

**COMPENSATION FOR VIOLATION OF FUNDAMENTAL RIGHTS
A NEW REMEDY IN PUBLIC LAW
DISTINCT FROM RELIEF OF DAMAGES IN TORT**

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In Rahul Sah's case¹ the apex Court for the first time was faced with a dilemma whether or not to award compensation for violation of right to life and personal liberty guaranteed under Article-21. The stand taken on behalf of the State, was that the petitioner should be left entirely to claim damages under the ordinary Civil Law, by filing a suit in that behalf. This contention was, however, rejected by the Supreme Court as according to Hon'ble Mr. Justice Chandrachud, the then CJ it would have amounted to robbing Article 21 of its "Significant Content". He also felt it necessary to award monetary compensation of Rs. 30,000=00 without impairing the right of the petitioner to claim damages under ordinary law through Civil Courts, Chandrachud, CJ had observed that "the petitioner can be relegated to the ordinary remedy of suit if his claim to compensation was factually controversial in the sense that a Civil Court may or may not have upheld his claim but while the court has already found in the present case, that petitioner's prolonged detention after his acquittal, in prison was wholly unjustified and illegal, there can be no doubt that if the petitioner files a suit to recover damages for his illegal detention a decree for damages would have to be passed in that suit".

After this decision the Hon'ble Supreme Court had occasion to award compensation for violation of fundamental rights in four more cases, namely-**Sabastain M. Hongaray**², **Bhim Singh**³, **Saheli**⁴ and **Ravi Kant Patil**⁵. Before proceeding further it would be appropriate to mention them in Court in compliance with the Writ of Habeas Corpus issued by the Supreme Court. The Supreme Court, therefore, concluded that those persons must have met an un-natural death while in Army custody. Union of India was directed to pay an exemplary cost of one lac rupees each to the wives of those persons. In **Bhim Singh's** case the petitioner, who was M.L.A., was illegally arrested and detained with the object of preventing him from attending the Assembly Session. Supreme Court directed the State Government to pay Rs. 50,000=00 compensation to the petitioner. In **Saheli's** case⁶, writ was moved before the Supreme Court by the mother of the child aged about 9 years who died as a result of police beating. The Supreme Court awarded Rs. 75,000=00 as damages to the mother of the child against the Delhi Administration. In **Ravi Kant Patil's** case⁷ High Court's order awarding compensation for violation of fundamental right under Article 21 of an undertrial prisoner, who was handcuffed and taken through streets in a procession by the police during investigation, was upheld by the Supreme Court.

¹ Radul Sah Versus State of Bihar, AIR 1983 SC 1086

² Sebastian M. Hongray Vs. Union of India (1984)3 SCR 544.

³ Bhim Singh Versus State of J & K. (1985)4 Se.c. 677 AIR 1986 SC 494.

⁴ Saheli Versus Union of India. AIR 1990 SC 513.

⁵ State of Maharashtra Versus Ravi Kant Patil (1991)2 SC 3C3: AIR 1991 SC 871.

⁶ Saheli Versus Union of India, AIR 1990 SC 513.

⁷ State of Maharashtra Versus Ravi Kant Patil (1991)2 SC 3C3: AIR 1991 SC 871.

The aforesaid four cases are the authority for legal proposition that the Union or the State Government would be liable for tortious acts committed by their officers in violation of Article 21. However, it may be noted that the basis and the nature of the liability was not clearly spelled out by the Supreme Court in these decisions.

A survey of aforesaid four decisions discloses that in these cases no new jurisprudential foundation was provided for awarding monetary compensation to a person whose right to life and personal liberty guaranteed under Article 21 was violated. In **Rahul Sah's** case interim compensation was awarded as a "palliative" without impairing the petitioner's right to claim damages for wrongful detention under ordinary law of torts, as State was responsible for wrongs done by its officers. In **Sebastian M. Hongray's** case the Union of India was directed to pay exemplary cost of rupees one lac each to the wives of persons on their presumed un-natural death. This amount was awarded as an exemplary cost but was in the nature of compensation.⁸ In **Bhim Singh's** case the Apex Court had awarded compensation to the M.L.A. petitioner for being illegally prevented by the State from attending the session of the Legislative Assembly, and in **Saheli's** case, damages had been awarded to the mother of child against the Delhi Administration and its police officers who had caused the death of the child. In **Ravi Kant Patil's** case compensation was awarded for hand-cuffing and parading an undertrial prisoner in a procession in streets, during investigation. Thus the principles of vicarious liability of State was invoked in all these cases. It was in **Nilabati's** case⁹ that the Supreme Court felt the need for clearly spelling out the true basis and nature of State's responsibility to pay compensation for violation of fundamental rights of the citizen by their officers. The Supreme Court said:

"It would, however, be appropriate to spell out clearly the principle on which the liability of the State arises in such cases for payment of compensation and the distinction between the liability and the liability in law for payment of compensation in an action on tort".

The need for providing independent jurisprudential basis to liability of the State for payment of compensation for violation of fundamental rights became imperative due to the fact that in **Radul Sah's** case there was an observation to the effect that "the petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial", and "Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through ordinary process". The judgment in **Nilabati's** case clearly seems to have been inspired by the Privy Council decision in **Maharaj Versus Attorney General of Trinidad and Tobago**¹⁰ and Art. 9 of International Covenant on Civil and Political Rights. In the said decision the Privy Council was called upon to interpret Sections 1¹¹ and 2 of the Constitution Act of Trinidad and Tobago (which correspond to Articles-21 and 22 of Constitution of India) and Section 6 (which corresponds to Article 32 and 226 of Constitution of India). The Privy Council had clearly laid down in the said decision that Section 6 of the Constitution Act of Trinidad and Tobago "impliedly permitted award of compensation" where it was "the only practical mode

⁸ Bhim Singh Versus State of J & K (".....word compensation was not used but it is obvious that the court awarded compensation").

⁹ Nilabati Behera Versus State of Orissa AIR 1993 S.C. 1993 S.C. 1960 (J.S. Verma, Dr. A.S. Anand and N. Venkatachala, JJ.)

¹⁰ (1978)2 All.E.R. 670.

¹¹ Section-1 of the Constitution of Trinidad & Tobago recognises amongst others the right of the individual of life, liberty, security of person & the right of not to be deprived thereof except by due process of law.

left for enforcement of right” to life and liberty of an individual.¹² In the said case a barrister was committed to 7 day’s imprisonment by the High which was set aside by Privy Council. Thereupon the appellant had applied for redress under Section 6 on the ground that he was deprived of his liberty without ‘due process of law’. This application was dismissed by the High Court. In appeal Privy Council held that Section 6 of the Constitution impliedly permitted the High Court to award monetary compensation where that may be the only practical form of redress left for the victim.

In India even prior to the **commencement of the Constitution**, the law was clear that the Government was liable for the tort committed by its officers while acting in discharge of their statutory duties.¹³

In this case the distinction was made between Sovereign and non-Sovereign functions of the State. Peacock C.J. had observed that “there is a great and clear distinction between the acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them.” As the tort in this case was committed by the servants of the Government in the course of trading activity and the case was not directly concerned with acts done in the exercise of Sovereign powers, the relief was granted. However, **Madras**¹⁴ and **Bombay**¹⁵ High Courts did not follow this view of Peacock C.J. and had held that Government was liable even for torts committed by its officers in the exercise of Sovereign functions. In post Constitution period, prior to Supreme Court’s decision in **Kasturilal’s** case, the Punjab High Court and the Supreme Court¹⁶ had held the State liable for torts of its servants. The Supreme Court, however, has approved the decision in *Peninsular and Oriental Steam Navigation Co., in Kasturi¹⁷ Lal’s case*. There the State failed to restore the gold ornaments seized and deposited in Police **Malkhana** suspecting them to be stolen property. The Head Constable Incharge of the **Malkhana** after mis-appropriating the gold ornaments had fled to Pakistan. In the said decision the Supreme Court had taken the view that State of U.P. was not liable to return the gold ornaments or to pay compensation for the loss thereof as the tort was committed in the discharge of Sovereign function of the State.

However, the authority of this decision has become very diluted on account of **subsequent Supreme Court** decisions¹⁸ though it has not yet been overruled. Therefore, the

¹² Section 6 provides for an application to the High Court for redress. The question in Maharaj’s case was whether the provision permitted an order for monetary compensation. Held, “jurisdiction to make such an order is conferred on the High Court by para (a) of Section 6 & 28, viz- jurisdiction to hear and determine any application made by any person in pursuance of Sub-section (1) of this Section. The very wide powers to make orders, issue writs and give directions are ancillary to this”. (Lord Diplock).

¹³ *Peninsular and oriental Steam Navigation Co. v. Secretary of State for India* (1868-69)5 Bom. H.C. App. 2 at p-1. (plaintiffs Servant while travelling in a horse driven carriage which passed through Kidderpore Dockyards owned by Government was injured due to negligence of the government servants working there. Court drew a distinction between the sovereign and non sovereign functions of **East India Company** and held that maintenance of the Dock-yard was a non-sovereign function of the East-India Company and thus the government was liable for the negligence of its servants).

¹⁴ *Secretary of State for India v. hari Bhanji*, ILR (1882)5 Madras 273.

¹⁵ *Rao v. Advani*, (1949) 51 Bombay L.R. 342 (396) = AIR 1949 Bombay 277.

¹⁶ *Rup Ram v. State of Punjab* AIR 1961 Punjab 336 (F.B.) (b) *State of Rajasthan v. Vidya mati*, AIR 1962 SC 933.

¹⁷ *Kasturi Lal Rabia Ram Jain v. State of U.P.* AIR 1965 S.C. 1039.

¹⁸ *State of Gujarat v. Memon Mohamed*, AIR 1967 S.C. 1885. (Certain seized under Customs Act were not properly kept and were disposed of by order of the Magistrate. The seizure was found to be illegal and the Supreme Court held that there arose bailment and statutory obligation to return the goods and the suit was maintainable).

test to be applied still is, whether tort has been committed within the protected field of Sovereign function or not. There is to be a close nexus between the act complained of and one of the traditional Sovereign functions of the State. According to **Lord Waston**¹⁹ the traditional Sovereign functions are:-

“The making of laws, administration of justice, maintenance of order, repression of crime, carrying of war, the making of treaties of peace and other consequential functions”. In short Sovereign powers are those powers “which cannot be lawfully exercised except by a sovereign or by a private individual delegated by a **Sovereign**²⁰ to exercise them.”

Having noticed as to what are traditional Sovereign functions of State, we may in short also notice as to what activities have not been regarded as Sovereign functions of the State by our Supreme Court. **Famine Relief work**²¹ **Socio economic and welfare activities undertaken by modern State**²², **routine Military duty**²³. The distinction between traditional Sovereign function and non-Sovereign function of the State is important only in cases of claim for damages in Tort i.e. under private law. In case a tort is committed by an officer of the State in the exercise of its Sovereign function, the defence of Sovereign immunity can be successfully taken by the State but the plea of Sovereign immunity will not be available in case of the public law remedy of claim of monetary compensation for violation of a fundamental rights, specially right to life and personal liberty guaranteed under Article 21 of the Constitution. Herein lies the importance of the decision of Nilabati's case.²⁴ It has cleared the doubts about the nature and scope of the new public law remedy evolved by the Supreme Court. The following principles clearly emerged from this decision:-

1. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;
2. Such claim is based on strict liability;
3. Such claim is distinct from, and in addition to remedy in private law for damages for tort;
4. This remedy would be available when it is the only practicable mode of redress available;

(b) Basowa M. Dyamogonda Patil v. State of Mysore, A.I.R. 1977 S.C. 1749. (Certain gold articles, given in police custody by the Magistrate for evaluation by the gold smith, were kept in police guard room, but were lost. In a proceeding Under Section 517 of Cr.P.C., 1898, the Supreme Court held that when “there is no prima-facie defence made out that the State or its officers had taken due care and caution to protect the property”, the court can order the State to pay the value of the property to the owner.

¹⁹ Comber v. Justice of Berks, (1883)9 A.C. 61.

²⁰ (1868-69)5 Bom HCR Appendix 1 p.1 at p. 14.

²¹ Shyam Sunder v. State of Rajasthan, AIR 1974 S.C. 890. (It is not possible to say that famine relief work is a sovereign function of State as it has traditionally been understood.

²² (a) State of Bombay v. Hospital Mazdoor Sabha, AIR 1960 SC 610.

(b) Nagpur Corporation v. its employees, AIR 1960 SC 675. (Socio economic and welfare activities undertaken by modern State are not covered by the traditional sovereign functions.

²³ Pushpa Thakur v. Union of India, (1984) ACD 559 (S.C.).

(A Military truck, after Indi Pak war was over, was returning to its permanent location at Jhansi when the accident occurred. High Court had held that accident had occurred during the exercise of sovereign function of the State and Union of India was not liable for compensation. Supreme Court reversing the decision of the High Court observed: “we are of the view that on facts of the case the defence of sovereign immunity of the State for the acts of its servants has no application and the High Court was in error in rejecting the claim.”)

²⁴ AIR 1993 SC 1960.

5. Against claim for compensation for violation of a fundamental right in writ petition under Article 32 of 226 of the Constitution, the defence of Sovereign immunity would be inapplicable.

Before awarding compensation, the Supreme Court in **Nilabati Behera's case**²⁵ had directed the District Judge to hold an enquiry and submit his report and evidence so collected by the District Judge report submitted by him was examined by the Supreme Court itself with the assistance of the Amicus Curiae and the counsel of the parties and after being satisfied that victim's right to life and personal liberty had been violated, it had awarded the compensation in money to the victim's dependants. This procedure may be followed in subsequent cases of such nature coming before the Apex Court as well as before the State High Courts.

The new remedy is thus to be welcomed as it would go a long way in providing relief to victims of violation of right to life and personal liberty guaranteed under Article 21 and their dependants, as well as for violation of other fundamental rights. However, this remedy would be available where it is the only practicable mode left for redressal. A contrary view would have merely rendered the Court powerless and made the Constitutional guarantee a mirage if the Court was powerless to grant any relief against the State, except the punishment of the wrong-doer as observed by Verma J. "If the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law is to be real, the enforcement of the right in case of every contravention must also be possible in the Constitutional scheme, mode of redress being that which is appropriate in the facts of each case. This remedy in public law has to be more readily available when invoked by the havenots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies were more appropriate."²⁶

[J.T.R.I. JOURNAL – First Year, Issue – 2 - Year – April – June, 1995]

²⁵ Nilabati Behera v. State of Orissa, AIR 1993 SC 1960.

²⁶ Para 19 of the decision of Nilabati's case.