CHAPTER- 7

JUDICIAL APPROACH TOWARDS THE PROBLEM OF CUSTODIAL VIOLENCE

“Men do not go to prison for punishment but as a punishment”

…Sir

Alexander Paterson

“Whether the law is right or wrong,
I know only the prison wall is strong,
Where the days are like years,
And years whose days are long.”

…Oscar Wilde

“If you once forfeit the confidence of our fellow citizens you can never regain their respect and esteem. It is true that you can fool all the people some of the time, and some of the people all the time, but cannot fool all the people all the time.”

…Abraham Lincoln

7.1 INTRODUCTION

The earlier stand of Indian judiciary on the application of the general norms of international law and India’s treaty obligations was that unless specifically incorporated by local statute, treaties do not create rights in municipal or domestic law. The Supreme Court of India has however, substantially altered the law in this regard. It is a settled principle now that if the norms of international law are not contrary to Indian law then are legally enforceable. And the treaty obligations which are rights-enhancing are taken as part of the
life, liberty and due process provision of the Constitution. The Supreme Court of India has time and again read the provisions of the UDHR and ICCPR into the fundamental rights chapter of the Indian Constitution.\(^1\) Atrocities and torture by governmental agencies especially police in India has always been a subject matter of curiosity, controversy and debate. In view of the provisions of Article 21 of the Constitution, any form of torture or cruel, inhuman or degrading treatment is prohibited.

Supreme Court of India in awarding compensation has relied on Article 9(5) of ICCPR even though India had entered a specific reservation to the same claiming that the Indian legal system did not recognize a right to compensation for victims of unlawful arrest or detention. The courts have leaned in favour of international conventions in interpreting the scope of life, liberty and due process clause of the Indian Constitution under Article 21 in a long line of its judicial precedents.

The National Committee to Review the Working of the Constitution (2002) set up by the Law Ministry specifically recommended for ‘prohibition of torture and cruel, inhuman or degrading treatment or punishment’ as one of the additions to the fundamental rights chapter as Article 21(2) on the basis of the dicta laid down in various Supreme Court judgments in recognition of torture in our constitutional jurisprudence.

Torture is not permissible whether it occurs during investigation, interrogation or otherwise. The wrong-doer is accountable and the State is responsible if a person in custody of the police or others is deprived of his life except in accordance with the procedure established by law. However, when the matter comes to the court, it has to balance the protection of fundamental rights of an individual and duties of the police. It cannot be gainsaid that freedom of an individual must yield to the security of the State. Latin maxim *salus populi est*


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suprema lex— the safety of the people is supreme law; and salus reipublicae
suprema lex— safety of the State is supreme law, co-exist. However, the
doctrine of the welfare of an individual must yield to that of the community.
The right to life has rightly been characterised as supreme and basic which
includes both so-called negative and positive obligations for the State. The
negative obligation means the overall prohibition on arbitrary deprivation of
life. In this context, positive obligation requires that State has an overriding
obligation to protect the right to life of every person within its territorial
jurisdiction.

The obligation requires the State to take administrative and all other measures
in order to protect life and investigate all suspicious deaths. The State must
protect victims of torture, ill-treatment as well as the human rights defenders
fighting for the interests of the victims, giving the issue serious consideration
for the reason that victims of torture suffer enormous consequences especially
psychologically. The problems of acute stress as well as a post-traumatic stress
disorder and many other psychological consequences needs to be understood
in correct perspective. Therefore, the State must ensure prohibition of torture,
cruel, inhuman and degrading treatment to any person, particularly at the
hands of any State agency or police force.

In addition to the protection provided under the Constitution, the Protection of
Human Rights Act, 1993, also provide for protection of all rights to every
individual. It prohibits illegal detention.

Torture and custodial deaths have always been condemned by the courts in
this country. In its 113th report, the Law Commission of India recommended
the amendment to the Indian Evidence Act, 1872 to provide that in case of
custodial injuries, if there is evidence, the court may presume that injury was
causd by the police having the custody of that person during that period.
Onus to prove contrary is on the police authorities. Law requires for adoption
of a realistic approach rather than narrow technical approach in cases of
custodial crimes.

There is another aspect to the protection of rights of an accused i.e. chemical-
induced truth testing of a suspect is deeply problematic and has been touted as
a measure that will reduce the temptation for investigators to resort to torture. Aside from the fact that the efficacy of these methods is open to serious doubt, the very thought of attributing a pre-determined truth value to a confession of guilt even before the trial begins, a truth value that will operate as a presumption for the court to follow, can only be viewed as incompatible with due process. There is no thought and discussion of subjecting the witnesses especially the prosecution witnesses and the police witnesses to any such chemical induced truth testing tests. There is a strong temptation to pressurize a suspect to agree to undergo such a test. Therefore, the suggestion that such a test, whatever be its scientific basis would be an anti-dote to torture can never be taken seriously. That apart, such a practice frontally offends the rule against self-incrimination. It is little better than police assertions of ‘voluntary confessions’. A disturbing pattern is noticed as to the disjuncture between normative human rights principles laid down in public law and the actual course of criminal prosecutions of officials accused of custodial crimes. The Supreme Court of India has conclusively held that Narco analysis, Polygraph test and Brain Electrical Activation Profile violate the right against self-incrimination.2

7.2 VIOLENCE IN POLICE CUSTODY

Article 21 which is one of the luminary provisions in the Constitution of India, 1950 and is a part of the scheme for fundamental rights occupies a place of pride in the Constitution. The article mandates that no person shall be deprived of his life and personal liberty except according to the procedure established by law. This sacred and cherished right i.e. personal liberty has an important role to play in the life of every citizen. Life or personal liberty includes a right to live with human dignity. There is an inbuilt guarantee against torture or assault by the State or its functionaries. Chapter V of the Code of Criminal Procedure, 1973 deals with the powers of arrest of persons and the safeguards required to be followed by the police to protect the interest of the arrested person. Articles 20(3) and 22 of the Constitution further manifest the constitutional protection extended to every citizen and the guarantees held out

for making life meaningful and not a mere animal existence. It is, therefore, difficult to comprehend how torture and custodial violence can be permitted to defy the rights flowing from the Constitution. The dehumanizing torture, assault and death in custody which have assumed alarming proportions raise serious questions about the credibility of the rule of law and administration of the criminal justice system. The community rightly gets disturbed. The cry for justice becomes louder and warrants immediate remedial measures. This Court has in a large number of cases expressed concern at the atrocities perpetrated by the protectors of law.

Justice Brandeis’ observations which have become classic are in the following immortal words: Government as the omnipotent and omnipresent teacher teaches the whole people by its example. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself.\(^3\)

The diabolic recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new and unwarranted peril because the guardians of law destroy the human rights by custodial violence and torture, invariably resulting in death. The vulnerability of human rights assumes a traumatic torture when functionaries of the State whose paramount duty is to protect the citizens and not to commit gruesome offences against them, in reality perpetrate them.\(^4\)

But at the same time there seems to be a disturbing trend of increase in cases where false accusations of custodial torture are made, trying to take advantage

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of the serious concern shown and the stern attitude reflected by the courts while dealing with custodial violence. It needs to be carefully examined whether the allegations of custodial violence are genuine or are sham attempts to gain undeserved benefit masquerading as victims of custodial violence. Below, some of the cases and the principles laid down by them have been discussed.

In *Raghubir Singh v. State of Haryana*\(^5\), while dealing with torture in police custody, the court observed:

“We are deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of the law gore human rights to death. The vulnerability of human rights assumes a traumatic, torturesome poignancy when the violent violation is perpetrated by the police arm of the State whose function is to protect the citizen and not to commit gruesome offences against them as has happened in this case. Police lock-ups, if reports in newspapers have a streak of credence, are becoming more and more gruesome cells. This development is disastrous to our human rights awareness and humanist constitutional order.”

In another case of *Gauri Shanker Sharma etc. v. State of U.P.*\(^6\), the Court held:

“....it is generally difficult in cases of deaths in police custody to secure evidence against the policemen responsible for resorting to third degree methods since they are in charge of police station records which they do not find difficult to manipulate as in this case. The offence is of a serious nature aggravated by the fact that it was committed by a person who is supposed to protect the citizens and not misuse his uniform and authority to brutally assault them while in his custody. Death in police custody must be seriously viewed for otherwise we will help take a stride in the direction of police raj. It must be curbed with a heavy hand. The punishment should be such as would

\(^5\) AIR 1980 SC 1087.

\(^6\) AIR 1990 SC 709.
deter others from indulging in such behaviour. There can be no room for leniency.”

In *Munshi Singh Gautam and other v. State of M.P.*, the honorable court held that peculiar type of cases must be looked at from a prism different from that used for ordinary criminal cases for the reason that in a case where the person is alleged to have died in police custody, it is difficult to get any kind of evidence. The Court observed:

“Rarely in cases of police torture or custodial death, is direct ocular evidence available of the complicity of the police personnel, who alone can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues....... The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case,.............often results in miscarriage of justice and makes the justice-delivery system suspect and vulnerable. In the ultimate analysis society suffers and a criminal gets encouraged.......The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kinds of crime in a civilized society governed by the rule of law and poses a serious threat to an orderly civilised society. Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/under trial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in “khaki” to consider themselves to be above the law and sometimes even to become a law unto themselves. Unless stern measures are taken to check the malady of the very fence eating the crop, the foundations of the criminal justice- delivery system would be shaken and civilisation itself would risk the consequence of heading towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism. The

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7 AIR 2005 SC 402.
courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually lose faith in the efficacy of the system of the judiciary itself, which if it happens, will be a sad day, for anyone to reckon with.”

In State of U.P. v. Mohd. Naim, State of U.P. filed an appeal for expunging the following remarks made by the Allahabad High Court:

“That there is not a single lawless group in the whole of the country whose record of crime comes anywhere near the record of that organised unit which is known as the Indian Police Force.”

“.....Where every fish barring perhaps a few stinks, it is idle to pick out one or two and say that it stinks.”

These remarks even though later were removed by the court but still shows the gravity of situation which needs to be fought at every level by all of us.

In yet another case of Nilabati Behera alias Lalit v. State of Orissa and ors, recognizing the ‘public law’ nature of the right to reparation, the court held:

When the court molds the relief of compensation in proceedings under Article 32 and 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizens. The payment of compensation in such cases is not to be understood as a civil action for damages under the private law but in the broader sense of providing relief by an order of making ‘monetary amends’ under the public law for the wrong done due to breach of public duty of not protecting the fundamental rights of the citizen. The compensation is in the nature of ‘exemplary damages’ awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved.


9 AIR 1993 SC 2366.
party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/ and prosecute the offender under the penal law.

Through a letter dated 14.9.1988 by a mother, Supreme Court of India learnt about the death of her son in custody which was treated as a writ petition under Article 32 of the Constitution. He died as a result of the multiple injuries inflicted to him while he was in police custody and thereafter his dead body was thrown on the railway track. It was prayed in the petition that award of compensation be made to her, for contravention of the fundamental right to life guaranteed under Article 21 of the Constitution. The defence of the respondents was that petitioner’s son managed to escape from the police custody at about 3 a.m. on 2.12.1987 from the Police Outpost, where he was detained and that thereafter he could not be apprehended in spite of a search and that his dead body was found on the railway track on 2.12.1987 with multiple injuries, which indicated that he was run over by a train. After hearing the parties and appreciating the evidence it was found that the hands of the deceased were tied by a rope by the police while beating him and later his body was thrown on the railway track to show that the death was caused due to an accident i.e. by collision with the train while escaping from the police custody. It was a case of custodial death, and the deceased died as a result of the injuries inflicted to him voluntarily while he was in police custody at the Police Outpost.

Court held that award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for 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 based on tort. The deceased was aged about 22 years and had a monthly income between Rs.1200 to Rs.1500. A total amount of Rs.1,50,000 was held to be appropriate as compensation, to be awarded to the petitioner. The State of Orissa was directed to pay the sum of Rs.1,50,000 to the petitioner as compensation and a further sum of Rs.10,000 as costs to be paid to the Supreme Court Legal Aid Committee.
In *Sebastian M.Hongroy v. Union of India* , a poor man lost his son allegedly killed due to torture by the police officials of Keeraithurai police station, Madurai District who knocked at the doors of the Court for a Mandamus, directing the State and others to pay compensation of Rs.5 lakhs and also prayed for a direction to initiate both disciplinary and criminal prosecution against those responsible for the untimely death of his son. The petitioner’s son, aged about 26 years was running a meat shop at Anuppandi, for his livelihood. He was living with his wife, who was 7 month’s pregnant, at the time of his death, daughter and two sons, aged 5 and 3 years respectively.

On 04.12.2004 while he was returning from the meat shop around 7 p.m. after he drank liquor near TASMAC wine shop No.5276, the Police Constables, Mr.Marimuthu and Mr.Karuppiah of Keeraithurai Police Station, came there in a motor cycle and questioned him for consuming liquor, in the residential area. On intimation, some other policemen also assembled and took him to Keeraithurai Police Station for enquiry. The same was witnessed by two people. He was tortured brutally by the police.

A complaint was lodged with Avaniyapuram Police Station and they registered a case. According to the petitioner, the police officials under the guise of an enquiry, had tortured his son, which resulted in his death. His son was handed over by the policemen in an unconscious condition, with injuries on his body and it was a clear case of unlawful confinement, torture, physical assault, illegal treatment resulting in the death of his son. It was also contended that though the police personnel had committed serious offences under Sections 120(B), 166, 302, 307, 325, 329, 342, 347, 352 and 357 of IPC, no action was taken against the violators of law, despite the matter being brought to the notice of the respondents.

On the question whether the petitioner is entitled to compensation for the death of his son when prima facie death is said to have been caused by seven police officials was answered in positive by the court. On the question of payment of compensation to the victims of torture, physical assault,

10 AIR 1984 SC 1026.
humiliation, rape, custodial death and where there is an infringement of constitutional right to life and liberty under Article 21 of the Constitution of India, the Hon’ble Supreme Court has ordered compensation in cases where investigation is pending and also in cases, after the conclusion of the proceedings taken against the police officials involved.

The Apex Court ordered payment of compensation to the family of the victim who suffered torture, agony and mental oppression.

**Bhim Singh v. State of Jammu & Kashmir**¹¹ is a very famous case in which the Apex Court held as follows:

“Orders of remand were obtained from the Executive Magistrate and the Sub-Judge on the applications of the police officers without the production of Shri Bhim Singh before them. The manner in which the orders were obtained i.e. at the residence of the Magistrate and the Sub-Judge after office hours, indicates the surreptitious nature of the conduct of the police. The Executive Magistrate and the Sub-Judge do not at all seem to have been concerned that the person whom they were remanding to custody had not been produced before them. They acted in a very casual way and we consider it a great pity that they acted without any sense of responsibility or genuine concern for the liberty of the subject. The police officers, of course, acted deliberately and mala fide and the Magistrate and the Sub-Judge aided them either by colluding with them or by their casual attitude. We do not have any doubt that Shri Bhim Singh was not produced either before the Magistrate on 11th or before the Sub-Judge on 13th, though he was arrested in the early hours of the morning of 10th. There certainly was a gross violation of Shri Bhim Singh’s constitutional rights under Articles 21 and 22(2).

We can only say that the police officers acted in a most high-handed way. We do not wish to use stronger words to condemn the authoritarian acts of the police. If the personal liberty of a Member of the Legislative Assembly is to be played with in this fashion, one can only wonder what may happen to lesser mortals. Police officers who are the custodians of law and order should have

the greatest respect for the personal liberty of citizens and should not flout the laws by stooping to such bizarre acts of lawlessness. Custodians of law and order should not become depredators of civil liberties. Their duty is to protect and not to abduct. However the two police officers, the one who arrested him and the one who obtained the orders of remand, are but minions, in the lower rungs of the ladder. We do not have the slightest doubt that the responsibility lies elsewhere and with the higher echelons of the Government of Jammu and Kashmir but it is not possible to say precisely where and with whom, on the material now before us. We have no doubt that the constitutional rights of Shri Bhim Singh were violated with impunity. Since he is now not in detention, there is no need to make any order to set him at liberty, but suitably and adequately compensated, he must be. That we have the right to award monetary compensation by way of exemplary costs or otherwise is now established by the decisions of this Court.

When a person comes to us with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free. In appropriate cases we have the jurisdiction to compensate the victim by awarding suitable monetary compensation. We consider this an appropriate case. We direct the first respondent, the State of Jammu and Kashmir to pay to Shri Bhim Singh a sum of Rs 50,000 within two months from today. The amount will be deposited with the Registrar of this Court and paid to Shri Bhim Singh.”

In *People’s Union for Democratic Rights v. Police Commissioner*\(^{12}\), there was a report by the Deputy Commissioner, accepting the atrocities committed by the police officers and that the matter was investigated for criminal prosecution. The Apex Court directed a sum of Rs.50,000/- to be paid to the family of the deceased, as compensation which would be invested in a proper manner so that the destitute’s family might get some amount every month towards their expenses.

It was also directed that after investigation and inquiry officers who are found guilty, the amount paid as compensation or part thereof may be recovered from these persons out of their salaries after giving them opportunity to show cause. This order will not prevent any lawful action for compensation. But in case some compensation is ordered by a competent court, this will be given credit to.

In this case, though the District Collector had recommended only departmental action against the erring officials namely, the Inspector of Police, the Sub Inspector of Police but the Government took a decision to prosecute the officials.

In *Saheli v. Commissioner of Police* 13 dealing with custodial death and compensation, the Hon’ble Supreme Court held as follows:

“It is now apparent from the report dated December 5, 1987 of the Inspector of the Crime Branch, Delhi as well as the counter-affidavit of the Deputy Commissioner of Police, Delhi on behalf of the Commissioner of Police, Delhi and also from the fact that the prosecution has been launched in connection with the death of Naresh, son of Kamlesh Kumari showing that Naresh was done to death on account of the beating and assault by the agency of the sovereign power acting in violation and excess of the power vested in such agency. The mother of the child, Kamlesh Kumari, in our considered opinion, is entitled to get compensation for the death of her son from respondent 2, Delhi Administration.

An action for damages lies for bodily harm which includes battery, assault, false imprisonment, physical injuries and death. In case of assault, battery and false imprisonment the damages are at large and represent a solatium for the mental pain, distress, indignity, loss of liberty and death. It is well settled now that the State is responsible for the tortious acts of its employees. Respondent 2, Delhi Administration is liable for payment of compensation to Smt. Kamlesh Kumari for the death of her son due to beating by the SHO of Anand Parbat Police Station, Shri Lal Singh.”

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13 (1990)1 SCC 422.
In **Joginder Kaur v. Punjab State**\(^\text{14}\), the court observed:

“In the matter of liability of the State for the torts committed by its employees, it is now a settled law that the State is liable for tortious acts committed by its employees in the course of their employment.”

**State of Rajasthan v. Vidhyawati**\(^\text{15}\), the court said:

“Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and functioning as such as any other employer. The immunity of the Crown in the United Kingdom, was based on the old feudalistic notions of justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own courts. In India, ever since the time of the East India Company, the sovereign has been held liable to be sued in tort or in contract, and the Common Law immunity never operated in India.”

In **Peoples’ Union for Democratic Rights v. Police Commissioner, Delhi Police Headquarters**\(^\text{16}\), one of the labourers who was taken to the police station for doing some work and on demand for wages was severely beaten and ultimately succumbed to the injuries. It was held that the State was liable to pay compensation and accordingly directed that the family of the deceased labourer will be paid Rs 75,000 as compensation within a period of four weeks from the date of this judgment. And the Delhi Administration may take appropriate steps for recovery of the amount paid as compensation or part thereof from the officers who will be found responsible.


In *Re : Death of Sawinder Singh Grover*¹⁷, the Supreme Court ordered for compensation where the facts and circumstances created a prima facie case for investigation and prosecution and held:

“*It is not disputed that the matter has not as yet been finally investigated. The learned Attorney-General assisting us in this case states that he does not accept the findings of the report and he reserves his right to challenge the same at the appropriate stage. We are of the view that the facts and circumstances which have now come to light create a prima facie case for investigation and prosecution. We, therefore, direct that all the persons named in the report of the learned Additional District Judge and others who are accused as a result of the investigation, be prosecuted for the appropriate offences under the law by the Central Bureau of Investigation. We direct the CBI to ensure that an FIR is registered on the facts as emanate from our order and the report of the learned Additional District Judge. A copy of the report along with all the annexures be sent to the Central Bureau of Investigation. As an interim measure by way of ex gratia payment, we direct that a sum of Rs 2,00,000 (two lakhs) shall be paid by the Union of India/Directorate of Enforcement to the widow of the deceased-Sawinder Singh. In the event a suit being filed for compensation, appropriate compensation may be determined in accordance with law after hearing the parties. The contentions of the learned Attorney-General which he wishes to place before us at this stage, should be reserved by him for an appropriate stage. In the event a decree to be passed, the sum of Rs 2,00,000 to be paid ex gratia, shall not be taken into account. The payment of rupees two lakhs shall be made within three months from today. The amount shall be deposited in the Registry of this Court and the widow of deceased-Sawinder Singh shall be at liberty to withdraw the entire amount on the identification to the satisfaction of the Registrar (Admn.). Any observation made by us in this order will not affect the investigation, prosecution and the trial.”

In *Inder Singh v. State of Punjab and others*\(^\text{18}\), the Supreme Court while considering the violation of human rights, abduction and elimination of seven persons, by a police party led by Deputy Superintendent of Police, held as follows:

“The Punjab Police would appear to have forgotten that it was a police force and that the primary duty of those in uniform is to uphold law and order and protect the citizen. If members of a police force resort to illegal abduction and assassination, if other members of that police force do not record and investigate complaints in this behalf for long periods of time, if those who had been abducted are found to have been unlawfully detained in police stations in the State concerned prior to their probable assassination, the case is not one of errant behaviour by a few members of that police force. We do not see that ‘constitutional culture’ had percolated to the Punjab Police. On the contrary it betrays scant respect for the life and liberty of innocent citizens and exposes the willingness of others in uniform to lend a helping hand to one who wreaks private vengeance on mere suspicion.”

*State of M.P v. Shyamsunder Trivedi*\(^\text{19}\). The Hon’ble Supreme Court considered the case of custodial death or police torture, the availability of direct ocular evidence of the complicity of the police personnel and the ground reality in such matters where the police personnel, would remain silent and more often than not even pervert the truth to save their colleagues and observed as follows:

“The observations of the High Court that the presence and participation of these respondents in the crime is doubtful are not borne out from the evidence on the record and appear to be an unrealistic over simplification of the tell-

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tale circumstances established by the prosecution. The following pieces of circumstantial evidence apart from the other evidence on record, viz., (i) that the deceased had been brought alive to the police station and was last seen alive there on 13-10-1981 (ii) that the dead body of the deceased was taken out of the police station on 14-10-1981 at about 2 p.m. for being removed to the hospital (iii) that the deceased had died as a result of the receipt of extensive injuries while he was at the police station (iv) Respondents were present at the police station and had all joined hands to dispose of the dead body of Nathu Banjara (v) that the SI Trivedi, Respondent 1 created false evidence and fabricated false clues in the shape of documentary evidence with a view to screen the offence and for that matter, the offender in connivance with some of his subordinates and herein had taken steps to cremate the dead body in hot haste describing the deceased as a lavaris unerringly points towards the guilt of the accused and the established circumstances coupled with the direct evidence are consistent only with the hypothesis of the guilt of the respondents and are inconsistent with their innocence.

The High Court erroneously overlooked the ground reality that rarely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel would be available, when it observed that direct evidence about the complicity of these respondents was not available. Generally speaking, it would be police officials alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues, and the present case is an apt illustration, as to how one after the other police witnesses feigned ignorance about the whole matter.

The trial court and the High Court, if we may say so with respect, exhibited a total lack of sensitivity and a ‘could not care less’ attitude in appreciating the evidence on the record and thereby condoning the barbarous third degree methods which are still being used at some police stations, despite being illegal. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact-situations and the peculiar circumstances of a given
case, as in the present case, often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and a criminal gets encouraged.

Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the courts because it reinforces the belief in the mind of the police that no harm would come to them, if an odd prisoner dies in the lock-up, because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilised society, governed by the rule of law and poses a serious threat to an orderly civilised society. Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/undertrial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in ‘Khaki’ to consider themselves to be above the law and sometimes even to become law unto themselves. Unless stern measures are taken to check the malady, the foundations of the criminal justice delivery system would be shaken and the civilization itself would risk the consequence of heading towards perishing. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may lose faith in the judiciary itself, which will be a sad day.”

In Shri Dino DG Dympep & Another v. State of Meghalaya & Ors.20, the Court held as follows:

“Having come to the conclusion that the deceased died due to custodial violence, the next question to be determined what is to be done by this Court on the facts and circumstances of the case. Since a case of breach of fundamental right to life guaranteed by Art.21 of the Constitution by the State and its instrumentality has been made out, the award of compensation against

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the State respondents can only be the appropriate and effective remedy. The relief of monetary compensation as exemplary damages, in a proceeding under Article 226 by the High Court for established infringement of the enforceable right guaranteed under Article 21 of the Constitution is undoubtedly a remedy available in public law and is based on strict liability for contravention of the guaranteed basic and indefeasible right of the citizen. To quote the Apex Court, the purpose of public law is not only to civilize public power but also to assure the citizen they live under a legal system which aims to protect their interests and preserve their rights. When therefore, the Court moulds the relief by granting compensation in proceeding under Article 226 of the Constitution seeking enforcement and protection of fundamental rights, it does so under the public law by way of penalizing the wrong doer and fixing the liability for the public wrong doer on the State which has failed in its duty to protect the fundamental right of the citizen. The payment of compensation in such a case is not to be understood, as it is generally understood general interest in a civil action for damages under the public law but in the broader sense of providing relief by an order of making monetary amends under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of exemplary damages awarded against the wrongdoer for breach of public duty and is independent of the rights available to the aggrieved party to claim compensation under the prevalent law through a suit instituted in a court of competent jurisdiction. The quantum of compensation will, however, depend on the facts and circumstances of the case. In the instant case, the deceased was 27 years old at the time of his death, was a daily wage earner and is survived by his wife and two minor children. Considering the condition of the deceased and the circumstances in which he died. The court was of the view that a compensation of Rs.3 lacs will meet the ends of justice and the State-respondents are directed to pay the same within a period of two months from the date of receipt of this judgment. The State-respondents shall also hold an enquiry to find out the police personnel involved in the custodial death of the deceased. The amount of compensation paid to the petitioner No.2 may be realized by the State-respondents from the police personnel found to be involved in the custodial death of the deceased. It
shall also be open to the petitioner to approach a civil Court for compensation/damage available under the law of tort.”

In *P.Amaravathy v. The Government of Tamil Nadu & others*\(^{21}\), the petitioner’s husband died in police custody. The Court ordered for Rs.1,00,000/- by way of interim compensation to be paid and adjusted at a later stage when regular compensation is claimed.

In *Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble*\(^{22}\), the Hon’ble Supreme Court, while dealing with the cases relating to custodial violence, torture and abuse of police power in alarming proportions prevailing in this country, observed as follows:

“If you once forfeit the confidence of your fellow citizens you can never regain their respect and esteem. It is true that you can fool all the people some of the time, and some of the people all the time, but you cannot fool all the people all the time”, as said by Abraham Lincoln.

Custodial violence, torture and abuse of police power are not peculiar to this country, but it is widespread. It has been the concern of the international community because the problem is universal and the challenge is almost global. The Universal Declaration of Human Rights in 1948 which marked the emergence of a worldwide trend of protection and guarantee of certain basic human rights stipulates in Article 5 that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Despite this pious declaration, the crime continues unabated, though every civilized nation shows its concern and makes efforts for its eradication.

If it is assuming alarming proportions, nowadays, all around, it is merely on account of the devilish devices adopted by those at the helm of affairs who proclaim from rooftops to be the defenders of democracy and protectors of people’s rights and yet do not hesitate to condescend behind the screen to let loose their men in uniform to settle personal scores, feigning ignorance of

\(^{21}\) 1996 (2) CTC 478.
\(^{22}\) (2003)7 SCC 749.
what happens and pretending to be peace-loving puritans and saviours of citizens’ rights.

In *Rajamal v. State of T.N. & Ors.*23, the appellant’s husband therein, aged 50 years, was suspected for receiving stolen jewels and taken to police station. Later, his body was found lying in reserve forest. The Government sanctioned prosecution of the police personnel, involved in the death. The learned Single Judge, directed payment of Rs.3,00,000/-, as compensation which was not challenged by the Government. Seeking enhancement of the compensation, the appellant preferred an appeal, as her family was suffering from financial crunch. Considering the number of family members and the financial difficulties, the Division Bench enhanced the compensation to Rs.5,00,000/-.

Though there is no specific method in arriving at the quantum of compensation, in these type of matters, where vicarious liability is fixed on the State Government, for tortious acts committed by the officers of the Government and where there is a prima facie finding of their involvement for the cause of death or custodial violence, or case of rape, torture, physical assault, etc., this Court is inclined to apply the method followed, while computing the compensation, arising out of the Motor Vehicles Claims cases, where, the victim has to be awarded ‘just compensation’.

In *R.Dhanalakshmi v. Government of Tamil Nadu*24, a learned Single Judge in respect of custodial death and after taking note of age and income of the deceased, family circumstances, dependency etc., and by applying multiplier, as provided in Motor Vehicles Act, awarded compensation of Rs.9 Lakhs.

In *T.M.Kamalanathan v. Government of Tamil Nadu and others*25, while computing compensation to be paid to victims of torture, court applied the principles followed in Motor Accident Claims cases by applying the principles of ‘Just Compensation’, as provided under Second Schedule to Section 163-A of Motor Vehicles Act.

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25 2009 (1) MLJ 634; B.Ammu v. State of Tamil Nadu, 2009 (1) MLJ 1090.
Taking into consideration, the age of the minor children, wife, child in the womb and age of the father of the deceased, the Court deemed fit to direct the State Government to pay a sum of Rs.1,00,000/- to the petitioner, father of the deceased, Rs.1,00,000/- to the wife of the deceased and the remaining compensation amount of Rs.3,00,000/- to be deposited in the name of the minor children in a fixed deposit for a period of three years in a nationalised bank, proximate to the residence of the wife of the deceased. Like in Motor Transport Claims cases, she was also permitted to withdraw the accrued interest from the fixed deposit, till the minor children attained majority. The amount ordered by this Court was to be deposited within one month from the date of receipt of a copy of this order.

In *Sudha Rasheed v. Union of India*[^26^], the Supreme Court granted a compensation of Rs. 7,50,000/- to the relatives of an advocate who had died in police custody and observed:

“There is no wrong without a remedy. The law wills that in every case where a man is wronged and damaged he must have a remedy. A mere declaration of invalidity of an action or finding of custodial violence or death in lock-up, does not by itself provide any meaningful remedy to a person whose fundamental right to life has been infringed. Much more needs to be done. There is indeed no express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life, nonetheless, the Supreme Court has judicially evolved a right to compensation in cases of established unconstitutional deprivation of personal liberty or life.

Awarding appropriate punishment for the offence must be left to the Criminal Courts in which the offender is prosecuted, which the State, in law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait-jacket formula can be evolved in that behalf.

The relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit.”

“The Court is not helpless and the wide powers given to the Supreme Court by Article 32, which itself is a fundamental right, imposes a constitutional obligation on the Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enable the award of monetary compensation in appropriate cases, where that is the only mode of redress available. The power available to the Supreme Court under Article 142 is also an enabling provision in this behalf. The contrary view would not merely render the Court powerless and the constitutional guarantee a mirage, but may, in certain situations, be an incentive to extinguish life, if for the extreme contravention the Court is powerless to grant any relief against the State, except by punishment of the wrongdoer for the resulting offence, and recovery of damages under private law, by the ordinary process. 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, the 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 have-nots, 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 remedies, where more appropriate.”

In Bhajan Kaur v. Delhi Administration27, the Court while determining the scope and width of Article 21 of the Constitution held as follows:

“Personal liberty is fundamental to the functioning of our democracy. The lofty purpose of Article 21 would be defeated if the State does not take

27 1996 AIHC 5644.
adequate measures for securing compliance with the same. The State has to
control and curb the malefic propensities of those who threaten life and liberty
of others. It must shape the society so that the life and liberty of an individual
is safe and is given supreme importance and value. It is for the State to ensure
that persons live and behave like and are treated as human beings. Article 21
is a great landmark of human liberty and it should serve its purpose of
ensuring the human dignity, human survival and human development. The
State must strive to give a new vision and peaceful future to its people where
they can co-operate, coordinate and co-exist with each other so that full
protection of Article 21 is ensured and realised. Article 21 is not a mere
platitude or dead letter lying dormant, decomposed, dissipated and inert. It is
rather a pulsating reality throbbing with life and spirit of liberty, and it must
be made to reach out to every individual within the country. It is the duty and
obligation of the State to enforce law and obligation of the State to enforce
law and order and to maintain public order so that the fruits of democracy can
be enjoyed by all sections of the society irrespective of their religion, caste,
creed, colour and language. Article 21 is an instrument and a device to attain
the goal of freedom of an individual from deprivation and oppression and its
violation cannot and must not be tolerated or condoned. Preamble to the
Constitution clearly indicates that justice, liberty and equality must be secured
to all citizens. Besides, it mandates the State to promote fraternity among the
people, ensuring the dignity of the individual and the unity and integrity of the
nation. Article 38 of the Constitution also requires the State to promote
welfare of the people by securing and protecting, as effectively as it may, a
social order in which justice social, economic and political shall inform all
institutions of the national life. These are the goals set by the Constitution and
Article 21 and other fundamental rights are the means by which those goals
are to be attained. Therefore, it becomes the responsibility and avowed duty of
the State to adopt means and methods in order to realise the cherished aims.”

In Francis Corallie Mullin v. Union Territory of Delhi\(^2\), the Supreme court
has condemned cruelty or torture as being violative of Art 21 in following
words “any form of torture and cruelty or degrading treatment would be

\(^2\) (1981)1 SCC 608.
offensive of human dignity and it would on its view, be prohibited by Article 21. It would be seen that there is implicit in Article 21 the right to protection against torture or cruel, inhuman which is enunciated in Article 5 of Universal Declaration of Human right and guaranteed by Article 7 of International Covenant on Civil and Political Rights”.

In Khatri v. State of Bihar which is also known as the Bhagalpur Blinding Case involving the forcible blinding of detainees by pouring acid into their eyes. The Supreme Court of India failed in giving compensation to the victims of crime as the responsibility of the police officers was still under investigation. But the court ordered for the medical treatment for the seven blinded prisoners to be paid for by the state.

In Punjab & Haryana High Court Bar Association v. State of Punjab and Ors., a case concerning the abduction and murder of an advocate, his wife and their child of two years, for which the police appeared to be responsible and the court held that:

The police officers in question must be suspended by the State and the trial is transferred to the Designated Court at Chandigarh. The Court is to direct the trial expeditiously within six months of its commencement. In accordance with the requirements of the CrPC the state of Punjab is to sanction the prosecution of the police officers immediately, within one month of receiving this order.

In State of Punjab v. Vinod Kumar, this case was concerned with an enforced disappearance by the Punjab police. The High Court directed the State Government to sanction prosecution of the officials involved. The Supreme Court of India read the direction down to mean that the State government must ‘consider’ grant of sanction to prosecute.

In Inder Singh v. State of Punjab, the court held that although ‘command responsibility’ is not recognized in the law, police officials who failed to

29 AIR 1981 SC 928.
check their subordinates despite complaints against them of abduction and elimination were made to face disciplinary proceedings by the Supreme Court’s directions in this case. Also, in this case the court drew an inference that the extra-judicial killing of the detained persons was done by the Punjab policemen as the three caught or detained suspected militants who were picked up and detained illegally could not be traced.

*In Joginder Singh v. State of U.P*[^33^], the subject of discretion to arrest came up before the Supreme Court of India, in this case and it first noted that the law of arrest is one of balancing individual rights, liberties and privileges on the one hand and individual duties etc. on the other hand. One has to balance protection for the individual against the social need that crime shall be suppressed. After elaborating on this point, and after noticing the views expressed by the National Police Commission in its Third Report (pages 31 and 32) and by the Royal Commission on Criminal Procedure, the Supreme Court of India took care to suggest certain guidelines regarding arrest by the police. The court also referred to the following suggestion of the Royal Commission on Criminal Procedure:

“To help to reduce the use of arrest we would also propose the introduction here of a scheme that is used in Ontario enabling a police officer to issue what is called an appearance notice. That procedure can be used to obtain attendance at the police station without resorting to arrest provided a power to arrest exists, for example to be fingerprinted or to participate in an identification parade. It could also be extended to attendance for interview at a time convenient to both the suspect and to the police officer investigating the case.”

The Supreme Court also referred to section 56(1) of the Police and Criminal Evidence Act, 1984 (U.K.) which reads as under:-

“Where a person has been arrested and is being held in custody in a police station or other premises, he shall be entitled, if he so requests, to have one friend or relative or other person who is known to him or who is likely to

[^33^]: JT (1994)3 SC 423.
take an interest in his welfare told, as soon as is practicable except to the extent that delay is permitted by this section that he has been arrested and is being detained there.”

In the case of Joginder Kumar v. State of Uttar Pradesh, the court (in paragraph 24 of the judgments) took pains to point out that an arrest cannot be made, merely because it is lawful for the officer to do so. The existence of the power is one thing, while the exercise of the power quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention may cause incalculable harm to the reputation and self-esteem of a person. The court made the following observations in this behalf:

“No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a Police Officer in the interest of protection of the constitutional right of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person’s complicity and even so as to the need to effect arrest. A person is not liable to arrest merely on suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer affecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave Station without permission.”

In paragraph 26 of its judgment, the Supreme Court set out the requirements as under:

“These rights are inherent in Articles 21 and 22(1) of the Constitution. For effective enforcement of these fundamental rights, following is required:

[34] JT (1994) 3 SC 423.

[35] Article 21- “No person shall be deprived of his life or personal liberty except according to procedure established by law.”
1. An arrested person being held in custody is entitled, if he so requests, to have one friend, relative or other person who is known to him or likely to take an interest in his welfare told, as far as practicable that he has been arrested and where he is being detained.

2. The police officer shall inform the arrested person when he is brought to the police station of this right.

3. An entry shall be required to be made in the Diary as to who was informed of the arrest.

These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly.”

Article 22- “(1) no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty- four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply-
- (a) To any person who for the first time being is an enemy alien; or
- (b) To any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless-
- (a) an advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:
  Provided that nothing in this sub- clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by the parliament under sub- clauses (a) and (b) of clause (7); or
- (b) Such person is detained in accordance with the provisions of any law made by parliament under sub- clauses (a) and (b) of clause (7).

(5) when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe-
- (a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub- clause (a) of clause (4);
- (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and
- (c) the procedure to be followed by an Advisory Board in an inquiry under sub- clause (a) of clause (4).”

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The Supreme Court has also directed that it shall be the duty of the Magistrate before whom the arrested person is produced, to satisfy himself that the requirements set out in the preceding paragraph have been complied with. As per paragraph 28 of the judgment, the above requirements must be followed till legal provisions are made in this behalf and it was further clarified that these requirements are in addition to the rights of arrested persons found in various police manuals.

In Joginder’s case, paragraph 29, the Supreme Court, while clarifying that these requirements are not exhaustive, directed the Director General of Police of all the States in India to issue necessary instructions requiring due observance of these requirements. In addition, departmental instructions have also to be issued that a police officer making an arrest must also record in the case diary the reasons for making the arrest.

7.3 VIOLENCE IN JUDICIAL CUSTODY

It is axiomatic that convicts, prisoners or under trials are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under trials or other prisoners in custody, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of no exceptions. The wrongdoer is accountable and the State is responsible if the person in custody is deprived of his right except according to the procedure established by law. The defence of “sovereign immunity” in such cases is not available to the State.
The Supreme Court of India issued certain guidelines to be followed by police officers or judicial officers which are as under: 36

(a) If a judicial officer is to be arrested for some offence, it should be done under intimation to the District Judge or the High Court as the case may be.

(b) If facts and circumstances necessitate the immediate arrest of a judicial officer of the subordinate judiciary, a technical or formal arrest may be affected.

(c) The fact of such arrest should be immediately communicated to the District and Sessions Judge of the concerned District and the Chief Justice of the High Court.

(d) The judicial officer so arrested shall not be taken to a police station, without the prior order or directions of the District and Sessions Judge of the concerned district, if available.

(g) There should be no handcuffing of a judicial officer. If, however, violent resistance to arrest is offered or there is imminent need to effect physical arrest in order to avert danger to life and limb, the person resisting arrest may be overpowered and handcuffed. In such case, immediate report shall be made to the District and Sessions Judge concerned and also to the Chief Justice of the High Court. But the burden would be on the police to establish the necessity for effecting physical arrest and handcuffing the judicial officer, and if it be established that the physical arrest and handcuffing of the judicial officer was unjustified, the police officers causing or responsible for such arrest and handcuffing would be guilty of misconduct and would also be personally liable for compensation and/or damages as may be summarily determined by the High Court.

It is here necessary to take note of the fact that the question of arrest of Members of Parliament and of Members of Legislature of States is also of some importance. The current practice is that the police officer arresting such member on a criminal charge shall forthwith inform the presiding officer of the legislature through telegram and also by post. This practice should continue. In *Joginder Singh*’s case, the Supreme Court emphasized the need to observe strictly the following norm:

> “Under rule 229 of the Rules for Procedure and Conduct of Business in Lok Sabha, when a Member is arrested on a criminal charge or is detained under an executive authority or order of the Magistrate, the executive authority must inform without delay such fact to the Speaker. As soon as any arrest, detention, conviction or release is affected, intimation should invariably be sent to the Government concerned concurrently with the intimation sent to the Speaker/Lok Sabha/ Rajya Sabha. This should be sent through telegrams and also by post and the intimation should not be delayed on the ground of holiday.”

Below some of the cases have been discussed wherein the Supreme Court of India laid down certain guidelines and made some observations.

In *Rudul Sah v. State of Bihar*\(^\text{38}\), the Supreme Court and the High Courts have awarded compensation under Article 21 in cases of illegal detention, mistreatment in legal custody, rape, and other forms of torture, deaths in custody, disappearances, fake-encounters and detention by the armed forces. Recognizing that in matters of personal liberty, every citizen, rich or poor, is equal and entitled to compensation as a public law remedy, the court


calculated the compensation after factoring in the erosion in the value of the Indian currency. The Apex Court held as follows:

“It is true that Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of courts, civil and criminal. A money claim has therefore to be agitated in and adjudicated upon in a suit instituted in a court of lowest grade competent to try it. But the important question for our consideration is whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right. The instant case is illustrative of such cases.

The petitioner could have been relegated to the ordinary remedy of a 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 we have 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, though it is not possible to predicate, in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders to release from illegal detention.”

“We respectfully concur with the view that the court is not helpless and the wide powers given to this Court by Article 32, which itself is a fundamental right, imposes a constitutional obligation on this Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enable the award of monetary compensation in appropriate cases, where that is the only mode of redress available. The power available to this Court under Article 142 is also an enabling provision in this behalf. The contrary view would not merely render the court powerless and the constitutional guarantee a mirage, but...
may, in certain situations, be an incentive to extinguish life, if for the extreme contravention the court is powerless to grant any relief against the State, except by punishment of the wrongdoer for the resulting offence, and recovery of damages under private law, by the ordinary process. 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, the 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 have-nots, 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, where more appropriate.”

“....But we have 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, though it is not possible to predicate, in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mull its violators in the payment of monetary compensation. Administrative secrecy leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilisation is not to perish in this country as it has perished in some others too well known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy.”
Therefore, the State must repair the damage done by its officers to the petitioner’s rights. It may have recourse against those officers by punishing them appropriately.

In *D.K.Basu v. State of West Bengal*\(^{39}\), after enumerating the rights of an accused/detenu and on the aspect of dealing with custodial death, the Supreme Court held as follows:

“Custodial death is perhaps one of the worst crimes in a civilised society governed by the rule of law. The rights inherent in Articles 21 and 22(1) of the Constitution require to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law-breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchanism. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal cord of human rights’ jurisprudence. The answer, indeed, has to be an emphatic “No”. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under trials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

Torture of a human being by another human being is essentially an instrument to impose the will of the strong over the weak by suffering. The word torture today has become synonymous with the darker side of human civilisation. In all custodial crimes what is of real concern is not only infliction of body pain but the mental agony which a person undergoes within the four walls of police station or lock-up. Whether it is physical assault or rape in police custody, the extent of trauma a person experiences is beyond the purview of law. Custodial torture is a naked violation of human dignity and degradation which destroys,

\(^{39}\) AIR 1997 SC 610.
to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward. Flag of humanity must on each such occasion fly half-mast.

The expression “life or personal liberty” in Article 21 includes the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries. The precious right guaranteed by Article 21 cannot be denied to convicts, undertrials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law. It cannot be said that a citizen ‘sheds off’ his fundamental right to life the moment a policeman arrests him. Nor can it be said that the right to life of a citizen can be put in ‘abeyance’ on his arrest. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become lawbreakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchy. No civilised nation can permit that to happen. The Supreme Court as the custodian and protector of the fundamental and the basic human rights of the citizens cannot wish away the problem. The right to interrogate the detenus, culprits or arrestees in the interest of the nation, must take precedence over an individual’s right to personal liberty. The Latin maxim salus popult suprema lex (the safety of the people is the supreme law) and salus republicae suprema lex (safety of the State is the supreme law) co-exist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be right, just and fair. Using any form of torture for extracting any kind of information would neither be right nor fair and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated, indeed subjected to sustained and scientific interrogation determined in accordance with the provisions of law. He cannot, however, be tortured or subjected to third-degree methods or eliminated with a view to elicit information, extract confession or derive knowledge about his
accomplices, weapons etc. His constitutional right cannot be abridged to the manner permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal. Challenge of terrorism must be met with innovative ideas and approach. State terrorism is no power to combat terrorism. State terrorism would only provide legitimacy to terrorism. That would be bad for the State, the community and above all for the rule of law. The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves. That the terrorist has violated human rights of innocent citizens may render him liable to punishment but it cannot justify the violation of his human rights except in the manner permitted by law. Need, therefore, is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge.

Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of an offence but the law does not permit use of third-degree methods or torture of accused in custody during interrogation and investigation with a view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purposeful to make the investigation effective. By torturing a person and using third-degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it.

Failure to comply with the requirements hereinabove mentioned shall apart from rendering the official concerned liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country, having territorial jurisdiction over the matter.

The requirements, referred to above flow from Articles 21 and 22(1) of the Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies also to which a reference has been made earlier.
The requirements mentioned above shall be forwarded to the Director General of Police and the Home Secretary of every State/Union Territory and it shall be their obligation to circulate the same to every police station under their charge and get the same notified at every police station at a conspicuous place. It would also be useful and serve larger interest to broadcast the requirements on All India Radio besides being shown on the National Network of Doordarshan or by publishing and distributing pamphlets in the local language for information of the general public. Creating awareness about the rights of the arrestee would be a step in the right direction to combat the evil of custodial crime and bring in transparency and accountability. It is hoped that these requirements would help to curb, if not totally eliminate, the use of questionable methods during interrogation and investigation leading to custodial commission of crimes.”

The guidelines given under this case and the CrPC provide some safeguards against custodial abuse:

1. While making an arrest, the police officers must identify themselves and must bear clear identification of their names and designations.

2. The person arrested must be immediately informed about the following:
   (a) Grounds for arrest
   (b) Right to bail (in a bailable offence)
   (c) Right to nominate a person to be informed of the arrest and place of detention, who shall be informed without delay and whose details should be entered in a diary kept in the police station.

3. An arrest memo should be prepared at the time of arrest containing the time and date of arrest, signed by an independent witness and countersigned by the detainee. The arrested person shall be taken before the magistrate or officer in charge of police station without unnecessary delay.

4. If the offence is bailable, the detainee should be released immediately upon furnishing bail.
5. Even if the offence is non-bailable, the police officer should endeavor to complete investigation within 24 hours and must have sufficient justification for seeking custody beyond 24 hours.

6. At the time of arrest, there should be a physical examination of the detainee and any injuries found should be noted in an inspection memo to be signed by the detainee and the officer effecting the arrest.

7. Every 48 hours, the detainee should be examined by a doctor from an approved panel of doctors; copies of all the aforesaid documents should be sent to the concerned magistrates. The NHRC has also suggested that at the time of release from police custody, there must be a medical certificate indicating the state of the prisoner with a record of injuries, if any.

8. All arrests made without a judicial warrant shall be reported to the District Magistrate by the officer in charge of each police station, along with information whether bail has been granted.

In *Nasiruddin v. State*[^40], while relying on the decision of the Supreme Court in *D. K. Basu v. State of West Bengal*, the court granted monetary compensation to the father of an accused who died in Tihar Jail as a result of sixteen injuries which were found on his person.

In *Ajab Singh v. State of Uttar Pradesh*[^41], there were similar facts with regard to custodial death of late Rishipal and the Supreme Court considered the law laid down in the case of *D. K. Basu v. State of West Bengal* while referring to the report of enquiry of the Deputy Inspector General (Prisons) in the said case. The Apex Court awarded compensation amount of Rs. 5 lakhs and directed the State Government to pay the same within three months and also to take disciplinary proceedings against the concerned officials who were responsible for the death of Rishipal.

To assess compensation for the wrongful death of any person, the principles for assessing compensation under the Motor Vehicles Act, 1988 can be applied. When a person dies in an unnatural manner because of the

[^40]: Criminal Writ No. 585 of 1996; decided on 16-12-1997.
[^41]: 2000 Cri LJ 1809.
carelessness of the police officials, the high court in its writ jurisdiction awarded compensation of Rs. 2,00,000/-.  

The Supreme Court has expressed concern over the increasing number of cases of custodial violence or torture, custodial rapes and lock-up deaths in the country posing a serious threat to human rights of citizens. The court attributed this to the “devilish devices adopted by those at the helm of affairs who proclaim from rooftops to be the defenders of democracy and protectors of people’s rights and yet do not hesitate to condescend behind the screen to let loose their men in uniform to settle personal scores, feigning ignorance of what happens and pretending to be peace–loving puritans and saviors of citizens’ rights.” On a close perusal, it is evident that exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies were themselves fixed in the dock, ignoring the ground realities, has often resulted in miscarriage of justice. Hence, it becomes incumbent on the part of the government and the legislature to give serious thought to bring about appropriate changes in law not only to curb custodial crime but also to see that such crime “does not go unpunished.”

Supreme Court is the crusader of custodial torture and a ray of hope in darkness. Under Article 32 of the Constitution of India, Supreme Court has the power to issue writs for the enforcement of the fundamental rights. The Supreme Court is thus the protector and guarantor of our fundamental rights, the right to life and to live with human dignity being the most important amongst them. The apex court is conscious of its responsibility to protect the poor and helpless from the custodial violence. Such people can approach the court directly to get their grievances heard even by writing an informal letter to the court.

The Supreme Court treats these ordinary letters of inmates as writ petitions and issues notices to the concerned governments, police, jail-authorities or any

other detaining authorities authorized to arrest, detain and interrogate an accused under any charge of any offence.

“Justice delayed is justice denied

Justice hurried is justice buried”

The court has to strike a balance between these two extremes so that justice is actually done. Justice should not only be done but seems to have been done.

The Indian judiciary has played a powerful role by ruling against violence and torture and extrajudicial killings by the law enforcement personnel, among others. There is no law in India for compensation of victims and the public servants enjoy impunity under the law for acts done as part of duty. But the courts have regularly awarded compensation to victims and prosecuted the accused.44

“Police should depend upon its wits and not on fists, and on culture and not on torture for investigating a crime”

Although, the prohibition of violence or torture in specific terms lacks constitutional authority, Indian courts have held that Article 21 of the Constitution of India implies protection against violence and torture and that sections 330 and 331 of the Indian Penal Code as well as section 29 of the Police Act, specifically forbid this practice. The Supreme Court on several occasions has made weighty pronouncements de crying and severally condemning the conduct of police in torturing and handcuffing the suspect prisoners or under trials without any lawful justification.45

7.4 CUSTODIAL VIOLENCE AGAINST WOMEN AND CHILDREN

There is indeed no express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life, nonetheless the

44 Torture in India 2010, Asian Centre for Human Rights, p. 55.
Supreme Court of India has judicially evolved a right to compensation in cases of established unconstitutional deprivation of personal liberty or life.46

Award of compensation as a public law remedy for violation of the fundamental rights enshrined in article 21 of the Constitution of India in addition to the private law remedy under the law of torts was evolved in the last three decades.47

Article 9(5) of the International Covenant on Civil and Political Rights, 1966 provides that anyone who has been the victim of unlawful arrest or detention shall have enforceable right to compensation. No one can with impunity set the fundamental rights at naught or circumvent them and the courts power in this regard is as ample as the defense of the Constitution requires.48

In exceptional cases compensation may be awarded in a petition under Article 32. The infringement of the fundamental right must be gross and patent, i.e., incontrovertible and ex-facie glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons or it should appear unjust or unduly harsh or oppressive on account of their poverty or disability or socially or economically disadvantaged position to require the person(s) affected by such infringement to initiate and pursue act in the civil courts.49

Relief in exercise of the power under Article 32 or 226 would be granted only when it is established that there has been an infringement of the fundamental rights of the citizen and no other form of appropriate redressal by the court in the facts and circumstances of the case, is possible.

A claim in public law for compensation for contravention of human rights and freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is distinct from, and in

47 Sube Singh v. State of Haryana, 2006 Cri LJ 1242 SC.
addition to the remedy in private law for damages for the tort resulting from the contravention of the fundamental right.\textsuperscript{50}

It may be necessary to identify the situations to which separate proceedings and principles apply and the courts have to act firmly but with certain amount of circumspection and self-restraint lest proceedings under Article 32 or 226 are misused as a disguised substitute for civil action in private law. An action for damages lies for bodily harm which includes battery, assault, false imprisonment, physical injuries and death. In case of assault, battery and false imprisonment the damages are at large and represent a solatium for the mental pain, distress, indignity, loss of liberty and death. Award of compensation against the state is an appropriate and effective remedy for redress of an established infringement of a fundamental right under Article 21 by a public servant.\textsuperscript{51}

While assessing the compensation to be paid to the victim or his family, the emphasis should be on the compensatory and not on punitive element. The objective of compensation is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence irrespective of compensation must be left to the criminal courts in which the offender is prosecuted, which the state, in law, is duly bound to do.

The claim is not a claim in private law for damages for the tort of false imprisonment under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone.\textsuperscript{52}

In \textit{People’s Union for Civil Liberties v. Union of India & Anr.},\textsuperscript{53} the Court has been entertaining petition after petition involving the allegations of fake encounters and rapes by police personnel of States and in a large number of cases has transferred the investigation itself to other agencies and particularly the CBI. This Court considered a pathetic case of unnatural death of a poor


\textsuperscript{52} \textit{Maharaj v. Attorney General of Trinidad and Tobago}, (1978)2 All ER 670.

\textsuperscript{53} \textit{AIR 2005 SC 2419}. 
woman in police custody and directed the State Government to pay compensation of Rs.3 lakhs, including Rs.1 lakh already awarded by the order of the State Government to the family of the victim.

In *Tukaram v. State of Maharashtra* 54, which is also known as the Mathura rape case, was an incident of custodial rape in India on 26 March 1972, wherein Mathura, a young tribal girl, was allegedly raped by two policemen on the compound of Desai Ganj Police Station in Chandrapur district of Maharashtra. After the Supreme Court acquitted the accused, there was public outcry and protests, which eventually led to amendments in Indian rape law via The Criminal Law (Second Amendment) Act 1983.

Mathura was a young orphan tribal girl living with one of her two brothers. She was a dalit girl. Mathura occasionally worked as a domestic help with a woman named Nushi. She met Nushi’s nephew named Ashok who wanted to marry her, but her brother did not agree to the union and went to the local police station to lodge a complaint claiming that his sister, a minor, was being kidnapped by Ashok and his family members. After receiving the complaint the police authority brought Ashok and his family members to the police station. Following general investigation Mathura, her brother, Ashok and his family members were permitted to go back home. However, as they were leaving, Mathura was asked to stay behind while her relatives were asked to wait outside. Mathura was then raped by the two policemen.

The judgment found the defendants not guilty. It was stated that because Mathura was ‘habituated to sexual intercourse’, her consent was voluntary and under the circumstances only sexual intercourse could be proved and not rape.

On appeal the Nagpur bench of the Bombay High Court set aside the judgment of the Sessions Court, and sentenced the accused to one and five years imprisonment respectively. The Court held that passive submission due to fear induced by serious threats could not be construed as consent or willing sexual intercourse.

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However, in September 1979 the Supreme Court of India reversed the High Court ruling and again acquitted the accused policemen. The Supreme Court held that Mathura had raised no alarm and also that there were no visible marks of injury on her person thereby suggesting no struggle and therefore no rape. The judge noted, “because she was used to sex, she might have incited the cops who were drunk on duty to have intercourse with her.”

The judgement went largely unnoticed until September 1979, when law professors Upendra Baxi, Raghunath Kelkar and Lotika Sarkar of Delhi University and Vasudha Dhagamwar of Pune wrote an open letter to the Supreme Court, protesting the concept of consent in the judgment stating “Consent involves submission, but the converse is not necessarily true and from the facts of the case, all that is established is submission, and not consent. Is the taboo against pre-marital sex so strong as to provide a license to Indian police to rape young girls.” Spontaneous widespread protests and demonstrations followed by women’s organisations who demanded a review of judgement, received extensive media coverage.

A number of women’s group were formed as a direct response to the judgment, including SAHELI in Delhi, and prior to that in January 1980, Lotika Sarkar, was also involved in the formation of the first feminist group in India against rape, “Forum Against Rape”, later renamed “Forum Against Oppression of Women” (FAOW). A national conference was organised by FAOW which started the debate for legal reforms. Issues of violence against women and the difficulty of seeking judicial help in sexual crimes was highlighted by the women’s movement.

Following the same tradition, on the International Women’s day women from various states including Delhi, Mumbai, Hyderabad and Nagpur took to the streets. Seema Sakhare, the founder of the first organizations in India worked on the issue of violence against women.

However, the courts ruled that there was no locus standi in the case to rule in favour of Mathura. Eventually this led to Government of India amending the rape law.
The Criminal Law (Second Amendment) Act 1983 made a statutory provision in the face of Section 114 A of the Evidence Act made on 25 December 1983, which states that if the victim says that she did not consent to the sexual intercourse, the Court shall presume that she did not consent as a rebuttable presumption. New laws were also enacted following the incident. Section 376 IPC underwent a change with the enactment and addition of sections 376(A), 376(B), 376(C), 376(D), which made custodial rape punishable under the Act. Besides defining custodial rape, the amendment shifted the burden of proof from the accuser to the accused once intercourse was established and it also added provisions for in-camera trials, the prohibition on the victim identity disclosure, and tougher sentences.

The case is seen as turning point in women right’s movement in India, as it led to greater awareness of women’s legal rights issue amidst oppression and patriarchal mindsets. A number of women’s organisations soon came forth across India. Previously, rape misjudgments or acquittals would go unnoticed, but in the following years, women’s movement against rape gathered force and organisations supporting rape victims and women’s rights advocates came to the fore.

In Sheela Barse’s case\(^55\) also certain guidelines were laid down, both regarding arrest generally and regarding the arrest of women. The relevant guidelines are as under:

1. Few police lock-ups should be selected in the reasonably good localities where only female suspects should be kept and they should be guarded by female constables.

2. Female suspects should not be kept in police lock-ups in which male suspects are detained.

3. Interrogation of female suspects should be carried out only in the presence of female police officers/ constables.

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Whenever a suspect is arrested by the police and taken to the police lock-ups, the police will immediately give intimation of the fact to the nearest legal aid committee.

Surprise visits to the police lock-ups in the city should periodically be made with a view to providing arrested person an opportunity to hear their grievances and ascertain the conditions of police lock-ups.

As soon as a person is arrested, the police must immediately obtain from him/her the name of any relative or friend who he/she would like to be informed about his/her arrest and the police should get in touch with such relative or friend and inform him/her about the arrest.

The Magistrate before whom an arrested person is produced shall enquire from the arrested person whether he has any complaint of torture or maltreatment in police custody.

The subject of presence of counsel at the time of interrogation of an accused by the police has received attention of many countries, particularly from the constitutional angle. The point was touched in the well-known case of *Nandini Satpathy* where an emphasis was laid on the presence of counsel in the light of Article 20(3) of the Constitution (testimonial compulsion) and Article 22(1) of the Constitution (right to consult and to be defended by a lawyer of one’s choice). The relevant observation made by the court is as under:

“Lawyer’s presence is a constitutional claim in some circumstances in our country also, and, in the context of Article 20(3), is an assurance of awareness and observance of the right to silence. We think that Article 20(3) and Article 22(1) may, in a way, be telescoped by making it prudent for the police to permit the advocate of the accused, if there be one, to be present at the time he is examined. We do not lay down that the police must secure the services of a lawyer’s system, an abuse which breeds other vices. But all that we mean is that if an accused person expresses the wish to have his lawyer by his side

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when his examination goes on, this facility shall not be denied, without being exposed to the serious reproof that involuntary self-incrimination secured in secrecy and by coercing the will was the project."

If we examine the constitutional aspect in great detail, it would appear that at least three articles of the Constitution Articles 20, 21 and 22 are relevant here. Even if the non-constitutional aspect is taken into account it would seem, that if serious effort is made to check the malpractices of violence or

57 Article 20- “(1) No person shall be convicted of an offence except for violation of a law in force at the time of the commission of the offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
(2) No person shall be prosecuted and punished for the same offence more than once.
(3) No person accused of any offence shall be compelled to be a witness against himself.”

Article 21- “No person shall be deprived of his life or personal liberty except according to procedure established by law.”

Article 22- “(1) no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.
(2) every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty- four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.
(3) nothing in clauses (1) and (2) shall apply-
(a) to any person who for the first time being is an enemy alien; or
(b) To any person who is arrested or detained under any law providing for preventive detention.
(4) No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless-
(a) an advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:
Provided that nothing in this sub- clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by the parliament under sub- clauses (a) and (b) of clause (7); or
(b) Such person is detained in accordance with the provisions of any law made by parliament under sub- clauses (a) and (b) of clause (7).
(5) when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.
(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.
(7) Parliament may by law prescribe-
(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub- clause (a) of clause (4);
(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and
(c) the procedure to be followed by an Advisory Board in an inquiry under sub- clause (a) of clause (4).”
torture and allied practices during interrogation, there should be a provision at least entitling the arrested person to demand that the interrogation should be carried out in the presence of his counsel or a family friend of his choice.

(1) In the event of a woman being required to be arrested, the police officer concerned shall not actually touch the person of the woman and may presume her submission to custody. This recommendation is being made in order that the dignity of the concerned woman is maintained.

(2) Ordinarily, no woman shall be arrested after sunset and before sunrise.

In exceptional cases of calling for arrest during these hours-

(i) Prior permission of the immediate superior officer shall be obtained or

(ii) If the case is of extreme urgency, then, after arrest, a report with reasons shall be made to the immediate superior officer and to the Magistrate.

(3) Wherever a woman is medically examined, the examination shall be conducted only under the supervision of a female medical practitioner, with strict regard to decency.

(4) The concerned woman shall be informed about her right to be medically examined, “in order to bring on record any facts which may show that an offence against her has been committed after her arrest.”

(5) A copy of the report of the medical examination shall be furnished to the woman.

(6) A woman shall not, under section 160 of the Criminal Procedure Code, be required to attend for interrogation at any
place other than her dwelling house, and section 160 of the Code should be amended for the purpose.58  

(7) When the statement of a woman is recorded during investigation, a relative or friend of the woman or authorized representatives of an organization interested in the welfare of women shall be allowed to remain present.

7.5 VIOLENCE UNDER THE CUSTODY OF ARMED FORCES

India is one of the few countries whose Constitution allows for peacetime preventive detention without the safeguards that are generally considered basic. The ICCPR permits derogation from certain personal liberties during a state of emergency. The words in the Constitution alone can’t guard against the State’s constant endeavor to curtail individual liberty by using the rhetoric of security. It is no doubt true that India has shown the resilience and the will to reverse such deviations where fundamental rights are suspended during emergency, at least in the text of the law. Such resilience, unfortunately, has not been shown uniformly. In the north-east and in Kashmir and in tribal areas like Chhattisgarh there are all kinds of special security laws even without a declared emergency and the right to judicial remedy, especially habeas corpus, remains illusory. The superficiality of Indian democracy is demonstrated by the State’s proneness to resort to security measures rather

58 Sec. 160- “(1) Any police officer making an investigation under this chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the facts and circumstances of the case; and such person shall attend as so required:
Provided that no male person under the age of fifteen years or woman shall be required to attend at any place other than the place in which such male person or woman resides.
(2) The state government may, by rules made in this behalf, provide for the payment by the police officer of the reasonable expenses of every person, attending under sub- section (1) at any place other than his residence.”
than political solutions in regions where people have been alienated, largely on account of the state’s own policies.\textsuperscript{59}

The Supreme Court of India has invariably upheld extraordinary security legislations. Neither the expansive interpretation of fundamental rights post the \textit{Gopalan’s} case nor the Emergency experience has stood in the way of a judicial ratification of laws like the AFSPA, the terror statutes and the very many laws of preventive detention. Legislations deviating from standard due process have found judicial approval on grounds of legislative competence, executive wisdom and the ubiquitous fear of ‘disruption’. The plain fact that extreme measures have always worsened the situation seems to elude policymakers.

The GOI, however has not invoked this privilege as the current internal situation does not meet the standards set forth in Article 4. During the campaign of genocide in Manipur there were 1528 cases of extrajudicial execution including 33 women and 98 children by governmental armed forces since January 1979 till May 2012\textsuperscript{60}, 44 cases of brutal torture, 16 cases of enforced disappearances from 1980 to 1999 and 12 cases of massacres that resulted 110 dead including Malom killing of 1996, Tera Bazar killing of 1993, Oinam Village killing of 1987 and Heirangoithong killing of 1984\textsuperscript{61}. These cases are illustrative in nature like a tip of an iceberg. Most of the cases were unreported and undocumented and above all national media was also silent and reflected discriminatory attitude in many aspects.

In Genocide campaign in Oinam Village of Manipur (Operation Blue Bird) the NSCN troops had killed 9 AR personnel and inflicted injury to three personnel on July 9, 1987 at the AR Post near Oinam Village in Senapati district. Post the attack, the AR personnel launched the operation and allegedly burnt down over a hundred houses, six schools and 10 Churches in the thirty Naga villages. Properties worth of 50,75,000 were allegedly destroyed from seven villages. Three women were reportedly raped, five women allegedly molested and around 300 persons were tortured by the AR apart from killing 27 persons.


\textsuperscript{60} As documented by CSCHR & UN (2013).

\textsuperscript{61} As documented by HRI, Manipur (2009).
at different locations on different occasions in Senapati district. N Surendra who collected hard evidence of the Indian military personnel's atrocities at Oinam was picked up allegedly by Assam Rifles from the road and killed but his corpse was never found.\footnote{The Sangai Express; July 11, 2012.}

Justice JS Verma Committee observed that “brutalities of the armed forces faced by residents in the border areas and conflict areas are causing more alienation and that impunity for systematic or isolated sexual violence is being legitimized by AFSPA”

Under the Act even non-commissioned officers are empowered to shoot at sight and more interestingly de jure impunity is granted to Armed Forces of India for their criminal act. It means ‘extrajudicial executions under the cloak of AFSPA have become virtually a part of State Policy’. But the Supreme Court of India upheld the constitutional validity of the Act in 1997. The fact of racial, discriminatory and genocidal policy of GOI is also very clear from the fact that the GOI has repealed the Terrorist and Disruptive Activities (Prevention) Act, 1985 and the Prevention of Terrorism Act, 2002 and not the black law AFSPA.

GOI’s persistent refusal to repeal the Act even though with strong worded recommendations poured from UN human rights bodies, Treaties Monitoring bodies including Human Rights Committee, CERD, Committee on All form of Discrimination against Women, Committee on Rights of Child observations by many international rapporteurs, credible international human rights NGOs and its own created committees clearly shows the colonial mindset of the GOI.

The governmental armed forces too are victims of AFSPA because of retaliation and communal tendency arising from genocide, torture and other inhuman acts committed by them. This violence and genocide often arise from racial and ethnic discrimination. Discrimination can easily lead to racially and ethnically motivated violence, which in turn, may escalate into genocide.

This state policy of genocide, extreme persecution coupled by oppression and cycle of legal impunity as a result of AFSPA prove that the existing GOI is racist regime and the Act itself is an instrument of genocide campaign.
India has filed reservations that nullify important provisions of both the ICCPR and the Torture Convention. These reservations effectively reject even a basic level of international scrutiny as envisaged by the Torture Convention. India holds a dubious record for consistently refusing to invite the UN Special Rapporteur on Torture.

**Thangjam Manorama** (1970–2004) belonged to Manipur state of India who on July 10, 2004, was picked up from her home by the Indian paramilitary unit- Assam rifles on uncertain allegations of being associated with People’s Liberation Army. The next morning, her bullet-ridden corpse was found in a field. An autopsy revealed semen marks on her skirt suggesting rape and murder.

At the time of the arrest, no incriminating items were found, as per the arrest memo. Later it was stated that a grenade and other items had been seized from her home. Assam Rifles claimed that she was shot while trying to escape. However, no blood was found near the body despite six bullet wounds. No soldier was identified as having tried to run or detain her.

Given these disparities, a Commission of Inquiry was set up by the Manipur government in 2004, and which submitted its report in Nov 2004. However, the Guwahati High Court also looked into the matter and ruled that since the Assam Rifles had been deployed under the AFSPA, 1958 the State government did not have jurisdiction over them, and the case should be dealt with by the Central government. The failure to assign culpability led to a widespread and extended protests in Manipur and Delhi. Five days after the killing, around 30 middle-aged women walked naked through Imphal to the Assam Rifles headquarters, shouting: “Indian Army, rape us too. We are all Manorama’s mothers”.

In **Masooda Parveen v. Union of India**[^63], Masooda was seeking compensation for the death of her husband while in military custody in Kashmir. Neither the death nor the custody was denied by the state. The court, however, cited lack of convincing proof to decline her prayer, ignoring a slew of judgments that squarely place the onus on the state to explain any death in

[^63]: AIR 2007 SC 1840.
its custody. The state didn’t produce the original record despite several opportunities. Yet, the court did not draw an inference against the state, but instead held that Masooda had shown no proof of her allegations. Even believing the bare assertion of the state that Masooda’s husband was a militant who knew where the arms were hidden, his life was hardly some personal preserve of the Army that should have disentitled her to compensation for his death in their custody. They did not deny the death but claimed that he died because of an explosion in a heap of arms that he was uncovering at the behest of the Army after he was taken into custody. The widow was expected to disprove this thin story, though the army itself failed to bring the material on record to prove the same. No wrongdoing on his part could alter the fact that his death was an extra-judicial execution by military officials. Or, at any rate, it was a death that the army failed to prevent, of a man for whom they were responsible as he was in their custody. Would the imperatives of statehood not require that reparative justice be done to the family of a person who has died by the act of the state?

In 2012, the Justice Verma committee included measures for reviewing AFSPA as part of a set of steps to reduce violence against women. In December 2014, the Supreme Court of India told government to pay a compensation of Rs. 10 lakh to Manorama’s family. A court of law cannot close its consciousness and aliveness to stark realities. Mere punishment of the offender can’t give much solace to the family of the victim and civil action for damage is a long drawn and cumbersome judicial process. Monetary compensation for redressal by the court in finding infringement of the indefeasible right to life of the citizens, therefore is, a useful and at times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim, who may have been the bread winner of the family. Compensation in public law ought to be directed to be paid by the state for the humiliating and unauthorized assault caused by the police to anyone. The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much as

protector and guarantor of the indefeasible rights of the citizens. The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations.

The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by the Supreme Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting compensation in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making monetary amends under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of exemplary damages awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law.

The Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by
calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings. The State, of course has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law - through appropriate proceedings. Of course, relief in exercise of the power under Article 32 or 226 would be granted only once it is established that there has been an infringement of the fundamental rights of the citizen and no other form of appropriate redressal by the court in the facts and circumstances of the case, is possible.

Self-preservation is the most pervasive aspect of sovereignty. To preserve its independence and territories is the highest duty of every nation and to attain these ends nearly all other considerations are to be subordinated.\textsuperscript{66}

No civilised system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his life and property illegally by negligent act of officers of the State without any remedy. From sincerity, efficiency and dignity of State as a juristic person, propounded in Nineteenth Century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government at par with any other juristic legal entity. Any watertight compartmentalization of the functions of the State as ‘sovereign and non-sovereign’ or ‘governmental or non-governmental’ is not sound. It is contrary to modern jurisprudential thinking. The need of the State to have extraordinary

powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and was done negligently. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a welfare State is not shaken. Even in America where this doctrine of sovereignty found its place either because of the financial instability of the infant American States rather than to the stability of the doctrine theoretical foundation, or because of logical and practical ground, or that there could be no legal right as against the State which made the law gradually gave way to the movement from State irresponsibility to State responsibility. In welfare State, functions of the state are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives, has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a Constitutional Government, the State cannot claim any immunity.

Such incidents strike at the very foundation of rule of law. Deprivation of life without due process of law is banned and barred under Article 21 of the Constitution. Yet such incidents take place. Those who think that they can detect and eradicate crime by resorting to crime are in fact stoking the fire which they want to extinguish. The police can surely interrogate a person accused of an offence but it cannot torture him to extract information otherwise tyranny will replace law. Despite several judgments by the Apex Court, the force is preferred to scientific methods to elicit information. This must stop. The State cannot claim sovereign immunity for the tortious act of public servants leading to violation of Article 21 of the Constitution. The Supreme Court in the path breaking case of D. K. Basu v. State of West Bengal, laid down several safeguards for the detainees. It also considered the
question of claim in public law for compensation for unconstitutional deprivation of fundamental right to life and liberty.

It is now a well-accepted proposition in most of the jurisdictions, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrongdoer. In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal Courts in which the offender is prosecuted, which the State, in law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no straitjacket formula can be evolved in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit.