examines the different approaches to governmental liability in the U.S.A., and traces the genesis and fruition of an analogous device in India under Article 32 of the Constitution for redressing victims of State excesses, by examining judicial pronouncements on the same. Finally, it highlights certain persistent doubts raised on a scrutiny of the judicial evolution of compensatory jurisprudence in the area of Constitutional infractions by the State, outlines the inconsistencies in judicial thought, and seeks to provide guidelines to remedy such inconsistencies.

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I. INTRODUCTION

If the plaintiff has a right, "he must of necessity have a means to vindicate and maintain it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."

The world over, a welfare state has been eulogized, resulting in a corresponding expansion of its powers and functions, and greater encroachment into the domain of individual rights. Thus, the extent and scope of action against the state for the imposition of state liability for rights violations is increasing. Furthermore, it is an irrefutable principle of civil and criminal jurisprudence that any individual who infringes the rights of another is to be punished, and monetary compensation is to be granted in certain circumstances when the victim is adversely affected by such infringement. Similarly, the State, which performs its functions through its huge apparatus of employees, is also liable, with few exceptions, to pay monetary compensation, whenever its employees contravene rights, more so in any country governed by the rule of law and democracy. The State is thus liable for its employees' misdemeanors in the area of their administrative functions.

The concrete manifestation of this principle may be seen in the genesis of the "Constitutional Tort" in various jurisdictions, in particular, the U.S. In the American context, and as used in this paper, the term "Constitutional Tort"

3 Pecuniary compensation is a judicially recognised and endorsed mode of enforcing fundamental rights by the courts, as also the right to compensation for victims of unlawful arrest or detention. The two opinions rendered by Verma and Anand, JJ. in Nilabati Behera v. State of Orissa, A.I.R. 1993 S.C. 1960, are unanimous on the aforesaid dicta. See also Srinivas, id. at 168.
4 For the genesis of this principle in the U.S., see generally Christina Whitman, Constitutional Torts, (1986) 79 MICH. L. REV. 5, 6 [hereinafter Whitman, Constitutional Torts].
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encompasses all claims for damages brought against government officials for violating an individual’s federal constitutional rights.

Closer home, this approach is exemplified in the creation of the extraordinary remedy of writ compensation by the Supreme Court, by putting its wide powers under Article 32 to innovative and judicious use. This development must be seen in the context of the excruciatingly slow, complicated, and often unrewarding process, of pursuing a claim in tort in a civil court against the government; and the conservative attitude of the Indian legal system with regard to errors of omission, commission and callousness on the part of the State, “thus breeding and fostering lack of accountability of the public servant.”

It is pertinent to note that in India, even a cursory survey of judicial decisions conclusively establishes that the ambit of writ compensation has thus far, largely been restricted to compensating victims whose guaranteed fundamental rights under Part III of the Constitution, have been infringed, as opposed to the American position, wherein a violation of any constitutional right can give rise to a valid claim for pecuniary redressal. This point is further elaborated upon in this paper. The author further submits that this position must be viewed in the context of 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, and were meant to be a check on arbitrary state action. Furthermore, the remedy of writ compensation is still on relatively new ground in India, whereas the U.S. courts began awarding such a remedy as far as back as in 1961. The rigours of British rule, which resulted in the complete subordination of liberty and civil rights to the whims of the State, reinforced the compulsion to ensure that these entrenched rights were capable of being enforced effectively. Thus a special jurisdiction of the Supreme Court under Article 32 was created,

6 For the scope for the enforcement of Fundamental Rights under Article 32, see 7 Lok Sabha Secretariat, Constituent Assembly Debates 930-955 (Rev. ed. 1999).
8 Patel, supra note 5, at 239.
9 Constitution of India, Article 32:

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 rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or order or 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.
which confers on it the status of “the custodian of the Constitutional Rights and the protector thereof.” What is crucial to note is that this right to approach the Apex Court for the enforcement of fundamental rights is itself a fundamental right.

Given this background, the notion of “fundamental” rights 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 provide a palliative for the victim’s wounds is by way of awarding compensation. As will be elucidated subsequently by the author, the conventional remedies are often found wanting in several circumstances, and this virtually necessitates compensation.

Therefore, this paper seeks to contextualize this dynamic trend in judicial thought in terms of efforts in other jurisdictions to grapple with similar issues, most notably the U.S.A.; to examine its origin and fruition through judicial creativity; and then to reflect on some glaring discrepancies that merit urgent consideration.

II. THE RATIONALE BEHIND ESTABLISHING GOVERNMENT LIABILITY

Traditional tort law recognizes damages as a remedy that affirms rights, provides compensation, promotes deterrence, vindicates the citizens’ reliance on the sacrosanct nature of their rights, and secures corrective justice. Imposing government liability for constitutional violations attempts to advance analogous goals, which include:

a. **Affirming the plaintiff’s rights:** When an individual’s constitutional rights are violated, remedies, such as injunctions can only serve to restrict future constitutional harm. Unless he is paid damages for the past loss he has suffered, his constitutional rights would be meaningless. Compensations paid for past violations, as opposed to writs for *habeas corpus*, etc. (which can be availed of only if the impugned violation is subsisting, and would be futile if awarded after the violation has come to an end), serve to underline the sacred nature of the rights concerned, and the stringent outlook of the judiciary towards any State transgression of the same.

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b. Deterrence of Constitutional violations and the avoidance of over-deterrence: Deterrence is of prime importance in the context of violations of constitutional rights, because the impugned conduct is the very action that the framers of the Constitution sought to avoid. Unlike an injunction or other remedies, damages are a tangible result, which forces the government to transfer funds from the public treasury to the private citizen. This in turn requires either higher taxes or government cost-cutting. In the process, the government, if held accountable through institutional liability, would then take the necessary steps to reduce its liability by selecting more competent employees, by providing them with better and more continuous training, by ensuring more supervision of its employees, and by creating internal disciplinary rules for violators of the Constitution. Simultaneously, as personal liability of the officers is removed, government agents can perform their governmental duties zealously, knowing that any unwitting/unavoidable constitutional infraction will be covered by their employer and not by their paycheck.13

c. Breach of Social Contract: A Constitution is a social contract through which individuals give up certain liberties, in exchange for government-provided community services like enforcement of social norms through criminal law, economic infrastructure, and social stability.14 However, the government also agrees to certain limitations on its authority in the form of constitutional rights.15 Whenever the government breaches this contract on which the people have relied to their detriment, they deserve compensation.16

d. Corrective Justice: The Aristotelian theory of “corrective justice” requires the award of monetary compensation whenever one party ignores the limitations placed upon its behavior with respect to another party.17 In certain cases, when the government oversteps its limitations, the plaintiff suffers loss while the state may realize gains through more efficient policy implementation. The transfer of funds from the wrongdoer to the victim restores the balance.18

e. Responsibility as Principal and Employer: Since the government selects its own agents, trains them, and oversees their employment, the government

15 See J.W. Harris, Legal Philosophies 10-11 (1997).
16 Id.
18 Id.
alone is in the best position to institute the programs necessary to eradicate constitutional violations. Because most constitutional violations are attributable to systemic flaws in the state, it is the state that should face liability in order to facilitate correction of those flaws. By selecting the best employees, by providing them with adequate and continued training, and by disciplining them for their unconstitutional behavior, the government can substantially reduce the number of constitutional torts. Further, it is inconsistent that the government may be liable for the common law torts of its employees but not their constitutional misconduct.

In the U.S.A., it was also felt that the concept of a “Constitutional Tort” implicitly recognizes that constitutional rights and liberties are specific limitations on governments, and must be enforceable. Thus, it naturally follows that the courts must allow the traditional common law remedy, that is, damage suits, not because constitutional rights parallel the interests protected by common law tort actions, but because constitutions are enforceable in their own right.

III. CONTEXTUALIZING CONSTITUTIONAL TORTS IN THE UNITED STATES

The typical constitutional tort involves an individual who was injured because of a government official’s alleged wrongdoing, like an unreasonable search, or custodial rape. It is, thus, hard to precisely determine the difference between constitutional and common law torts. Essentially, constitutional tort law marries the substantive rights granted by the Constitution to the remedial mechanism of tort law. The difference between constitutional torts and a civil action against the government is accentuated by the inapplicability of the common law defence of “sovereign immunity” to constitutional tort. Fundamental rights

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19 Jefferson, supra note 13, at 1558.
21 See generally Jeffries, supra note 17.
22 Jeffries, supra note 17.
are designed to limit the reach of the state, while sovereign immunity would effectively bar the vindication of those rights, when the state transgresses them.\textsuperscript{25}

The U.S. has a written Constitution guaranteeing a Bill of Rights, which contains the Due Process of Law clause. The said clause confers wide powers on the judiciary to provide complete justice, and to order monetary compensation in appropriate cases. Traditionally, however, the Constitution has not been made the basis for affirmative remedies. There has been a strong bias towards nullifying the effect of constitutional violations, as in \textit{Mapp v. Ohio},\textsuperscript{26} wherein it was simply held that evidence gained by the State in contravention of the Fourteenth Amendment could not be used in the courts.

From the mid-twentieth century, courts expanded the range of remedies available for constitutional violations. The constitutional tort action emerged from two Supreme Court judgments, wherein the Supreme Court acknowledged that the common law could not adequately regulate the government's unique power to inflict injuries, and established a system where the Constitution, rather than state common law systems, governs the actions of federal and state officials, which cause injury to individuals.

In \textit{Monroe v. Pape},\textsuperscript{27} the Court held that section 1983\textsuperscript{28} extends to a State official's acts that exceed his authority, creating an avenue for individuals to argue that the Constitution itself regulated State government officials' acts, and the number of section 1983 cases brought to federal courts exploded, as they were not restricted any more to only the State law. It was observed by some


\textsuperscript{26} 367 U.S. 943 (1961).

\textsuperscript{27} 365 U.S. 167 (1961).

\textsuperscript{28} The sweeping language of 42 U.S.C. § 1983 (commonly known as § 1983) provides that:

\begin{quote}
Every person who, under color of any [state law] subjects, or causes to be subjected, any [person] to the deprivation of any [constitutional rights] shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
\end{quote}

The United States Congress enacted § 1983, in 1871, in response to the widespread violence against blacks in the South, and it is the foundation of most suits against state and local government employees to remedy federal law violations.
commentators that this appeared to be the beginning point of the evolution of the concept of “Constitutional Tort.”

In 1971, in the landmark case of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, the American Supreme Court held that the violation of the Fourth Amendment could be made the basis of a civil suit against erring federal officers. This filled the remedial gap created after Monroe, for individuals wishing to bring suits for the misconduct of federal officials. Harlan, J., in a famous statement, said:

For people in Bivens’ shoes, it is damages or nothing.

Thus, the American Bill of Rights is a constitutional limitation, powerful enough to be directly made the basis of an action for damages, without awaiting legislative authorization. There is no reason why the same should not hold true for fundamental rights in the Indian Constitution.

IV. TRACING THE EVOLUTION OF WRIT COMPENSATION IN INDIA

A. The Pertinent Constitutional Framework

Article 32 of the Constitution provides for the enforcement of fundamental rights by the Supreme Court. Enforcement literally connotes “compelling the

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30 Bivens, supra note 25, where six federal agents entered the appellant’s residence at night, arrested, manhandled and searched him, and repeated the same at their headquarters. The Court felt that in the absence of effective alternative remedies, the Fourth Amendment could directly be made the basis of an action for damages without waiting for a legislative mandate. Thus, the Supreme Court sanctioned an affirmative remedy based directly on the Constitution.

31 In India, on the other hand, given the unique position of the fundamental rights, petitions seeking their enforcement are filed directly, in the form of writs in the higher courts, instead of civil suits.

32 Bivens, supra note 25, at 410. In his judgement, Harlan, J., explained the propriety of awarding damages for violation of a constitutionally protected interest. He stated that if the court is competent to select remedies for statutory and common-law policies, it is also competent to do the same for constitutional violations. Further, he asserted the value of deterrence.
observance of law.” Thus, this appears to include not only the redressal of particular violations, but also ensuring that rights are not violated with impunity in the future. The Constitution has expressly placed this responsibility on the Supreme Court, and the Court is the “sole arbiter” of the appropriateness of the relief that may be granted.

Conventionally under Article 32, there was not much scope for the award of positive, dynamic relief, even in cases where traditional methods of relief through writs would be wholly inadequate in actualizing the objectives of Part III. It is submitted, however, that a plain construction of Article 32 does not justify this narrow view. The Article specifically sanctions the passing of directions or orders independent of the mentioned writs. There is powerful support for the proposition that under Article 32(2), the Court may issue any direction or orders whatsoever, provided, that they are “appropriate” for the enforcement of rights. The manner in which this position was indubitably established by the Court may be seen through a series of cases, which document the shift from an initially hesitant approach, to an assertive, rights-oriented one.

B. Judicial Trends

(i) The Diffident Initial Pronouncements

The first case in which the Supreme Court confronted the compensation quandary was Khatri v. State of Bihar. The petitioners in the case had been blinded in police custody and demanded compensation for violation of their right to life under Article 21. Bhagwati, J. observed that the Court ought to be prepared to forge new tools and devise new remedies for vindicating the fundamental right to life and personal liberty. Without expounding the law on the point, however, the Court ordered the government to meet the expenses of housing these men in a blind home in Delhi, as an interim measure.

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37 Id. at 930. A disturbing contention of the State was that, the errant officers had acted without the authority of law, and the State was thus immune from liability. The Court rightly rejected this argument, on reasoning similar to the U.S. Supreme Court’s decision in Monroe’s case, where it gave a broad definition to “under the color of law.”
Similarly in Sant Bir v. State of Bihar,\textsuperscript{38} where a criminal lunatic was detained unlawfully in prison for sixteen years after regaining sanity, Bhagwati, J. did not rule out the possibility of compensation for State excesses. However, no final decision was given on this point. In Veena Sethi v. State of Bihar,\textsuperscript{39} however, Bhagwati, J. chose to remain silent on the issue of whether damages are permissible for illegal detention.

Hence, it is evident that while the judiciary was cognizant of the need for innovative and effective mechanisms for shielding life and liberty of individuals from State atrocities, it was reluctant at this stage, to award damages for the violation of fundamental rights.

**(ii) Breakthrough Decisions: Ambivalent Justifications**

The breakthrough was achieved in Devaki Nanda v. State of Bihar.\textsuperscript{40} Here, the petitioner's pension had been delayed for twelve years. Without much discussion in the judgment, "exemplary costs" were awarded to the petitioner for "intentional, deliberate and motivated" harassment of the petitioner, though no specific rights violation was cited.

In the same year, the precedent-setting case of Rudul Sah v. State of Bihar,\textsuperscript{41} was decided. Here the petitioner, who had been acquitted by the Court of Sessions, but not released from prison for fourteen years, presented a habeas corpus petition, wherein he also sought certain ancillary remedies like rehabilitation, reimbursement of expenses for medical treatment, and compensation for illegal incarceration. Since the petitioner was released before the actual hearing of the petition, the mere issuance of a writ of habeas corpus would have been futile. Under the conventional approach, the only remedy would have been to file a suit to recover damages from the Government, but the difficulties of filing such a suit were immense. The Court felt that if it refused to pass an order for compensation,

\textsuperscript{38} A.I.R. 1982 S.C. 1470.

\textsuperscript{39} (1982) 2 S.C.C. 583.

\textsuperscript{40} A.I.R. 1983 S.C. 1134.

\textsuperscript{41} A.I.R. 1983 S.C. 1086. While this case is often celebrated as the one wherein compensation was awarded for the first time in India for government lawlessness, it was actually the famous Jallianwala Bagh case in 1919, in which the Hunter Commission held that the shooting was unjustified and, in an unprecedented move, awarded Rs. 2000 each to the relatives of those who were killed. See P. Srikrishna Rao, Custodial Deaths in India, (1994) 6 N.L.S.J. 42, 56.
it would be doing only lip service to the fundamental right to liberty, and accordingly ordered the Government to pay the petitioner a sum of Rs. 30,000.

A two-track approach is discernible in this case. While on the one hand the Court wished to afford some “palliative” in the form of a right to compensation, simultaneously it desired to penalize for their unlawful acts “those instrumentalities which act in the name of the public interest.” The exact jurisprudential basis for the award of monetary relief was therefore not clarified.

The path-breaking pronouncement in *Rudul Sah* was greeted with both bouquets and brickbats. The judgment was welcomed as the Court had rightly tried to punish an inert and callous executive, and tried to enforce conformity with constitutional prescriptions. However, the irresolute nature of the judgment was apparent. The rationale for awarding “damages” in *Rudul* as opposed to “exemplary costs” in *Devaki* was not explained, and the Court had explicitly termed the award a mere “palliative”, though the author feels that the tone and tenor of the judgment, culminating in the award of monetary relief, seemed to be building up a case for the grant of “compensation.” Further, the Court was not prepared to hold that Article 32 *per se* allows for compensation in all cases of fundamental rights violations. Chadrachud, C.J. made a further qualification. He observed that if the case had involved disputed questions of fact, then the Court would have been constrained to direct the petitioner to approach the civil court. *Rudul Sah* was indeed a commendable though ambivalent beginning, and in several subsequent cases, its ratio was affirmed and expanded by the Court.

The jurisprudential ambivalence of the Court was again apparent in *Sebastian Hongray v. Union of India*, where a writ of *habeas corpus* was issued.

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42 Id. at 1089.
43 This has to be seen in the context of the judicial activism that gripped the judiciary in the mid-seventies. The Supreme Court, which had generally been a conservative, tradition-bound institution, became sensitive to the needs of the weaker sections. See further N. Santosh Hegde, *Public Interest Litigation and the Control of the Government*, (1992) 4 STUD. ADV. 1.
44 *Rudul Sah*, supra note 41, at 1089.
45 As a response to this ruling, various eminent lawyers further raised the pertinent contention that Article 32 itself was also not bereft of difficulties. The Court, under Article 32, had to resolve disputed questions of fact before awarding damages, and this would change the complexion of writ jurisdiction. See P.K. Tripathi et al., *Article 32 and the Compensation Conundrum*, (1984) 2 S.C.C. (J) 51, 53.
46 *Rudul Sah*, supra note 41, at 1089.
for the release of two men in army custody, but never executed. The Court ordered the payment of "exemplary costs"\textsuperscript{48} to their wives (as the men were dead by that time). The Court was obviously still not completely at ease with the budding remedy of compensation, since it used the term "exemplary costs", when in fact it appeared that the payment was awarded in view of the torture, agony and mental oppression which the wives of the deceased had to undergo, and was more akin to the concept of "damages" or "compensation." Hence the jurisprudential basis for the award of the "damages" was still unclear.

(iii) Further Developments

In \textit{Bhim Singh v. Jammu and Kashmir},\textsuperscript{49} the Supreme Court finally averred that it had "the right to award monetary compensation by way of exemplary costs or otherwise."\textsuperscript{50} In this case, which involved a writ of \textit{habeas corpus}, the Court followed \textit{Rudul Sah} and \textit{Sebastian}, and directed the State to pay compensation. Further, deviating from the rule that \textit{habeas corpus} is remedial and not punitive, it stated that in appropriate cases, where merely setting free the victim would not wash away the mischief perpetrated, it may compensate the victim by awarding suitable monetary compensation.

The trend of awarding compensation was well-settled by this time. In many subsequent cases compensation was awarded to victims of State excesses, which encroached on their fundamental rights.\textsuperscript{51} Of particular importance were cases, which involved atrocities committed by the police. The Court took a strong view of such excesses, and this helped in further elucidating the concept of monetary compensation for fundamental rights violations by the State.

(iv) Custodial Deaths and Torture: Ambivalence Eschewed

The remedy of compensation for violation of fundamental rights takes on special significance in cases of custodial deaths and torture. Although there is no specific prohibition of torture and provision for compensation for its victims in the Constitution, such rights have been read into the jurisprudence surrounding

\textsuperscript{48} Id. at 1028.

\textsuperscript{49} (1985) 4 S.C.C. 677.

\textsuperscript{50} Id. at 686.

Article 21.5 Besides, cases of torture and custodial deaths, by their very nature, are likely to involve situations where a writ may not be a sufficient remedy, since the damage would probably have occurred already. Further, such damage would constitute incontrovertible and *ex facie* glaring infringement of fundamental rights.

The reasons for the award of compensation for the violation of fundamental rights were expounded in *Saheli v. Commissioner of Police, Delhi*,53 where the Court held that an action for damages lies for bodily harm, including battery, assault, false imprisonment, physical injuries and death, since damages represented a solatium for mental pain, distress, indignity, loss of liberty and death.54

The jurisprudential reasoning behind the award of damages in cases of violations of fundamental rights was elucidated in *Nilabati Behera v. State of Orissa*,55 which can truly be considered a landmark case in the development of law in this area. The Supreme Court in this case eschewed all hesitation and laid down in lucid terms that Article 32 imposed an obligation on the Court “to forge such new tools as may be necessary for doing complete justice and enforcing fundamental rights.” Verma, J. enunciated that compensation under Articles 32 or 226 is a remedy available in public law, based on strict liability for the 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 in tort.”56

The Court held that this was the correct interpretation of *Rudul Sah*, and was the basis of subsequent decisions as well. A hitherto ignored, but extremely pertinent aspect was also touched upon in this case. The Court referred to Article 9(5)57 of the International Covenant on Civil and Political Rights, 1966

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54 Id. at 516.
55 Supra note 3.
56 Supra note 3, at 1969. This reasoning was forcefully reiterated in *P. U.C.L. v. Union of India*, A.I.R. 1997 S.C. 1203, 1204-05. See also *Consumer Education and Research Centre v. Union of India*, A.I.R. 1995 S.C. 922, 941, where the Court held that there was no question of this defence being available against a constitutional remedy, which was a practical and inexpensive mode for redressal of contravention of rights.
57 Article 9(5), I.C.C.P.R. provides:

[A]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
("I.C.C.P.R."), to buttress its stance that award of compensation is not alien to the concept of enforcement of a guaranteed right. Reference to the said Article 9(5) was again made by the Supreme Court in the case of D.K. Basu v. Union of India, to wherein it was held that the Government of India's reservation to the I.C.C.P.R., on the ground that the India legal system does not recognize a right to compensation, had lost its relevance in view of the law laid down by the Supreme Court.

In D.K. Basu, the Supreme Court also reiterated that pecuniary compensation was an appropriate, effective, and sometimes, the only suitable remedy for redressal for rights violations, and, thus, leaving the aggrieved at the mercy of remedies available in civil law, would hamper the Court's role as the protector and custodian of the citizens' indefeasible rights to an unacceptable degree.

(v) Fencing the Power

Though the remedy of monetary compensation for violation of fundamental rights is now well established, courts have at the same time imposed limitations on their own power to grant such relief. For example, the courts may refuse to issue a writ granting compensation, when disputed questions of facts arise, and the tortious liability is clearly denied by the State. In S.P.S. Rathore v. State of Haryana, the Supreme Court accepted the contention that it could grant compensation only when there is a prima facie or established violation of a guaranteed fundamental right. When the foundational fact itself is in dispute, the Court will desist from ordering compensation. The exercise of the power under Articles 32 or 226 for conducting an enquiry to determine compensation in glaring and clear cases of custodial rape or death or, illegal detention of the poor and helpless, is not feasible in such a case.

It is pertinent to note that the Government of India at the time of the ratification of I.C.C.P.R., in 1979, had made a specific reservation to the effect that the Indian legal system does not recognise a right to compensation for victims of unlawful arrest or detention. See generally http://www.jnu.ac.in/Huriter/AsiaHumanRights/1.doc (last visited March 10, 2006).

59 Id. at 618.
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M.C. Mehta v. Union of India62 saw the Supreme Court take on another self-imposed restriction. It asserted its power to award compensation for violation of fundamental rights, but limited this remedy to “appropriate cases”, where the infringement was gross and patent, that is, incontrovertible and ex facie glaring. This would be the case where such infringement either affects the rights of many persons, or appears unjust, unduly harsh or oppressive, on account of the disability of the victims to initiate or pursue action in civil courts. Put simply, the infringement’s magnitude must be such as to shock “the conscience of the Court.”63

From the discussion in the above part, it is seen that though the concept of granting compensation for violation of fundamental rights had an ambivalent entry into Indian constitutional jurisprudence, it is now a well entrenched concept. It is recognized that courts can and do award writ compensation for fundamental rights violations. Further, when a court awards damages for infraction of Article 21, “it is administering the law of constitutional torts and it is for this reason that it does not have to be inhibited by concepts peculiar to common law torts.”64

V. WELL BEGUN, BUT HALF-DONE: PROTRACTED INCONSISTENCIES IN WRIT COMPENSATION JURISPRUDENCE

In India the parameters of State liability for its servants’ tortious acts are not defined by legislation. Hence, the Supreme Court has invoked the principles of human rights jurisprudence to compensate the victims of “governmental lawlessness.” However, the application of these principles has not conformed to any clearly discernible pattern. Thus, there are a number of lingering qualms in this sphere.

a. Quantum of Compensation: In most cases, courts have not specified any basis for calculating compensation.65 There is thus no uniformity or continuity in the amounts awarded. The Court came closest to laying down some principles, in Nilabati Behera. Factors such as the age of the deceased and his current and potential earning capacity were taken into account in assessing the amount of

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62 Supra note 51.
63 Supra note 51, at 1091.
64 Patel, supra note 5, at 244. The judiciary itself seems to be inching towards adopting the nomenclature of “Constitutional Torts”, as can be seen from various High Court decisions. See, e.g., Gopal Krishna v. Union of India, 2001 (3) A.L.D. 436.
compensation. However, the calculation was made on a fact specific basis, and its application to all situations, may not be feasible. There is, therefore, an acute need for guidelines and rules for the award of compensation, which has so far been left to the judges’ absolute discretion, subjecting victims to “the fluctuating fortunes of justice.”

The author accepts that the quantum of compensation must necessarily differ, depending upon the gravity and surrounding circumstances of the rights violation, the possibility of mala fides on the part of the concerned official, the extent of the disregard shown towards the possible infringement of the right, the loss of life or limb, the number and condition of any dependants of the victim, her/his earning capacity, and the need to send out a clear signal to the administration, that callousness towards citizens’ rights will not be countenanced. However, as far as is possible, judicial decisions on this point must be backed by consistent reasoning.

b. Determining “Appropriate Cases” for Awarding Compensation: In Rudul Sah, the Supreme Court held that writ compensation will be awarded only in “cases of gross violation.” Subsequently, in the M.C. Mehta, the Court imposed a restriction on itself, declaring that a rights violation, which was serious enough to shock the Court’s conscience, was a mandatory pre-requisite. However, a perusal of the different decisions reveals that the courts have not followed this self-imposed restriction. Concerned with this trend, the Supreme Court, in the recent case of A.K. Singh v. Uttarakhand Jan Morcha, had to strike down the exorbitant compensation awarded by the Allahabad High Court, and felt that the “doctrine of Constitutional Tort” had been misused. In certain cases, courts have awarded compensation as an interim measure, and have left the remedy to approach the civil court to claim damages open to the aggrieved persons. However, there is no judicial decision on when such interim compensation should be granted. There is need to clarify the position of the law, and to prevent its inconsistent and arbitrary application. The author feels that the Courts must elucidate an unambiguous, comprehensible approach, so that some victims are not unjustly deprived of the benefits of compensation.

66 Jacob P. Alex, Constitutional Tort: Need for a Novel Outlook, A.I.R. 2001 (JOUR.) 207, 212.

67 Further, in R.N. Ghoshal v. University of Calcutta, (2002) 7 S.C.A.L.E. 137, 141, the Court said that it would not award damages against public authorities, merely because of an ultra vires order or inaction in discharge of duty, unless there is malice or conscious abuse.


c. Personal versus State Liability: In the U.S., the widely accepted view is that State liability is the natural choice, as opposed to personal liability, since it ensures effective compensation for the plaintiff. Further, avoidance of over-deterrence of conscientious officers from taking decisions that are in the public interest, is also a factor. Large amounts of discretion are vested in administrative officers, and they cannot perform their functions if their hands are constrained by invisible chains.

There is, however, no such steadfast rule in India. In *Rudul Sah* and *Saheli*, the Court opined that the State might proceed against the deviant officer. In certain other cases, the court has directly held the deviant officer personally liable. It is further generally accepted that when the court awards compensation, it is ultimately the taxpayer’s money which is being expended to make up for inaction or wrongful action, on the part of government officials, and in such cases, though immediate payment should be made from the public funds, the same should be recovered from the errant officer. However, State liability, rather than personal liability, is the usual practice. A plethora of cases show that, even where the officer’s action is seriously in doubt, the State is held liable.

The author feels that the “deep pockets” of the State, and the more equitable spreading of losses over a multitude of taxpayers, who enjoy governmental services and should therefore also bear responsibility for government-induced harm, makes it appropriate to impose liability on the State, except in cases where

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70 Jefferson, supra note 13, at 1555-56.
72 See *Rudul Sah* v. State of Bihar, supra note 51, at 1089; *Saheli* v. Commissioner of Police, supra note 53, at 516.
73 In *Shiv Sagar Tiwari v. Union of India*, A.I.R. 1997 S.C. 1483, the erring officer was asked to deposit Rs. 60 lakhs in the Court. In *Smt. Susheelamma v. State of Karnataka*, 1991 Crl. L.J. 2436, the High Court was convinced that the petitioner’s husband and nephew had been illegally detained, without even a formal complaint or registration of a case against them. The Court felt that the detainee-victims were deprived of Article 21 protection. Hence the concerned officer, was directed to pay Rs. 2500/- personally to the detenues.
75 In *R.S. Sodhi v. State of U.P.*, (1991) 2 S.C.C. 463, officials pulled out ten young Sikhs from a bus carrying Sikh pilgrims, took them to an adjoining jungle and shot them dead. However, the State was made liable for the compensation awarded to the petitioners. There have been several such cases, especially of army and custodial violence, where gross irregularities on the individual officers’ part went unpunished, and the State was made to pay the compensation. See *Bacha Bora v. State of Assam*, 1991 Crl. L.J. 2782; *Smt Purnima Barua v. Union of India*, 1991 Crl. L.J. 2675.
the officer’s wrongdoing is gross and patent, that is, incontrovertible and *ex facie* glaring.

d. Strict Liability Norm in Writ Compensation: The strict liability norm\(^76\) has been criticized as overtly harsh, since the bulk of powers in the hands of administrative officers are discretionary in nature.\(^77\) If every action is weighed and measured by this precarious doctrine, the flexible nature of the powers would become futile. However, it is pertinent to note that the courts themselves have not strictly adhered to this norm, and in the majority of cases, the respondents are given ample opportunity to defend their action.\(^78\) This is the position in other jurisdictions as well, including the U.S.A.\(^79\)

## VI. CONCLUSION

What is truly striking about India is the lack of respect for the rule of law, not just among the people, but also among those who make and those who enforce them.\(^80\)

Torts committed by State employees, resulting in rights violations, would be actionable wrongs for which a remedy would lie in a civil court for damages. However, the Supreme Court, perhaps taking a cue from judicial trends in contemporaneous liberal democracies, has been prepared to forge innovative and expedient devices for vindicating the fundamental rights, by interpreting the constitutional remedy under Articles 32 and 226, to include the grant of monetary compensation, which is an apposite, effective, and perhaps, the only suitable remedy for redressal of the established infringement of fundamental rights.

Jurists have assailed this novel public law remedy by questioning the competence of the court to award “Writ Compensation.” As we have seen, the authority to evolve this mode of Constitutional reparation may be derived directly

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\(^{78}\) Even in *Rudul Sah v. State of Bihar*, *supra* note 41, the Courts awarded compensation only after completely satisfying themselves that the authorities blatantly exceeded their power and acted with utter disregard for the law.


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from the language and purpose of Article 32 itself. Further, the court will be unable to effectively fulfill its role of protector and guarantor of the citizens' indefeasible rights, if it leaves those aggrieved of fundamental rights infringements, to seek civil remedies.

The American experience demonstrates that the significant benefits to the policy goals of public tort law - improved compensation to victims, enhanced deterrence, renewed vigour in decision making, and the increased integrity of the legal order itself - outweigh any potential negative results from these proposals for liability.

However, the judiciary in its well-intentioned zeal to alleviate public wrongs through an approach analogous to Constitutional Tort, is now finding itself bereft of guidance in determining issues of compensation for fundamental rights violations. Given the glaring anomalies in compensatory jurisprudence, the author submits that there is a need for legislation for fixing the parameters of the State liability, and for a novel reorientation of the doctrine of “Constitutional Tort.”

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