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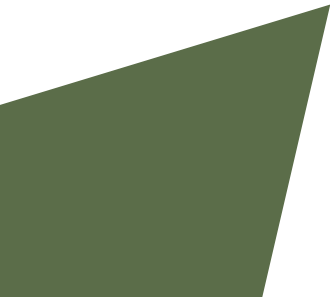
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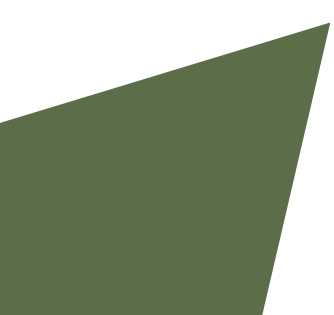
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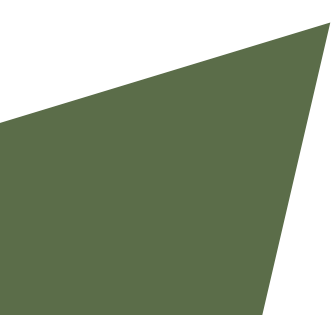
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**Constitutional dictate of compensatory justice: Comparing Indian and
American approaches**

Vershika Sharma

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ABSTRACT

This paper explores violations of constitutional rights and the ensuing remedial schema in India and USA. A comparative study is undertaken by the author to understand the differences in approach of the two democracies and present plausible parallel route to take in order to lunge towards the objective that compensatory remedies for constitutional violations sought to accomplish from its inception. Firstly, the paper shapes the rationale behind the compensatory jurisprudence. It explores the development of the doctrine in the two nations and determines the role of judiciary in shaping it albeit to come up with fairly different outcomes. Further, the paper traces the Indian development of the doctrine while examining the persisting loopholes. Lastly, while discerning the irregularities in the jurisdictional approach, the paper strives to deliver alternatives/ suggestions to resolve the irregularities.

INTRODUCTORY REMARKS

Ubi ius, ibi remedium, i.e. where there is right, there is remedy.¹ This is the maxim which gives meaning to the concept of constitutional compensation or compensation for the violation of fundamental rights and the compensatory justice that might follow in some cases.

The ever expanding powers of the State due to the globalised and interconnected world are giving the authorities multiple imperatives for the misuse of wide powers bestowed upon them. Consequently, the nature of liabilities against these authorities for infringement are ever increasing. The basic principle of justice entails that one who violates the rights of any other person cannot go unpunished. Additionally, when mere punishment does not suffice the case monetary compensation comes as an additional aid.² When such a mechanism is in place against private individuals, the Government- which functions through a stream of individuals who act as authoritative figures as its employees- must also be made accountable for infringement of the rights (particularly in the administrative domain) of the individuals. Such liability may sometimes include and not merely restricted to monetary damages.³

One of the examples of such a scheme can be seen in the case of the American “Constitutional Torts” Scheme.⁴ This incorporates within its ambit all suits for compensation against the Governments employees pertaining to infringements of rights enshrined in the American constitution.

In India, a similar structure is manifested in the shape of Writ Compensation exercised under the ambit of Article 32. The alternative provided in the tortious claims against the employees of the Governments is surrounded by the painfully slow moving and complex process of civil remedial structure. The biased attitude towards the governmental employees hardly prove helpful or beneficial to the ones trying to establish claims.⁵

The point that demands being showcased here is the clear distinction between the Indian and American position with respect to the type of rights against which such compensatory scheme sustains. In India it is restricted to Part III rights whereas in USA it applies to the whole of the constitutional rights. What is interesting is the fact that part III rights in fact were designed to check misuse of governmental powers,⁶ which was leftover lesson from the British oppressive

¹ Available at: <https://www.irmi.com/articles/expert-commentary/where-there-is-a-right-there-is-a-remedy-except-in-illinois> (Visited on April 17,2020)

² *Ashby v. White*, [1703] 2 All ER 92.

³ M.S.V. Srinivas, “Compensation under Articles 32 and 226 for Violation of Human Rights and Fundamental Freedoms”, *A.I.R. (Jour.)* 167 (1997).

⁴ Christina Whitman, “Constitutional Torts”, 79 *MICH.L. Rev.* 5, 6 (1980).

⁵ T. Patel, *PERSONAL LIBERTY UNDER THE CONSTITUTION OF INDIA* 239 (1993).

⁶ VII, Constituent Assembly Debates, 930-955.

regime.⁷ Owing to such a historical background the whole purpose of part III jurisprudence becomes redundant unless there evolved some scheme to prevent their infringement which leads to gross injustice. Since once an infringement takes place it cannot be restored. The only possible remains in a pecuniary restoration through monetary compensation. The instances of such necessities are further elaborated upon in this paper.

Therefore, this project 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.

JUSTIFICATION FOR CREATING STATE LIABILITY

The common law tortious liability establishes remedy in the form of compensation primarily. This serves multiple purposes of acknowledgement and affirmation of the established rights, provide deterrent effect, provides justice through the pecuniary remedies etc.⁸ Imposing government liability for constitutional violations attempts to advance analogous goals, which include:

UPHOLDING VICTIM'S FUNDAMENTAL RIGHTS

If rights are infringed upon, most of the available remedies such as permanent injunctions merely prevents further violations in the upcoming future. This in no way justifies what has already been done to the person and until that is achieved any protection by the constitutions stands hopeless. Hence, a possible solution can be through pecuniary remedy for the violation already done instead of say a writ of habeous corpus that can only be resorted for a persisting infringement.

DETERRING RIGHTS INFRINGEMENTS WHILE ENSURING CONSCIENTIOUS SPACE

To prevent the masses from infringing the rights enshrined in the constitution was the purpose with which the rights were incorporated in the constitution in the first place. As opposed to punitive damages, monetary damages are concrete solutions that might pressurise the State to peruse the money in the Government treasury for the common citizens. However since the funds in the treasury comes from the citizens itself, this would require economic changes at macro level in the form of raising taxes or cutting expenditure. Such a measure increases State accountability when it comes to their employees and their actions and proves as an incentive for the State to take steps for better competency, better and consistent training, better monitoring of the officers and maintaining an internal disciplinary mechanism for the violators of the rules and the constitutional

⁷ *Supra* note 5 at 239.

⁸ W. P. Keeton Et Al., *Prosser And Keeton On Torts* 20-26 (1984).

provisions. Additionally, removal of individual liability provides an incentive for the employees to give an optimum output due to the knowledge that an unavoidable constitutional effraction would not be deducted from their own salaries.⁹

DEVOLUTION OF POWER TO THE STATE IS NOT UNCONDITIONAL

The basic understanding of any constitution provides that it came about as a result of some form of contract between the people and those in power whereby citizens absolve a set of their freedoms in return for the promise of services towards the end of a civil society.¹⁰ But the powers bestowed upon the State are not unlimited as exemplified through part III rights in case of India. If an exercise of the State power crosses the barrier imposed by the constitution, punitive recovery/monetary compensation can only suffice and hence can be appealed by the ones on the suffering end of such overreaching exercise of power.¹¹

REMEDIAL JUSTICE: WHAT IS JUST TO THE VICTIM

Aristotle gave this theory and according to him it necessitated that damages be recovered through the mode of monetary compensation wherever any individual failed to respect the boundaries established on their right of action as it pertains to the other individual.¹² This theory is applied in the civil and criminal jurisprudence liberally. Similarly, where required it can be made equally applicable on the State authorities where an individual sustains legal injury owing to some official action.¹³

VICARIOUS LIABILITY

The task of choosing its employees rests in the hands of the State itself. The training, monitoring of actions and termination if needed, also is the part of state functions itself. This makes State the better choice for the formulation of policies in order to curb constitutional infringements through these state selected employees.¹⁴ Simple attributes such as choosing competent agents of state, appropriate consistent courses, inculcating discipline for avoiding unconstitutional conduct, can go a long way in decreasing violation of constitutional rights.¹⁵ Additionally, it does not seem aligned by the reason of legality that the State can be attributed tortuous liability of their agents and not the constitutional misdemeanours which are equally grave nature if not more.¹⁶

⁹ C. Whitman, "Emphasizing the Constitutional in Constitutional Torts" 72 *CHI-KENT L. Rev.* 661 (1997).

¹⁰ *Id.*

¹¹ *Supra* note 8.

¹² *Id.* at 27.

¹³ J. C. Jeffries, "Compensation for Constitutional Torts: Reflections on the Significance of Fault" 88 *MICH. L. Rev.* 82, 94-95 (1989).

¹⁴ *Ibid.*

¹⁵ *Supra* note 4.

¹⁶ L. Oren, "Immunity and Accountability in Civil Rights Litigation: Who Should Pay?" 50 *U. PITT. L. Rev.* 935, 1003 (1989).

American Jurisprudence acknowledged the importance of such a mechanism long before in the early 1960s, and held that the concept of constitutional tort categorically affirms the checks and boundaries on the State with respect to the liberties in the Bill of Rights, and the same can be made enforceable in practicality through such a mechanism.¹⁷

UNDERSTANDING THE CONCEPT CONSTITUTIONAL TORTS IN AMERICAN JURISPRUDENCE

What constitutional tort means is a wrong done to a person directly by a person in authority or through his/her actions like unreasonable search and seizure, custodial rape etc. The problem that emerges is thus the difficulty in establishing the difference between common law torts and constitutional torts.¹⁸ Basically, it is a calculated amalgamation of substantive rights guaranteed by the constitution and the compensation based damages provided in the common law torts.¹⁹ The relevance of such a differentiation is stressed upon by the non application of the defence of immunity granted to sovereign functions of the government under the tort law. Since basic rights are in fact a creation to restrict the scope of governments in certain areas of life and such an immunity negates the same function when the state commits wrongs with regard to same function.²⁰

America assures basic rights through the doctrine of Due process. Under this the SC is given ample authority to do justice in any matter presented before it whereunder they are authorised to even grant compensation which may or may not be monetary. The prevalent practice that remained in America is to somehow nullify the impact of constitutional violations such as in the case of **Mapp v. Ohio**.²¹

1950s marked the expansion of remedies in case the Basic Rights enshrined in the Bill of Rights were violated. The outcome led to the beginning of constitutional torts era. Two of the SC rulings stand tall in this regards which acknowledge the fact that existing mechanism was insufficient to tackle damages done by the framers of the law itself. Consequently, a mechanism was evolved whereby the constitution regulates actions of the authorities at each level of governance which is liable to cause damage to citizens.

Monroe v. Pape²² is the first case in this regard. The ruling stated that a certain section²³ covers actions of Government authorities who surpass the authorised powers. This meant a silver lining

¹⁷ *Supra* note 13

¹⁸ S. Nahmod, "Section 1983 and the 'Background' of Tort Liability" 50 *IND.L.J.* 5 (1974).

¹⁹ M. Wells, "Constitutional Remedies, Section 1983 and the Common Law" 68 *MISS. L.J.* 157, 157 (1998).

²⁰ *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, [1971] 403 U.S. 388.

²¹ [1961] 367 U.S. 643.

²² [1961] 365 U.S. 167.

²³ [1971] 403 U.S. 388.

for the citizens whereby constitutional protection was extended to check actions of authorities as well. Consequently cases under this section could be brought before the federal court itself. It is said that this actually marked the beginning of the doctrine of Constitutional Tort in the USA.²⁴

The bench mark in this regard was created in the case of ***Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics.***²⁵ The ruling established the basis for the constitutional torts by stating categorically that when there is infringement of 4th Amendment a civil case can be lodged against the perpetrating authorities and figureheads. The grey areas left open by the previous decision of *Monroe v. Pape* were made black and white as now not only cases can be lodged in the federal court, an appropriate remedial mechanism was also clarified.²⁶

The Bill of Rights in the USA therefore creates a check by the constitution itself which has been made as such by the courts that a person can directly file a suit for remedial measures without any statutory prerequisites. I fail to see the reason that why such a mechanism cannot be put in place in India for the violation of part III rights.

PROGRESSION OF MONETARY COMPENSATION IN INDIA

CONSTITUTIONAL PATRONAGE

The Indian constitution lays down the basic structure for the enforcement of the part III in a very specific manner through Article 32 (and article 226 in case of High Courts) which itself is an inalienable section of the said part. It states that the part III rights can be become enforceable directly by the apex courts of the country without going through formal general procedure for other civil mechanism.²⁷ However the literal reading of the said articles does not suffice the purpose.²⁸ The need is for the articles to be read in its purposive construction to allow for compensatory regimen which the courts have indeed undertaken in the recent past taking cues from the many other liberal democracies of the world.²⁹

TRACING THE APPROACH OF THE JUDICIARY

The Timid Approach

The starting of the regime of monetary awards in case of violations of the fundamental rights began from the initial judgement of ***Khatri v. State of Bihar.***³⁰ The victim here lost his eyes while he was under supervision of the authorities. His prayer stated monetary relief for his infringement

²⁴ M.S. Shapo, "Constitutional Tort: *Monroe v. Pape*, and the Frontiers Beyond" 60 *Nw. U. L. REV.* 277, 324 (1965).

²⁵ *Supra* note 19..

²⁶ *Id* at 410.

²⁷ THE OXFORD ENGLISH DICTIONARY 295 (Catherine Soanes ed., 2003)

²⁸ M.P. Singh (ed.), *V. N. Shukla's Constitution of India* (Eastern Book Co., Lucknow, 8th edn., 1990).

²⁹ M.P. JAIN, *INDIAN CONSTITUTIONAL LAW* 1123 (LexisNexis, New Delhi, 8th edn., 2003).

³⁰ AIR 1981 SC 928.

of living and livelihood. A striking and visionary statement was given by **Bhagwati, J.** whereby he proposed for invention of novel schemes for nurturing the exercise of fundamental rights and abstinence of their infringement in letter and spirit.³¹

Another instance is that of the case of ***Sant Bir v. State of Bihar***,³² which marked the gross violation of justice to a person who was wrongfully imprisoned for almost two decades. Again the same judge did not completely oppose the possibility of monetary relief for governmental wrongdoing. But the ratio remained silent on this point.

Eventually, the proactive speaker towards the compensation scheme chose silence in the case of ***Veena Sethi v. State of Bihar***,³³ on a similar matter.

The approach that becomes clear through these early precedents is that even when the courts were acknowledging the fact there was in fact a need for something more than mere affirming the fundamental rights, they were hesitant while allowing for any such grant and even when they did it was for different purposes altogether rather than recognising it as what it really was.

REVOLUTIONARY PRONOUNCEMENTS: INDECISIVE RATIONALE

The pathbreaking decision that shifted the curve of the judicial approach was in the landmark decision of ***Devaki Nandan v. State of Bihar***.³⁴ In this case the victim was denied his own pension for more than a decade. Although no debate was held on the legal reasoning for the grant of relief in the form of accrued up pension along with exemplary damages for the wrongdoings against the victim, there was still a shift as when money was recognised as a plausible remedial measure even in the cases of constitutional violations and not merely a civil remedy.

The most important landmark decision in the matter still remains that of ***Rudul Sah v. State of Bihar***.³⁵ The gross violation of the rights of the victim occurred in his unlawful detention even after acquittal of charges for one and a half decade. Now, the case was tricky as the victim was actually set free before the hearing and then the writ petition if had been followed in black and white would have been redundant. But this would have been the approach as per the traditional scheme that had been followed till now. The other route would have been file a separate civil suit- an extremely lengthy and cumbersome process.

That's when the judiciary came to the realisation of how certain cases demanded more than mere the letter read justice. It was understood that compensation could be the only way to corrective justice in the matter at hand.³⁶

³¹ *Supra* note 30 at 910.

³² AIR 1982 SC 1470.

³³ (1982) 2 SCC 583.

³⁴ AIR 1983 SC 1134.

³⁵ AIR 1983 SC 1086.

³⁶ *Id* at 1089.

However a dichotomy was created in this case.³⁷ First off, the judiciary wanted to grant compensation but the same actually came through punishing the wrongdoers in the form of imposition of fine on them which was treated as compensation to the victim and not added to the government treasury as the usual practice demands.³⁸ What this led to was more confusion than ever as the reasons were not made clear and remained vague for it to become a precedent leaving the ground open for complete discretion.

What remained a question to be determined in the future was the reading of monetary compensation into Art. 32.³⁹ But the fact remained that even through its murky waters the judgement was not only followed through the future but also its scope was established and explained.⁴⁰

However, this indecision on the point of compensatory awards for the violation of fundamental rights remained apparent even in the later cases.⁴¹

INDECISIVE TO “APPROPRIATE”

Lastly in the decision, *Bhim Singh v. Jammu and Kashmir*,⁴² the judiciary declared and read into the constitutional remedies articles the right to monetary relief.⁴³ *Sanjay Gupta’s* case⁴⁴ would be fruitful. The factual matrix in the said case pertains to Meerut Fire Tragedy where sixty-four people had died. While dealing with the grant of interim compensation, the Court held that there was a need for interim compensation considering the victims’ plight and a decade long wait.

Again in the very recent case of *Association of Victims of Uphaar Tragedy v. Sushil Ansal And Ors.*⁴⁵ the court reiterated the earlier position that “in extraordinary circumstances the Court can invoke its own methods depending upon the facts and circumstances of each case.”

A very relevant judgement is that of *Sube Singh v. State of Haryana and Ors*⁴⁶ where it was compensation as a remedial measure was accepted as a well settled law specially in cases of grave violations such as that of life and liberty the gravity of which was to be determined by considering the factual matrix of each case.

The court ruled that the writ justice was also punitive along with being a form of remedy. It was said that wherever necessary the court may go beyond the set writ boundaries to do adequate

³⁷ N. Santosh Hegde “Public Interest Litigation and the Control of the Government” 4 S.A.L. Rev. 1 (1992).

³⁸ *Supra* note 35, at 1089.

³⁹ P.K. Tripathi et al., “Article 32 and the Compensation Conundrum” 2 SCC (J) 51, 53 (1984).

⁴⁰ *Supra* note 38.

⁴¹ *Sebastian Hongray v. Union of India*, AIR 1984 SC 1026.

⁴² (1985) 4 SCC 677.

⁴³ *Id* at 1028.

⁴⁴ 2015) 5 SCC 283.

⁴⁵ AIR 2017 SC 976.

⁴⁶ (2006) 3 SCC 178.

justice through pecuniary relief. Following the directives and the general wave monetary relief became a new pattern for the courts against state misdemeanours against the victims.

CUSTODIAL CRIMES

This is actually the domain that makes it even more relevant for an additional scheme of justice as merely affirmation of a pre-existent right serves no purpose when the victim has already been harassed at the hands of those who are supposed to protect them. Torture itself in the exact terminology does not appear in the text of the constitution, it unquestionable follows from the right to life jurisprudence as even dictated by the apex court.⁴⁷ Along with the extremely grave nature of such a wrong the blatant consequence of such an act amounts to prima facie gross violation of part III rights.

In this context a legal explanation for such monetary remedial measures was made clear in the case of *Saheli v. Commissioner of Police, Delhi*,⁴⁸ and it was ruled categorically in this matter that for any injury (mental or physical) a remedy for compensation can be availed.⁴⁹

A further expanded reasoning came from the celebrated decision of *Nilabati Behera v. State of Orissa*.⁵⁰ This judgement can be called an actual progress in the right direction when it comes to the grant of monetary remedy in cases of violations of the basic rights. The earlier doubt and reluctance on part of the judiciary gave way to formation of a clear unambiguous rationale for the expansion of article 32 in order to devise new mechanisms for doing justice in real and actual sense. Even earlier decisions which gave an unclear view on the reasoning surrounding this aspect were interpreted to mean the expansive nature of Art. 32. Another important aspect of the judgement was also its resorting to the understanding of international regime that is reference to Article 9(5)⁵¹ of the ICCPR. This supported the already surmised reasoning of the judgement as to the need and non-alienate nature of the scheme

Another mentionable decision is that of *D.K. Basu v. Union of India*,⁵² where it was held that monetary remedy was sometimes non-negotiable and probably the sole applicable means of justice negating the same would simply defeat the existence of any remedy whatsoever in certain cases.⁵³

Limiting own power grasp

Of course giving itself unlimited power raises multiple questions especially when that comes from purposive expansion of a particular provision that needed interpretation to apply to a particular

⁴⁷ *People's Union for Democratic Rights v. Bihar*, AIR 1987 SC 355 & *M.C. Mehta v. Union of India*, AIR 1987 SC 1086.

⁴⁸ AIR 1990 SC 513.

⁴⁹ *Id* at 516.

⁵⁰ 1993 AIR 1960.

⁵¹ International Covenant on Civil and Political Rights, Article 9(5).

⁵² AIR 1997 SC 610, 624.

⁵³ *Id*.

situation. Hence the judiciary came with a solution of self-restraint in the form of limiting the wide interpretation. An instance of the same is presented when there are doubts and uncertainties in ascertaining factual matrix of the matter.⁵⁴

S.P.S. Rathore v. State of Haryana,⁵⁵ is one such decision which had in fact agreed to the limitation and held unless a blatant case for the infringement is established there cannot a monetary relief in the case.

In the case of **M.C. Mehta v. Union of India**⁵⁶ the SC devised another set of limitation on its powers with respect to compensatory jurisprudence. Despite recognising the compensatory remedies, it held that the doctrine can be applied to only applicable situations where there is incontrovertible and ex facie glaring infringement. Now, such a violation is possible when it affects multiple people, or is unacceptably harassing or one where it warrants a civil suit. What this means is the violation must be enough to shake the conscience of the judiciary.⁵⁷

Even when the doctrine has a slippery start in the initial years, it has now founded its footing in the compensatory jurisprudence in Indian legal regime. What remains to be pointed out is that when the judiciary provides an award under this doctrine it is actually towards constitutional remedy and not a civil remedy. Hence any limitation of a tortious claims should not limit the courts in determining liability under this doctrine.⁵⁸

RECENT INSTANCES OF COMPENSATION FOR VIOLATION OF FUNDAMENTAL RIGHTS

Case	Monetary compensation	Rationale for grant or denial of compensation
<u>S. Nambi Narayan v. Siby Mathews</u> ⁵⁹ (2018)	Compensation Granted with immediate effect.	Unlawful and malicious CBI investigation against a reputed scientist led to physical and mental harassment which could only be corrected through compensatory relief even when there was reasonable delay in action against the wrongdoers.

PERSISTENT IRREGULARITIES

The vicarious liability of the Government for its employees is not clearly put in black and white under any statutory scheme. Therefore, the apex court has devised a the scheme of compensation

⁵⁴ *Tamil Nadu Electricity Board v. Sumathi*, AIR 2000 SC 1603 & *Grid Corporation of Orissa Ltd. v. Sukamani Das*, AIR 1999 SC 3412.

⁵⁵ AIR 2005 SC 257.

⁵⁶ *M.C. Mehta v. Union of India*, AIR 1987 SC 1086.

⁵⁷ *Supra* note 53 at 1091.

⁵⁸ *supra* note 5 at 244.

⁵⁹ AIR 2018 SC 5112.

for those denied justice at the hands of the State while denying the basic rights enshrined in the constitution itself. The problem as to ascertainment of such compensatory scheme remains dicey for the lack of any set guidelines. The primary concerns amongst these include:

QUANTIFYING COMPENSATION: A QUESTION OF LAW OR FACT?

The judiciary has failed to device guidelines and parameters for ascertaining the quantum of the monetary damages.⁶⁰ This results in inconsistent quantum of compensation. The closest incident of some form of directives were issued in a single case.⁶¹ Probable causes to include in the calculation included the age factor, earnings (including potential) etc. again, the specifics of this case made it possible for these factors to apply and making them universally applicable might not be the best course.

WHAT AMOUNTS TO “APPROPRIATENESS” OF CASES?

The case of Rudul Shah brought forth benchmark decisions on the aspect of compensation for the violation of Fundamental rights and ruled that such remedy could be given when there was gross violation of justice and not otherwise.⁶² However, in a later decision of MC Mehta, the scope of the doctrine was limited and it was held as a mandatory requirements that only those infringements which were so grave as to shake the conscience of the court could attract this doctrine.⁶³ Although it becomes pertinent to point out that later judgements reveal that this constitution that the judiciary devised for itself was not followed as decided.⁶⁴

This particular inconsistency led the apex court to decide another case wherein it said that the compensation decided by the HC was extravagant and could not sustain and the misuse of the writ compensation was also pointed out.⁶⁵

WHOSE LIABILITY?

In American Jurisprudence preference is given to imposing liability on the Government instead of the individual and the reason for the same is the adequate damages for the individual.⁶⁶ Additionally, the fact that restricting the officials performing their administrative functions (for which they have been provided ample of discretionary powers and for good reasons) through imposing personal liability would probably create a deterrence for honest employees to carry out their duties to the fullest extent.

⁶⁰ Anupa Thapliyal, “Compensation in Writ Jurisdiction: A Few Basic Questions” 4 *IND. BAR Rev.* 95 (1994).

⁶¹ *Supra* note 47.

⁶² *Supra* note 35.

⁶³ R.N. Ghoshal v. *University of Calcutta*, (2002) 7 SCALE 137, 141.

⁶⁴ P.B. Khet Mazdoor Samiti v. *State of West Bengal*, AIR 1996 SC 2426.

⁶⁵ A.K. Singh v. *Uttarakhand Jan Morcha*, (1999) 4 SCC 476.

⁶⁶ *Supra* note 13 at 1555-56.

The situation presents itself completely different in case of India. It becomes clear from certain decisions of the SC wherein it held that the Government can proceed against the divergent employee.⁶⁷ Whereas many a times the judiciary itself has held the divergent employee responsible for the infringement.⁶⁸ The logic that is presented to the individuals is that eventually the money is actually of the taxpayers which is being used to compensate the infringing employee. And hence even when the payment can be made from the funds at the first instance, it must be restored by the misbehaving employee.⁶⁹ In most of the cases though, the Government is made liable instead of the perpetrating employee and a number of cases are evident of this fact even when the person's actions are seriously questionable.⁷⁰

HOW TO DETERMINE LIABILITY?

Strict liability is most often than not attached with the concern that it is too rigid⁷¹ due to the fact that at the end of the day the administrators need that spectrum of discretion to perform their duties to the optimum extent.⁷² The whole purpose of the discretionary powers would be defeated if all cases are filtered through the purifier of strict liability. But compliance of this doctrine is not possible as the court themselves have shied away from application of the same strictly⁷³ and the situation is similar to that of America.⁷⁴

NEED FOR CHANGE: SUGGESTIONS

AN ACUTE NEED FOR RULES FOR DETERMINING THE QUANTUM OF COMPENSATION

Without clear and adequate rules for quantifying compensation the functional aspect of writ compensation will remain at the absolute and sometimes arbitrary exercise of discretion. This leads to a perpetual inconsistency and possibility of fluctuating trends in the delivery of justice. This does not mean that I am trying to deny the need for a case to case basis analysis altogether, and there is agreement from my side on the fact there the same will be required at many instances depending upon the factual description of each and every case. An emphasis needs to be put on the wrongful intentions of the perpetrators, an absolute contempt presented by the deferring employee, cases which lead to death or grievous hurt etc. of course all these

⁶⁷ *Supra* note 45.

⁶⁸ *Supra* note 4 at 48-50.

⁶⁹ *Supra* note 45 at 516.

⁷⁰ *Shiv Sagar Timari v. Union of India*, AIR 1997 SC 1483.

⁷¹ *Lucknow Development Authority v. M.K. Gupta*, (1994) 1 SCC 243, 264.

⁷² *R.S. Sodhi v. State of U.P.*, (1991) 2 SCC 463.

⁷³ *Supra* note 47, at 1969

⁷⁴ Vandana Pai and T. Karthik Kumar "Writ Compensation: Issues and Perspectives" 13 *STUD.Ann.* 195, 202 (2001).

specifics need to be paid heed to. What this in no way means is there can be total inconsistency in the judicial precedents.

ELUCIDATE A CLEAR AND COMPREHENSIVE SCHEME BY THE JUDICIARY

There is need to clarify the position of the law, and to prevent its inconsistent and arbitrary application. The need is for the devising of an elaborate, comprehensive and clear directive by the judiciary so as to avoid deprivation of compensatory benefits to certain individuals.

PERSONAL LIABILITY IN CASE OF GROSS AND PATENT VIOLATION

It must be clearly stated through a precedent that the money for the compensation must be awarded from the public funds itself unless the defiant employee's transgression was *prima facie* evident. Because even when the money of the compensatory awards come from the funds that are essentially of the taxpayers, these are the same people who enjoy the benefits of government's beneficial schemes and therefore must also bear the State inflicted transgression of right.

IMPOSITION OF STRICT LIABILITY WHILE ALLOWING FOR OPPORTUNITY TO BE HEARD

Strict liability norm must apply in the writ compensation cases even when it seems too harsh *prima facie* so as to create consistency and universality. The case to case leeway might still be given as has been the approach even in tortious liabilities.⁷⁵

LESSONS FROM AMERICAN CONSTITUTIONAL TORT SCHEME

The compensation scheme under the constitution of India must not be restricted to part III of the constitution only. It must extend to the entire constitution and the validity for the same can be drawn from Article 142 which provides for the SC to do complete justice and 226 in case of High Courts whereby they are allowed to issue writs not merely for the violation of part III rights but also in case of "any other purpose".

⁷⁵ *Supra* note 47 at 1969.

CONCLUDING REMARKS

When a common law tort is committed by the government officials which amounts to rights infringement, it becomes case of civil suit for which solution is available through the suit for damages.⁷⁶ But like many lessons that we watch and learn the aspirations that the apex court has been taking from other countries propelled it to devise novel mechanisms for giving spirit to fundamental rights in a way. This has been done by widening the scope of constitutional remedies under articles 32 and 226 to incorporate in its ambit pecuniary remedy in the form of monetary awards. This in my view is perhaps the single real solution for the violation that has already taken place.

A lot of times this doctrine has been criticised and contravened for being outside the ambit and authority of the judiciary. However, it can be established through the study of case laws itself that the doctrine emerges from the purposive interpretation of the remedial articles itself.⁷⁷ Another issue remains that if the rights of the victims are left at the whims of civil justice system. The whole purpose of the existence of part III becomes defeated.

The evolution of tort compensation jurisprudence of the US reveals the positive sides of the implementation of this scheme. Consequently it can be easily witnessed that better remedial measures in the form of monetary awards, more deterrent impact, prompt justice etc. surpass the negative consequences created by imposing accountability on the State.

There is a dichotomy which is created by the enthusiastic judiciary in its search for novel ideas to provide remedy for violations of fundamental rights but finds itself amidst the crisis for devising clear and accurate guidelines for determining a uniform mechanism for awarding compensation. It becomes clear through the above discussion that the need is for specific statutory direction for establishing directives for making the government liable for its actions while clarifying the status of writ compensation in India taking cues from American structure.

⁷⁶ *Supra* note 35.

⁷⁷ *Supra* note 25.