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Article 32 and the Emerging Dimensions of State Accountability

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Abstract

This paper examines the emerging dimensions of State liability under Article 32 of the Constitution of India. It analyses the Supreme Court's expanding constitutional role in protecting Fundamental Rights and developing effective remedies where traditional writ remedies are inadequate. The decisions in Rudul Sah, Sebastian Hongray, Khatri, Hussainara Khatoun, and People's Union for Democratic Rights demonstrate the Court's willingness to impose monetary liability upon the State for serious violations of constitutional rights. The paper particularly examines compensation as a public law remedy, the scope of the Supreme Court's remedial powers, and the doctrine of sovereign immunity. It argues that effective remedies are essential to make Fundamental Rights meaningful and to ensure State accountability under the rule of law.

Keywords: Dimensions, sovereign immunity Fundamental Rights.

In the course of the last few years the Supreme Court of India has attempted to evolve an innovative new constitutional jurisprudence based on the necessity for giving new meaning to the rights of the socially and economically disabled masses of our country. An entrenched set of individual rights, like the Fundamental Rights embodied in Part III of the Constitution requires awareness of its existence on the part of the general mass of people, if it is to constitute an effective limitation on the power of the State, but unfortunately this is exactly what is lacking in most third world countries including India. The Court has tried to get over this seemingly insurmountable barrier through the creation of a legal regime conducive to the agitation of issues which are of vital importance to the disadvantaged majority.¹ Set against this is the increasing tendency towards irresponsibility on the part of the executive organ of the State, leading to a state of "governmental lawlessness" where little importance is given to the rule of law, and which the traditional, largely defensive, public law remedies available in the courts do not seem capable of combating. In Rudul Sah v. State of Bihar the Supreme Court has addressed itself to this situation and has fixed monetary liability on the State for a gross violation of the petitioner's fundamental right to life and personal liberty under Article 21.

There is little doubt that an activist philosophy of this nature has become essential and that some drastic action is necessary to render the Executive more amenable to the constraints of the rule of law. A few instances would serve to drive home the point. In Khatri v. State of Bihar, better known as the Bihar blinding's case, the Court was

faced with a situation where the police, the so-called guardians of the law, were found to have taken the laws into their hands and blinded suspected criminals. In *Hussainara Khatoon v. State of Bihar* the Court found that undertrial prisoners had served sentences longer than they would have undergone if they had been found guilty of the offences with which they had been charged. The list is longer, but what may be observed in all these cases is a lack of sensitivity to human dignity and a shocking lack of commitment on the part of the executive to the fundamental rights of citizens. It is true that this rarely happens in the case of the Central Government but in *People's Union for Democratic Rights v. Union of India* or the *Asiad labourers case*, it was found that the preoccupation of the Central Government with finishing the pre-parathions for the IX Asian Games held in New Delhi in 1982 had some-how led it to overlook numerous violations of the labour laws as well as the fact that the contractors engaged to construct the various stadia etc. were paying their workers less than the statutorily fixed minimum wages. In *Sebastian Hongray v. Union of India* it was discovered that two persons, who had been taken into custody by the Indian Army in the State of Manipur, had "disappeared" mysteriously, and no trace could be found of them thereafter.

The facts are not quite clear in *Rudul Sah*, so it must suffice to state that the petitioner was found to have been "illegally detained" without any statutory justification for a period of 14 years after his acquittal of criminal charges at a sessions trial. The Court felt that this constituted a "flagrant infringement" of the petitioner's fundamental right under Article 21 not to be deprived of his life or liberty except according to procedure established by law. From the facts it is obvious that the seriousness of the loss suffered by the plaintiff i.e. the fourteen years lost in jail contributed in large measure to the enormity of the government's offence in the eyes of the Court, especially in the light of the fact that not even a misinterpretation of the relevant statutory provisions could have permitted such a travesty of the administrative process, resulting in a man being deprived of fourteen precious years of his life. In the event although the petitioner prayed for monetary relief for his rehabilitation, reimbursement of his medical expenses and compensation for his illegal incarceration, the Court ultimately awarded the petitioner Rs. 30,000 as compensation in addition to the Rs. 5,000 already paid to him by the Government of the State of Bihar, in spite of the fact that he had already been released after the filing of the writ petition in 1983.

There are two other decisions of the Supreme Court which must be mentioned here as they are often cited in support of the contention that the Court can award compensation more easily and less controversially under Article 32 in the form of "exemplary" costs.¹¹ In *Deoki Nandan Prasad v. State of Bihar*,¹² a sum of Rs. 25,000 was awarded to the petitioner as exemplary costs on the ground that he had been put to undue harassment by the State of Bihar, as it had not paid the arrears of salary due to him as per an earlier judgement of the Supreme Court. While such an order may be justified here on the ground of non-compliance with the orders of the Court, the situation was not quite the same in *Sebastian Hongray v. Union of India*. Here the Court awarded Rs. 1,00,000 each in the form of exemplary costs to the wives of two individuals who had disappeared after being taken into custody by the Indian Army in the State of Manipur.¹³ The award was based on the ground that the Union of India had failed to respond to the writ of habeas corpus issued earlier. It is difficult to understand how the Central Government could respond to the writ, after, as they claimed, the two individuals in question had been set free. In the circumstances, the award of exemplary costs related more to the cause of action than any (mis) conduct during the proceedings. In substance, it is submitted, the principles which govern the award of costs¹⁴ have not been correctly applied in the case of exemplary costs because it can logically be awarded against a party only for misconduct during the proceedings before the court and is not ordinarily

awarded to penalise conduct prior to the institution of legal proceedings. It is not easy, therefore, to see how the court can award exemplary costs in such cases under Article 32 without considering the issues raised by the award of compensation.

I. The Mandatory Character of the Fundamental Rights as Limitations on State Power

An important question in the context of creating affirmative re-medies, specifically a new compensatory remedy, for the violation of the fundamental rights would be whether the rights in question actually do form a substantive basis for such a course of action. Can it be said about the Indian Constitution to put it a little differently-what Chief Justice John Marshall of the United States Supreme Court believed was the position with reference to the Constitution of the United States of America, namely, that “the Government of the United States has been emphatically termed a government of laws and not of men” and that “it will certainly cease to deserve this high appellation if the laws furnished no remedy for the violation of a vested legal right.”

Chief Justice Chandrachud certainly is of this opinion. He appears to have based his decision to award compensation to the petitioner in Rudul Sah on two complementary considerations both of which were based on the strength of the right guaranteed in Article 21 itself. From the point of view of the petitioner, he suggested that “in these circum-stances, the refusal of the court to pass an order of compensation in favour of the petitioner [would] be doing mere lip service to his funda-mental right to liberty which the State Government has so grossly vio-lated. Article 21

The American position

Although the provisions of the Constitution of the United States of America are relatively different, regard might be had to the position in that country in view of the fact that they have a similar Bill of Rights which did to an extent serve as a model of our own. There, Section 2 of Article III of the U.S. Constitution states that “the judicial power shall extend to all cases, in Law and Equity, arising under this Consti-tution, the Law of the United States....,” but traditionally the Consti-tution has been put to ‘defensive use’ and has not been made the basis for affirmative remedies. 23 There is a strong bias towards nullification of the effect of constitutional violations, as in *Mapp v. Ohio* where it was held that evidence gained by the State in contravention of the Fourth Amendment could not be used in the courts. However, the U.S. Supreme Court for the first time in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* 25 held that the violation of the Fourth Amendment could be made the basis for a civil suit in the Federal District Courts against the erring

II. The Nature and Scope of the Supreme Court’s Duty under Article 32

Presuming that the fundamental rights do require new remedies for their enforcement, the next major question which arises is on whom the responsibility for their enforcement lies, insofar as the creation of a new remedy is concerned. While it is fairly obvious that the responsibility for the enforcement of the fundamental rights lies on the Supreme Court by virtue of Article 32, it is apparently difficult to concede that such a responsibility extends to the creation of new remedies. It is alleged that this would involve the court in making decisions on policy, 20 which in truth is a matter to be left to the legislature, and that this would con-travene the constitutional framework for the separation of powers. It is submitted that this is not quite tenable, because Article 32 is plain in its meaning and its intent as to the constitutional responsibility for the enforcement of the fundamental rights. Insofar as it leaves the ‘appro-priateness of the proceedings by which the fundamental rights may be enforced as well as the

‘appropriateness’ of the reliefs that may be granted, to be decided by the Supreme Court, the legislature has no role to play in the creation of a remedy for this purpose.

This express grant of power by the Constitution also implies that this is an area forbidden to the legislature under ordinary circumstances, unless Parliament exercises its amending power. After the decision in *Keshavananda Bharati v. State of Kerala* where it was laid down that Parliament in the exercise of its amending power may not violate the ‘basic structure’ of the Constitution and the decision in *Indira Gandhi v. Raj Narain* where it was held that judicial review of the election of the Prime Minister may not be tampered with through amendment of the Constitution, any attempt to attenuate the judicial power with reference to the enforcement of the fundamental rights through amendment of the Constitution would also in all probability be struck down by the Court as a violation of the ‘basic structure’ of the Constitution. It is apparent, therefore, that to allow Parliament or the executive to dictate the conduct of the Supreme Court in enforcing the fundamental rights, which are directed towards limiting their own powers, would be a contradiction in terms. The only limitation is that the Supreme Court should not exceed the powers granted to it by Clause (2) of Article 32 for the purpose of enforcement of the fundamental rights. The use of the term ‘appropriateness’ to define the jurisdiction as well as the scope of the powers of the Supreme Court for the enforcement of the fundamental rights emphasizes that it is the subjective opinion of the Supreme Court which is to determine the enforcement of the fundamental rights.

III. Extent of the court’s remedial powers under article 32

The most important question in any examination of the suitability of the creation of remedies for violations of the fundamental rights would be whether the Supreme Court really does possess the power to do so. The language of Clause (2) of Article 32 appears to be wide enough to permit the Court to undertake the task of adjusting the relief to the necessity for redressing the wrong done to the rights of the individual. Seen from the perspective of the internal logic of the constitutional balance of power, such an interpretation is not as heretical as it sounds because it seems logical as pointed out earlier that if the Supreme Court has been entrusted with the responsibility of ensuring that the Executive observes the constitutional limitations, it should also be given the power of tailoring the remedies to the requirements of the situation. This does, of course, confer a more positive role on the Supreme Court but that is not surprising either, in view of the new realities of a situation where the executive appears to have forgotten the need for governance in accordance with civilised norms.

The traditionalists have all along seen the jurisdiction of the Court under Article 32 as primarily a writ jurisdiction, although they concede that it has the limited flexibility needed to prevent the procedural technicalities of the prerogative writs from impeding the grant of relief in appropriate situations.³⁸ Thus they do not see much scope for the award for more positive reliefs even in situations where no other inference could be drawn except that the traditional reliefs would be wholly inadequate in giving content to the promises embodied in the fundamental rights. They base their view of the Supreme Court’s powers on the premise that the “writs including writs in the nature of habeas corpus, mandamus, etc.” which may be issued by the Supreme Court for the enforcement of the fundamental rights circumscribe also the directions or orders that may be issued by the Court under Article 32. The Article specifically sanctions the passing of directions or orders independent of the writs that may be issued and there is powerful support for the proposition that under Article 32 the Court “can issue any directions (or orders) whatever, these writs being merely illustrative of the powers the Courts possess”,³⁹ provided, however, that they are appropriate for the enforcement of the fundamental rights. This leaves, it may be noted, a greater degree of latitude to the

Supreme Court to give relief, than if the relief granted was to be 'necessary' for the enforcement of the fundamental rights. It is apparent, therefore, that while the effect of an action of the State violating the fundamental rights could be nullified, it was necessary to include further provisions in Article 32 so that the Court could mould the relief to suit the facts and circumstances of the case. Article 32, therefore, provides a medium not only for nullification, but also for redressing the rights of the individual after they have been abridged or are threatened to be abridged by the State.

A. The Award of Compensation under Article 32

The practical necessity for fixing monetary liability on the State through the award of compensation under Article 32 is difficult to question after the decisions in Rudul Sah and Sebastian Hongray. If any corroboration is needed the decisions of the U.S. Supreme Court in *Bivens*, *Davis v. Passman* and *Carlson v. Green*, cited earlier, substantiate that constitutional provisions can support the creation of an 'affirmative cause of action' for damages. However, the question still arises as to whether such a compensatory remedy is appropriate in the jurisdiction of the Supreme Court under Article 32, as traditionally there is a distinction between the private law remedies like injunctions and damages and the public law remedies like the prerogative writs, the former being pursued normally in the civil courts.

At this stage, it might not be out of place to point out that some sort of distinction must be maintained between the terms "compensation" and "damages". Thus in Halsbury's Laws of England, "compensation" is defined as "the pecuniary recompense which a person is entitled to receive in respect of damage or loss which he has suffered, other than as a result of an actionable wrong litigated in the civil court, committed by the person bound to make the recompense. In this sense, "compensation" is distinct from "damages" which are recoverable in respect of an actionable wrong."⁵² Since a violation of the fundamental rights does not partake of the character of an actionable wrong and proceedings under Article 32 may not be likened to civil proceedings, it is possible to award compensation under Article 32 without equating it to awarding damages under a civil suit.

B. The Sovereign Immunity of the State

The last and potentially most daunting hurdle in the way of awarding compensation under Article 32 would be the sovereign immunity of the State, which the Supreme Court has inferred from Article 300 of the Constitution. The judicial treatment of the question in Rudal Sah has not been quite satisfactory and the Court appears to have ignored the immunity which attaches to the State in civil actions for its torts. Thus the court states that "if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in the suit, though it is not possible to predicate in the absence of evidence, the precise amount which would be decreed in his favour."⁵⁷ It is unfortunate that the Court did not pause to examine the implications of this statement, because in various decisions the Supreme Court has held that Article 300 must be read to mean that the position with reference to the liability of the State in tort remains the same as that which prevailed before the coming into force of the Constitution and that wherever the State was performing sovereign functions it could not be liable in tort for any injury suffered by its citizens.⁵⁸ Therefore, in all probability damages would not have been granted in a civil suit to the petitioner, on the ground that the State was possessed of sovereign immunity. The question remains as to whether the Court is bound by the doctrine of sovereign immunity and is prohibited from ordering under Article 32 the compensation by the State of the victims of gross violations of the fundamental rights.

Conclusion

The strands of the argument for permitting the creation of new re-medies under Article 32, and specifically a compensatory remedy, for the enforcement of the fundamental rights may now be drawn together. At the heart of the inclusion of entrenched 'fundamental' rights in a written Constitution like that of our country is the premise that they will function as fundamental limitations on the powers of the State and will be effectively enforced. The organ of the State which has been given the role of a "sentinel on the que vive"⁷⁷ as far as the enforcement of the fundamental rights is concerned is the superior judiciary, i.e. the Supreme Court of India and the various High Courts, although it is primarily the Supreme Court of India on whom the duty has been cast by virtue of Clause (1) of Article 32. For this purpose wide powers have been conferred on the Court by Clause (2) of Article 32, which is flexible enough to allow the creation of new remedies (like that of monetary compensation) where they are necessary for fulfilling the constitutional promise embodied in the fundamental rights.

One last point must be made. Throughout this article reference has been made to new remedies without specifying them.⁷⁸ An interesting area in which the Supreme Court has begun fashioning affirmative re-medies based on the positive content of the fundamental rights is in situations where the executive has blatantly violated Article 14, and it is found that setting aside the impugned action is not feasible. An instance would be the case of State-run medical colleges where admission is granted illegally to a few students, in violation of the norms laid down for admission, without taking into account the claims of others similarly or better placed in terms of merit. The Court has found it difficult, if not impossible, to invalidate these illegal admissions on account of the inequities involved in setting them aside after the passage of a long period of time. The Court has, therefore, evolved the remedy of compelling the State to create new seats to accommodate these students, which would, strictly speaking, be inconsistent with the principles applicable to the prerogative writ of mandamus.⁷⁹ Apart from this, while it is impossible to deal with all the other new situations which might require the fashioning of new remedies, there is a distinct possibility in the not-too-distant future that circumstances might render it necessary to fix liability jointly on the State and its officers, where there is evidence of bad faith on their part.⁸⁰ That, however, is outside the scope of this article and is better left for more thorough consideration elsewhere.

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3. For the parameters within which this activism functions in relation to public interest litigation, see U. Baxi, Taking suffering seriously: Social Action Litigation in the Supreme Court of India, 8 & 9 Del. Law Rev. (1979 & 1980)
4. 1981 (2) Scale 531.

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6. AIR 1982 SC 1473,
7. 1984 1 Scale 629, hereafter "Sebastian Hongray."
8. See S.N. Jain, Money Compensation for Administrative Wrongs through Art. 32, 25 JILI (1983) p. 118.
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15. See Prof. Julius Stone's analysis of the Hohfeldian framework in J. Stone, Legal Sytem and Lawyer's Reasoning, pp. 140-141.

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