CHAPTER 6
STATE LIABILITY FOR CUSTODIAL TORTURE

The State which represented the general will of the people appeared as an organism that would protect the members of the community and settle conflicts between them. The civil Law and criminal Law are developed for this purpose. In due course, it becomes evident that the problem of protection of human rights is not solved by the evolution of the State. The possibility of the State itself violating the rights of those to be protected by it became real. The liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy for the wrong\(^1\). One may commit a wrong, by breach of duty; duty may be one enforceable by a rule of law or only by a rule of morality. Thus the distinction is between legal and moral wrong. Though in most cases, there is difference between what a legal wrong is and a moral wrong yet there are cases where distinction is not clear. In the case of breach of moral duty, the sanction is that of social pressure or censure. In the case of breach of legal duty, generally there would be a legal remedy. The legal duties are classified into those, which are enforced by criminal law and those which are enforced by civil law. In the former case, the punishment of the wrongdoer is the aim of the law and in the latter case, compensation of the damage brought about by the wrong. Depending upon the policy of the State, more important interests, assigned to the realm of criminal law. Other rights are protected by civil law. There are certain interests those are protected both by the criminal law and the civil law.

**State Liability**

When the responsibility of the State is concerned, several problems arose. First of all, the State is not an individual though the State can act only through individual. If responsibility is fixed on the State, one has to develop criteria for determining in what context and subject, to what conditions, the acts of individual may be attributed to the State. Another problem is that, for valid reasons, individuals are sometimes conferred immunity. Though they would be held responsible according to the ordinary principles of liability, there are cases of immunity from liability, for State actions. The extent of immunity depends upon the policy of each State.

State and Law

There are three theories relating to relation between the State and the law, law is a creation of the State, State is creation of the law and State and law are one and the same thing.\(^2\) Where it is held that the law is the creation of the State, there will be the problem of determining what constitute the State on some non-legal criteria and the problem of stability of a law which fixes liability on the State. Generally adopting the criteria of political theory, State can be considered as association of people occupying defined territory, united under a Government and possessing and having sovereignty. Sovereignty is considered unrestricted and unlimited. According to Austin’s theory of law, “law is the command of the sovereign, who can inflict a sanction for disobedience”\(^3\). The sovereign is unrestricted and illimitable. The duty of such sovereign can only be a moral duty, State would be liable only if it willingly accepts liability, a principle of auto limitation, which can be changed by the State at its pleasure.

As per natural law theory, there are principles governing human life and activities which have got same validity as scientific law governing the universe. The principles of such a law of nature are discovered by reason. Such a law of nature has a higher validity and is binding on the State. This theory had its origin in the Greek philosophy, which was put to practical use by Rome in its ‘Jus Gentium’. The natural law theory had powerful influence on the development of political and legal theory. As an off shoot of the theory of natural law, the origin of State was explained in various theories of social contact during the seventeenth and eighteenth centuries. This in turn gave rise to various declarations of rights which ultimately found expressions in written Constitution as limitations on authority. In order to maintain the ‘Rule of Law’, the judicial review has been developed as an enforcing factor putting limitation on the governmental authority. There is no absolute limitation against the State, which prevents it from changing the law. What is laid down even in the Constitution can be changed according to the principles of amendment\(^4\).

The functions of the State depend on policy in the Constitution or legislative prescription from time to time. According to Hobbs’s theory,\(^5\) the authority appears as two swords, the sword of justice and the sword of war. The true original function of the

State administration is justice within the community and the protection of the community from aggression or war. To these two minimal functions of the State, the modern tendency adds many more welfare functions of the State. The protection of rights for the failure of which, liability can be fixed on the State is largely confined to the traditional principles of State liability in tort, contract and marginally under criminal law. The Indian judiciary has extended the scope of writ remedy by awarding compensation in partial recognition of State liability.

Generally liability arises from breach of duty but in the primitive period, liability was more based on a desire on the part of the aggrieved, in taking revenge on the wrong doer. Later this jurisprudence based on taking revenge upon the wrong doer was changed to the idea of refinement\(^6\).

**Development of the Concept of State Liability**

**Liability of the State during the Vedic Period**

During the Vedic period, the whole machinery of the King was operated by the law of Dharma. The duty of the King was interpreted in the light of the Vedas, the Smritis and the Dharma Shastras. Even though vicarious liability was not so developed as today even then the duties of the King and liability arising out of the breach was dealt with in the Hindu Dharma Shastras. Duties of the King included the protection of his subjects and their property. If this failed, the King had to compensate the subject from the treasury and if the officers failed to do it, the King was bound to protect the people against such officers\(^7\).

**Liability of the State during the Mughal Period**

When India was subjected to a series of invasions by the Muslims, they occupied the major portion of India and enforced the Mohammedan Law. The remedial rights followed by them included retaliation, compensation, restitution and money compensation in case of death\(^8\). The responsibility of the State and the accountability of it were recorded when one of the grandees of India alleged that Sultan Mohd. Bin Tuglaq, had executed his brother without just cause and cited the Sultan before the Kazi, the Sultan went on foot to the Court without arms and stood before the Kazi who gave the decision that the


\(^8\) Supra note 6 at 3.
sovereign was bound to satisfy the plaintiff, for the blood money of his brother and the decision was obeyed\(^9\). In the year of 1490, King Ghyas negligently hurt the son of a widow, who made a complaint against him in the Court of Kazi. The King was summoned and after hearing both the sides, Kazi held that the King was guilty and asked him to pay damages. In another case police officer was personally held responsible for the arrest of a citizen in a wrongful manner and was asked to pay compensation to the victim\(^10\). During the period of Akbar, he encouraged the proclamation of just claim against the servants of the King, as State being the trustee of the people was answerable for their wrongs\(^11\).

**Liability of the State during the British Period**

With the advent of the British rule, the principles of Common Law started to be followed in India; the applicability of the prerogative of the King also came up. The Crown was not liable in tort even though there was social necessity for a remedy against the Crown as employer, so the Crown enjoyed certain privileges. As far as personal liability is concerned, the Crown’s immunity in tort never extended to its servants. The liability of the State in India relating to tort claims is governed by public law principles inherited from British Common Law and the provinces of the Constitution of India. However during the period, when the governance of India was being carried on by East India Company, doubts were raised as to how far, it could claim immunities, enjoyed by the Crown in England.

(i) **Liability of the East India Company in 1831:** During the reign of the East India Company in 1831, the Supreme Court of Calcutta rejected the plea of exemption from suit raised by the Company, on the ground of sovereignty. In *Bank of Bengal v East India Co.*\(^{12}\), the suit was filed by the Bank of Bengal to recover the interest due on the promissory notes written by the East India Company, to borrow money for the prosecution of war. Grey, C. J. and Franks, J. of the Supreme Court of Bengal, held that the East India Company had no sovereign character to prevent it from being sued for the recovery of interest on three promissory notes on the basis of which the company borrowed money for the efficient prosecution of war for defending and extending the territories of the Crown in India.

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\(^9\) *Supra* note 3at131.
\(^12\) *Bingell’s Report* 87-181(1831).
In the beginning, the East India Company was engaged only in trading activities and after that by various Charters, it acquired certain legislative and judicial powers. Section 10 of the Charter Act, 1833, laid down the Company’s liability and it concluded that the Company would be liable in an action against it.

In 1858, the British Government took over the administrative control of India from the East India Company. The Government of India Act, 1858 transferred the power to rule the country to her Majesty and also made the Secretary of State in Council liable for tortious acts of their servants committed in the course of employment. This provision was first applied by Peacock, C.J. in *Peninsular and Orientation Steam Navigation Co. v Secretary of State*\(^\text{13}\). It is a landmark decision of the Calcutta High Court, in which whether the company enjoyed the immunity of the Crown was considered. In this case, the plaintiff sought action to recover the damages sustained by them by reason of injuries caused to the horses of the plaintiff through the negligence of certain servants of the defendant. When the Government of India Act, 1858 was passed, the Company was taken over by the British Crown by providing a Secretary of State in Council for the administration. Section 65 of the Act provided that,

“The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India, as they could have done against the said Company; and the property and effects hereby vested in Her Majesty for the purposes of Government of India, or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would, while vested in the said Company, have been liable, to in respect of debts and liabilities lawfully contracted and incurred by the said Company.”

The liability of the State, under Section 65 of the Government of India Act 1858, depends upon the legal position of the Company at that time. Peacock, C. J. had to decide if the East India Company would have been held liable in a situation of the present type as the Act of 1858 had not been passed. He referred to earlier Charter Act, 1833 by which Company had been allowed to retain sovereignty as well as its trading privileges. Since sovereign and trading rights were combined in the Company, there was no force in the argument that the principles of immunity enjoyed by the

\(^{13}\)(1861)5 Bom. H.C.R. App.A.
Crown in England under the maxim ‘King can do no wrong’ would apply to East India Company. The opinion expressed by Gray, C. J. in the case of Bank of Bengal v East India Company in which it was held that East India Company having been vested with powers called sovereign powers but did not constitute as sovereign. There is a clear distinction between acts done in the exercise of what are called as sovereign powers and acts done in the context of undertaking which might be carried on by private individuals without such powers delegated to them. Having found that East India Company did not enjoy immunity in respect of acts done in non-sovereign capacity, the Court found that the Company would have held liable if the facts of Peninsular and Orientation Steam Navigation Co. case had happened before 1858.

The Government was not liable for ‘sovereign function’ and in other words except for the defence of ‘Act of State’ action would lie against the Government.

The doctrine of immunity for ‘sovereign function’ enunciated in the Peninsular and Orientation Steam Navigation Co. case was applied by the Calcutta High Court in Nobin Chander Dey v Secretary of State.

The Madras, Bombay and Allahabad High Courts did not accept the reservation made by Peacock, C.J. that the Government was not liable if the tort was committed in the exercise of sovereign powers.

(ii) Government of India Act, 1915 and the Liability of the State: - Section 32 of the Act provided that,

“(1) The Secretary of State in Council may sue and be sued by the name of the Secretary of State in Council, as a body corporate.
(2) Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company, if the Government of India Act, 1858 and this Act had not been passed.”

(iii) Government of India Act 1935 and the Liability of the State: - Section 176 (1) of the Act provided that,

“The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this Chapter, may, subject to any provisions which may be made by an Act of the Federal or a Provincial Legislature enacted by virtue of powers

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14 Supra note 12.
15 (1873) ILR Cal 1.
16 Secretary of State v Hari Bhanji, (1882) ILR Mad, 273.
17 Shiva Bajan v Secretary of State, ILR 28 Bom 314 (1904).
18 Kishanchand v Secretary of State, (1881) ILR 2 All 829.
conferred on that Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed.”

This effort of enacting the Government of India Act, 1935 was made during the pre-Independence period with the intent to provide justice to the victims of State’s unlawful actions.

**Liability of the State under the Indian Constitution**

Clause (1) of Article 300 of the Constitution provides first, that the Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State; secondly, that the Government of India or the Government of a State may sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued, “if this Constitution had not been enacted”, and thirdly, that the second mentioned rule shall be subject to any provisions which may be made by an Act of Parliament or of the Legislature of such State, enacted by virtue of powers conferred by the Constitution.

Article 300 of the Constitution, refers back to the pre-constitutional laws like Government of India Act 1935, Section 32 of the Government of India Act, 1915 and Section 65 of the Government of India Act, 1858. After the commencement of the Constitution, in order to determine the State liability in torts, we have to refer back to the State liability of East India Company followed during the period of 1858.

In the post-Independence period the Courts began to discard Common Law principle of sovereign immunity. The Supreme Court of India considered the liability of the State in *State of Rajasthan v Vidyawati*¹⁹. The question which arose was whether the State could be held liable for the negligence of the driver of a jeep owned and maintained by the State. In the suit claiming the damages by Vidyawati against the State of Rajasthan, the State took the stand that the jeep was being maintained for the discharge of official duties of the collector that is to say for the purpose of discharging the sovereign powers of the State. In the appeal, Supreme Court dismissed the appeal and upheld the liability of the State on the following grounds-

1. Under the democratic Government there is no scope for making any claim based on sovereign immunity and therefore the State of Rajasthan must be liable for the Vidyawati’s husband’s death.

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¹⁹ AIR 1962 SC 933.
2. Maintaining a car for the Collector’s use and it causing damage while returning from the workshop is not referable to sovereign power therefore the State was liable.

The decision made in the above said case made an impression that the distinction between sovereign and non-sovereign for the purpose of liability was abolished and the Government would be liable in all cases except act of State. However, a different note was struck by the Supreme Court itself in *Kasturilal v State of U.P.* Referring the *Vidyawati’s* case, the Court observed that the driver in the Rajasthan’s case was not connected with the sovereign function of the State but the appointment of police who negligently dealt with gold in the present case was in connection with a sovereign function of the State. State was not held liable on the following grounds:

1) The act was done in the purported exercise of a statutory power.

2) The act was done in the exercise of a sovereign function.

**The Liability of the State under the Law of Torts**

Before the decision of *Peninsular and Orientation Steam Navigation Co. v Secretary of State* the liability of the State was determined in case of *Bank of Bengal v East India Co.* rejecting the plea of sovereign immunity raised by the Company. In this case while determining the liability of State, under Section 65 of the Government of India Act 1858, with respect to non-sovereign function, the Court clarified that State would be liable in case of non-sovereign function. According to the interpretation given in *Nobin Chander Dey’s* case the liability of the State can be determined on the basis the functions of the State as sovereign and non-sovereign. According to the decision of *Hari Bhanji’s* case the immunity of the State should be limited to the ‘Act of State’.

In *Shiva Bajan’s*, case the police officer who seized the goods under a statutory authority, failed to return the same after the release. In an action against the State for compensation for the loss of goods, the Court dismissed the suit on ground of exercise of public function.

In this case the statutory privilege was extended to the consequence of the act even if the concerned officer had done the act negligently. The Court failed to see that the

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20 AIR 1965 SC 1039.
21 *Supra* note 13.
22 *Supra* note 12.
23 *Supra* note 15.
24 *Supra* note 16.
25 *Supra* note 17.
Statutes are made for the purpose of exercising a statutory duty by the employee of the State without any hindrance. There is no need of extending this privilege in case of negligence or abuse or excess of power. In this case the goods were seized while exercising statutory authority but it was refused after the order for release. Without considering the breach of duty of the employee, the Court dismissed the suit on the ground of non-maintainability of the actions for the statutory function done by the employees. In *Etti v the Secretary of State*\(^\text{26}\), when the child was lost due to the negligence of the hospital authorities, the Court exempted the State from liability on the ground of sovereign immunity and stated that the hospital was run for the benefit of public out of the revenue. But the Court failed to understand that the revenue can be used to compensate the injured due to the act of State as explained in *Peninsular and Orientation Steam Navigation Co. v Secretary of State*\(^\text{27}\).

In *Rup Ram v The Punjab State*\(^\text{28}\), Rup Ram, a motor cyclist was seriously injured, when a truck belonging to the Public Works Department (PWD) struck him. When the plaintiff brought an action for compensation against the State for the rash and negligent driving, the Court refused to allow the plea of immunity. In *K. Krishna Murthy v State of A.P.*\(^\text{29}\), it was held by the Court that the Government is not in law within the rule of vicarious liability in relation to the tortious acts of its servants in the discharge of such duties. The plaintiff can have his relief as against the person whose acts of commission or omission have given rise to the cause of action. The Court expressed its shock over the suffering of the boy and its helplessness and observed, “It is unfortunate that a boy of tender age, barely five, has been disabled forever by the rash and negligent act of the driver. It would naturally rouse up feelings of deep commiseration for him because rendered thus disabled he has to enter the battle of life with no resources of due equipment and no provision to fall back upon in times of need. Of course a remedy in tort was open to him against the driver but that would have proved a poor recompense for the probable loss that he sustained. Had the employer been other than the Government, he would have hoped for an adequate compensation. It is unfortunate that the Government being the employer he has to look in vain for some appropriate provision which may afford a just and adequate relief. Article 300 of the Constitution contemplates no doubt a provision to be made by the Parliament or State Legislature and this provision in all

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\(^{26}\) AIR 1939 Mad 663.

\(^{27}\) *Supra* note 13.

\(^{28}\) AIR 1961 Punj 336.

\(^{29}\) AIR 1961 AP 283.
probability is intended to meet the ever-growing needs of the subjects in a social welfare State. But in the absence of any such enactment, the old state of law as available in the year 1858 has yet to prevail”.

In *Prem Lal v U.P. Government*\(^{30}\), the District Collector, purporting to act under the U.P. Requisition of Motor Vehicles Act, requisitioned the vehicles of the plaintiff, Prem Lal. The plaintiff alleged that his car was kept uncovered during this period of requisition with the result that the paint was damaged and some parts became rusty and so he had to repaint it. The Court observed, “In this case the District Magistrate, in his misguided zeal, abused the powers delegated to him by the Government and took away two vehicles of the appellant not because the Government needed them but because he wanted to teach the appellant a lesson as he was suspected of being a sympathiser of the Sangh. He thus violated a fundamental principle of freedom of thought which includes, in the words of Justice Holmes, "freedom for the thought that we hate". It is difficult to think of a grosser abuse of powers than in this case, and the only charitable explanation of the District Magistrate's action can be that the incident happened in 1948 when the habits of arbitrariness acquired during the World War still lingered among some officials of the Government”. State was held liable to pay all the costs of the plaintiff-appellant.

In *State of Gujarat v Memon Mohd*\(^{31}\), certain goods were seized under the Sea Customs Act. Those goods were not properly kept and were disposed of, by an order of the Magistrate. On the owner suing the State for value of the goods, it was held that the seizure was illegal because-

(i) a bailment arose;

(ii) a statutory obligation to return the goods arose; and hence

(iii) a suit was maintainable against the State

In *State of M.P. v Saheb Dattamal and Others*\(^{32}\), an appeal is filed by State against the judgement passed by the Sessions Court, Indore in favour of heirs and the dependents of deceased named Lala, who was killed by a shot alleged to have been fired by the police while controlling riot on 21 July 1954. On appeal by State against this order the appellate Court said that liability of the State would not arise as to maintain law and order is a sovereign function. There is no remedy under Indian law as we have no similar law like the Crown Proceedings Act. In this case, the Court failed to consider the grievance of the

\(^{30}\) AIR 1962 All 233.

\(^{31}\) AIR 1967 SC 1885.

\(^{32}\) AIR 1967 MP 246.
victim and the violation of guaranteed right to life. In *State of Orissa v Padmalochni*\(^{33}\), the Court held that the State is not liable, where the police assault a member of a mob, for dispersing it, when there was apprehension of attack on the office of the Sub Divisional Officer.

In *Smt. Basava Kom Dyamogouda Patil v State of Mysore and Anr.*\(^ {34}\), articles seized by the police were produced before a Magistrate, who directed the Sub-Inspector to keep them in his safe custody and to get them verified and valued by a goldsmith. The articles were lost, while they were kept in the police guard room. In a proceeding for the restoration of the goods, it was held that when there was no *prima facie* defence made out, that due care had been taken by officers of the State to protect the property, the Court can order the State to pay the value of the property to the owner.

The Court observed that, torts committed by the police, while making a lathi charge on a procession, are not actionable against the State, as the police are performing functions concerning law and order, delegated to them under Section 30 of the Police Act, in *State of MP v Chirojilal*\(^ {35}\).

In *Nagandra Rao and Co. v State of A.P.*\(^ {36}\), the Court clarified, “In the modern sense, the distinction between sovereign or non-sovereign power thus does not exist. It all depends on the nature of the power and manner of its exercise. Legislative supremacy under the Constitution arises out of constitutional provisions. The legislature is free to legislate on topics and subjects carved out for it. Similarly, the executive is free to implement and administer the law. A law made by a legislature may be bad or may be *ultra vires*, but, since it is an exercise of legislative power, a person affected by it may challenge its validity but he cannot approach a court of law for negligence in making the law. Also the Government, in exercise of its executive action cannot be sued for its decision on political or policy matters. It is in (the) public interest that for acts performed by the State, in its legislative or executive capacity should not be answerable in torts. That would be illogical and impracticable. It would be in conflict with even modern notions of sovereignty”. The Court in the above case suggested that, “One of the tests to determine if the legislative or executive function is sovereign in nature is, whether the State is answerable for such actions in courts of law. For instance, acts such as defence of the country, raising (the) armed forces and maintaining it, making peace or war, foreign

\(^{33}\) AIR 1975 Orissa 41.  
\(^{34}\) AIR 1977 SC 1749.  
\(^{35}\) AIR 1981 MP 65.  
\(^{36}\) AIR 1994 SC 2663.
affairs, power to acquire and retain territory, are functions which are indicative of
external sovereignty and are political in nature. Therefore, they are not amenable to
jurisdiction of ordinary civil court. No suit under Civil Procedure Code would lie in
respect of it. The State is immune from being sued, as the jurisdiction of the courts in
such matters is impliedly barred.” The Court further observed, “But there the immunity
ends. No civilized 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 (the law) as it is unjust and unfair for a citizen to be
denied of his property illegally by negligent act of officers of the State without any
remedy. From sincerity, efficiency and dignity of (the) 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 on a par
with any other juristic legal entity. Any watertight compartmentalization of the functions
of the State as “sovereign and non-sovereign” or “governmental and 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 (the) 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; 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”.

In *P. Gangadharan Pillai v State of Kerala*\(^{37}\), the petitioner’s hotel was ransacked
in a mob attack, causing damage to the property of the writ petitioner. Police had
sufficient warning of the likelihood of an attack by the rioters. The State was held liable
for failure to protect the petitioner’s hotel, which had resulted in infringement of the
petitioner’s right to carry on business and trade, as contained in Article 19(1)(g) of
the Constitution.

In *State of A.P. v Challa Ram Krishna Reddy and Others*\(^{38}\), the Andhra Pradesh
High Court held that the plea of sovereign immunity is not available, where there is a
violation of the fundamental rights of the citizens. It was a case where a person arrested

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\(^{37}\) *AIR 1996 Ker 71.*

\(^{38}\) *AIR 2000 SC 2083.*
by the police was lodged in a cell in the jail. He expressed his apprehension to the 
authority in charge of the jail, that his enemies were likely to attack and kills him in the 
jail. This apprehension was not given any consideration by the authorities. During the 
particular night, there were only two persons guarding the jail, instead of the usual six. 
The enemies of the arrested person entered the jail during the night and shot him dead. 
The legal representatives of the deceased filed a suit for damages. The trial court found 
that the authorities were negligent in guarding the jail and that the death of the deceased 
was attributable to such negligence. However, the suit was dismissed on the ground that 
the arrest and detention of the deceased in jail was in exercise of sovereign functions of 
the State. During the hearing of the plaintiff’s appeal, the State relied upon the decision of 
the Supreme Court in Kasturi Lal. The High Court, however, held, applying the principle 
of a decision of the Privy Council in Maharaja v Attorney General for Trinidad and 
Tobago\textsuperscript{39}, that where the Fundamental Rights of the citizens are violated, the plea of 
sovereign immunity, which is (assumed to be) continued by Article 300 of the 
Constitution, cannot be put forward. The view taken by the High Court of Andhra 
Pradesh was approved by the Supreme Court. In State of Punjab v Des Raj and Others\textsuperscript{40}, 
the Plaintiff filed a suit for recovery of damages for malicious prosecution launched 
against him. The appellate Court held that the State could not be immune from the 
consequence of the act of its agents. In this case the Court referred the case of State of 
A.P. v Challa Ram Krishna Reddy and Others\textsuperscript{41}, in which Supreme Court held that, 
“Fundamental Rights and human rights or human dignity are concerned, the Law has 
marched ahead like a Pegasus but the Government attitude continue to be conservative 
and it tried to defend its action or the tortious action of its officers by raising the plea of 
immunity for sovereign acts or acts of the State, which must fail”.

After the commencement of the Constitution, a considerable change was made by 
the judiciary, by interpreting that the maxim that ‘King can do no wrong’ or that ‘the 
Crown is not answerable in tort’ has no place in Indian jurisprudence where the power 
vests, not in the Crown, but in the people who elect their representatives to run the 
Government, which has to act in accordance with the provisions of the Constitution and 
would be answerable to the people for any violation thereof.

\textsuperscript{39} (1978) 2 All ER 670. 
\textsuperscript{40} AIR 2004 P & H 113. 
\textsuperscript{41} Supra note 38.
The Law Commission asked why the Government should not be placed in the same position as a private employer subject to the same rights and duties. The Law Commission in its First Report in 1959 presented certain outlines of the proposal for Legislation on ‘Liability of the State in Tort’. A Bill which was intended to implement that Report was introduced in the Lok Sabha in 1967 and it was referred to a joint committee. However, with the dissolution of the Lok Sabha in 1971, the Bill lapsed. After that no sincere efforts has been made to modify the law relating liability of the State in torts.

**Liability of the State in Criminal Law**

Protection of the rights of the citizen is the vital duty of the State and this can be done only by enforcing criminal laws. If a human rights violation is committed by the State agencies, the same procedure is followed to safeguard and protect the rights of the people. The tortious acts of the State agencies can be revealed only with the help of the Criminal Court. For fixing the liability of the State for the torts of its officials can be determined by the Civil Court only if the crime is proved in Criminal Court.

The administration of criminal justice all over the world seems to be guided by one cherished principle i.e. the protection of rights of the accused and it is to be secured at all costs by a Criminal Court determining liabilities on him. In a criminal trial there are at least two active participants, the offender for whose sake the entire machinery of justice always remains vigilant and the victim of crime – the forgotten man of the criminal justice system especially in contemporary era.\(^\text{42}\)

In India, when a crime is reported to the police, search is made for the criminal and prosecuting agency operates to get the accused convicted. During the course of trial the accused is treated as a privileged person and is provided with all possible help including a counsel at the cost of the State. Even after conviction emphasis is laid on reformation and humane treatment to offenders. The State has stepped into the shoes of the victim and sought retribution in his place for the maintenance of law and order, peace and smooth progress of the society. But in this move, the fear, trauma and the hardships which a victim faces after the crime or wrongful act is done go unnoticed and he has to still bear with all such turbulent experiences. The present criminal justice system exhibits a paradoxical situation where the retribution on the part of the victim is taken by the State, but the victim gets nothing more than a mere satisfaction and actually he warrants

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more than that. As justice should not only be done but it must be seem to have been done, therefore, according to punishment to the offenders for violation of the rights, of an individual is just the former part of justice i.e. the justice has been done by punishing the culprit. But the later part that it must be seen to have been done still requires something more to be done. It requires just not only punishment to the accused but caring for the victim and protection of his rights and supporting him in times of distress. The case of awarding compensation to the victim gets impetus because

(i) The victim must get compensation from the violator who has tempered with his right to safety and peace along with right to live with dignity.

(ii) The victim must get the recompense from the society because it failed to provide him conducive atmosphere worth living, and protect him during such invasions into his rights.

(iii) The victim must get the recompense from the State as it is the duty of the State to check the deviant behaviour and maintain peace and order in the society.

In some legal systems, victims are entitled to receive restitution in the form of payment or services from the offenders who harmed them. This ancient practice can be found in the Manusmriti, Code of Hammurabi, the laws of Moses, the law of Roman Empire and the original legal code of thirteen colonies before the American Revolution. It is argued that many opportunities arise for arranging restitution as a settlement of conflict in lieu of arrest, as a condition for dropping charges, as a term of negotiated justice or as a condition of suspended sentences, probation or parole. However, advocates of a greater reliance on restitution are split over priorities and goals. Some view restitution as an additional penalty and contend that offenders must first pay their debts to society by being punished through confinement before they can repay their financial debts to their actual victims. For others, the primary consideration is that restitution serves as a means of rehabilitation by developing in offenders a sense of responsibility for wrong doing by cultivating good work habits and marketable skills and by building self confidence through tangible accomplishments. Still others see restitution as a vehicle for reparation and then reconciliation, whereby the offenders make amends, repair damage and thus restore balance and harmony.

43 Ibid.  
44 Ibid.  
The right of a victim of crime to restitution has not yet merited statutory recognition in Indian Constitution. However, in certain cases of property offences the court can order for the restoration of property to the victim while convicting the offender for such property offences. Under Section 5 of the Probation of Offenders Act, 1958, the offender may be required, on release on probation under Section 3 or Section 4 of the Act to pay compensation to the victims of crime. In many cases the constitutional courts have been inclined to examine the plea of the victim for redressal of the losses suffered during violent incidents such as communal riots and caste clashes.46

Right to compensation to the crime victims is a crying need of the hour. The International Covenant on Civil and Political Rights, 1966 indicated that an enforceable right to compensation is conceptually integral to human rights. Article 9(5) of the Covenant provides, “Anyone, who has been the victim of unlawful arrest or detention, shall have an enforceable right to compensation”.

India adopted the Covenant with a reservation regarding the enforceable right to compensation. The Declaration by the Government of India dated 10 April 1979 in respect of Article 9(5) is as under:

**Declaration 11**, with reference to Article 9 of the International Covenant on Civil and Political Rights, the Government of the Republic of India asks the position that the provisions of the Article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of Article 22 of the Constitution of India.47 The Law Commission of India in its 152nd Report had recommended the introduction of Section 357A prescribing, *inter alia*, that compensation be awarded at the time of sentencing the victims of crime.48 Again, in its 154th Report, the Law Commission of India went one step further and recommended that it was necessary to incorporate a new Section 357A in the Code to provide for a comprehensive scheme for payment of compensation for all victims fairly and adequately by the Courts.49

**Section 357A of Criminal Procedure Code, provides that,**

“357A Victim compensation scheme —

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46 R. Gandhi v Union of India, AIR 1989 Mad. 205.
1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who, require rehabilitation.

2) Whenever a recommendation is made by the Court for compensation, the District Legal Services Authority or the State Legal Services Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in subsection (1).

3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under Section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

5) On receipt of such recommendations or on the application under subsection (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.”

Award of compensation for established infringement of the rights guaranteed under Article 21 of the Constitution is a remedy available in public law since the purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved. When the Fundamental Rights are violated by the State, the aggrieved can approach the writ Court under Article 32 and 226 of the Constitution by filing writ petition before the Supreme Court and High Court. Writ is an order of the Court issued to a person or authority to do some act or forbear from doing some act. Writ is expeditious, effective judicial tool to hold the Government and its functionary for performance of their official duties in the right spirit.

Out of different kinds of mechanism available in India to enforce and implement law, remedy available through writ Court is the important one as it gives immediate remedy to the victim and takes measures to prevent the ongoing human rights violation.

The violation of rights by the State agencies can occur in different ways and are due to breach of duty, inaction, negligence or excesses of power or abuse of power. These gross human rights violation like encounter deaths, custodial deaths and rape, custodial torture, arrest and illegal detention occur in the course of exercising their duty like maintenance of law and order, prevention of riot and controlling terrorism etc. In a welfare State its functions are multifarious so there may be chance of interference in fundamental rights of the citizen and the States are justified in using a reasonable force for protecting the person and the property. At the same time, the Fundamental Rights of the citizens are guaranteed by the State through the Constitution. If these rights are violated, the victim is entitled to approach the Court for getting a remedy. Grant of compensation in proceedings under Article 32 and Article 226 of the Constitution of India for the established violation of the Fundamental Rights guaranteed under Article 21, is an exercise of the Courts under the public law jurisdiction for penalizing the wrong doer and fixing the liability for public wrong on the State which failed in the discharge of its public duty to protect the Fundamental Rights of the citizen.

The primary source of the public law proceedings stems from the prerogative writs and the Courts have, therefore, to evolve ‘new tools’ to give relief in public law by moulding it according to the situation with a view to preserve and protect the Rule of Law. While concluding his first Hamlyn Lecture in 1949 under the title ‘freedom under the law’ Lord Denning in his own style warned: “No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient; our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up-to-date machinery, by declarations, injunctions and actions for negligence… This is not the task of Parliament… the Courts must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfare State: but abused they lead to a totalitarian State. None such must ever be allowed in this country.”

In *Byrne v Ireland*\textsuperscript{53} Walsh, J. observed, “In several parts in the Constitution, duties to make certain provisions for the benefit of the citizens are imposed on the State in terms, which bestow rights upon the citizen and unless some contrary provision appears in the Constitution, the Constitution must be deemed to have created a remedy for the enforcement of these rights. It follows that, where the rights are guaranteed by the State, it is against the State that the remedy must be sought if there has been a failure to discharge the constitutional obligation imposed”.

In *Maharaja v Attorney General of Trinidad and Tobago*\textsuperscript{54}, the Privy Council while interpreting Section 6 of the Constitution of Trinidad and Tobago held that though not expressly provided therein, it permitted an order for monetary compensation, by way of ‘redress’ for contravention of the basic human rights and fundamental freedoms. Lord Diplock speaking for the majority said, “It was argued on behalf of the Attorney General that Section 6 (2) does not permit of an order for monetary compensation despite the fact that this kind of redress was ordered in *Jaundoo v Attorney General of Guyana*\textsuperscript{55}. Reliance was placed on the reference in the sub-section to ‘enforcing, or securing the enforcement of, any of the provisions of the said foregoing Sections’ as the purpose for which orders etc. could be made. An order for payment of compensation, it was submitted, did not amount to the enforcement of the rights that had been contravened. In their Lordships’ view an order for payment of compensation when a right protected under Section 1 has been contravened is clearly a form of ‘redress’ which a person is entitled to claim under Section 6(1) and may will be the only practicable form of redress, as by now it is in the instant case. The jurisdiction to make such an order is conferred on the High Court by Section 6(2), viz, jurisdiction ‘to hear and determine any application made by any person in pursuance of sub-section (1) of this Section’. The very wide powers to make orders, issue writs and give directions are ancillary to this”. Lord Diplock further observed that, “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{53} 1972 IR 241 at 264.
\textsuperscript{54} Supra note 39.
\textsuperscript{55} 1971 AC 972.
In *Simpson v Attorney General*\(^{56}\), the Court of Appeal in New Zealand dealt with the issue in a very elaborate manner by references to a catena of authorities from different jurisdictions. It considered the applicability of the doctrine of vicarious liability of torts, like unlawful search committed by the police officials which violate the New Zealand Bill of Rights Act, 1990. While dealing with the enforcement of rights and freedoms as guaranteed by the Bill of Rights for which no specific remedy was provided, Hardie Boys, J. observed, “The New Zealand Bill of Rights Act, unless it is to be not more than an empty statement, is a commitment by the Crown that those who in the three branches of the Government exercise its functions, powers and duties will observe the rights that the Bill affirms. It is implicit in that commitment, indeed essential to its worth, that the Courts are not only to observe the Bill in the discharge of their own duties but are able to grant appropriate and effective remedies where rights have been infringed. I see no reason to think that this should depend on the terms of a written Constitution. Enjoyment of the basic human rights is the entitlement of every citizen and their protection is the obligation of every civilized State. They are inherent in and essential to the structure of society. They do not depend on the legal or constitutional form in which they are declared. The reasoning that has led the Privy Council and the Courts of Ireland and India to the conclusions reached in the cases to which I have referred is in my opinion equally valid to the New Zealand Bill of Rights Act if it is to have life and meaning.”

The substantial transition in the trends of the judicial verdicts since *Kasturi Lal* and *Vidyawati* wherein the plea of sovereign immunity had held away, has got supplanted by the activistic style and liberal attitude of the Court to confer on the scope of Article 21 a wider amplitude extending from right to life, to life to dignity and decency, the right to a clean and healthy environment\(^{57}\) and the right to claim compensation for State infringement\(^{58}\). Rudal Shah opened up new vistas in the area of offering solace by way compensation to the victims of State lawlessness. The concept of vicarious liability of the State got a clear and justifiable interpretation when the Apex Court observed, “Compensation is not a charity nor a privilege to be doled out but a right of the victim of malfeasance, misfeasance or non-feasance of the State.”

\(^{56}\) 1994 NZLR 667.

\(^{57}\) *Amolak Ram v Emperor*, AIR 1932 Lah 13.

\(^{58}\) *Koli Raja Rupa v State of Saurashtra*, 1949, 2 Sau, L.R. 121.
The Law Commission called for State liability to be made the rule and sovereign immunity an exception. Bhim Singh’s\textsuperscript{59} case was a step in the new trend when the Court taking note of the malafide action of the State, invoked the doctrine of appropriate cases to award exemplary monetary compensation with the observations that, “When a person comes to us with a complaint that he has been arrested with mischievous and malicious intent and that his constitutional and legal rights were involved. The mischief or malice and invasion may not be washed away or wished away by his being set free. In appropriate cases, the Court has jurisdiction to pay compensation to the victims by awarding suitable monetary compensation”\textsuperscript{60}.

The compensation for damages of assault, battery and false imprisonment are at large and represents a solutium for the mental pain, distress, indignity, loss of liberty and death. The State is responsible for the tortious acts of its employees\textsuperscript{61} and the Court would go whole-hog to seek reparation in such cases. It is also appropriate to observe that the Court created an opening for the State to take steps for recovery of the damages so paid by the State or part of that claim from the erring officials and further, all such actions would also not bar any criminal proceedings nor would they cause any prejudice against them.

The omissions of the public servants vested with a duty as cast by law would make it implicit for the master i.e. the State Government to answer the lapse.\textsuperscript{62} An alleged failure on the part of the police officials who did not get the needed medical attention to a person in their custody could not be condoned and even-though the person who had to get the medical attention was an accused. The failure of the police was deprecated by the Court and the State was asked to pay compensation to the dependents of the deceased\textsuperscript{63}. It highlighted the urge to respond by ensuring relief and compensation. The traditional view supported the theory that ‘arrest and detention’ is a ‘sovereign function’ of State\textsuperscript{64}. Thus, no liability of State was considered if there was illegal arrest and detention. But the judicial grammar of interpretation of Article 21 has undergone a mutation One of the impacts of this new interpretation is that in some cases the Court has considered the question of giving monetary compensation to one who might have suffered unduly, detained illegally, or was badly harmed.

\textsuperscript{60} Id. at 499.
\textsuperscript{61} Saheli v Commissioner of Police, (1990)1 SCC 422 at 424.
\textsuperscript{62} Supreme Court Legal Aid Committee v State of Bihar, (1990) 3 SCC 482.
\textsuperscript{64} Supra note 20.
In *Raghbir Singh v State of Haryana*\(^{65}\) the Supreme Court has indicated the need of improving the police with a special training and skill in conducting investigation and gathering of evidence. The Supreme Court directed the State to take initiative in giving special training to the police, for conducting investigation in a civilized way. The concern which was shown in this case more than three decades back seems to have fallen to deaf ears and the situation does not seem to be showing any noticeable change.

The Supreme Court brought about revolutionary breakthrough in the “Human Rights Jurisprudence” in *Rudal Shah v State of Bihar*\(^ {66}\), when it granted monetary compensation of rupees thirty five thousands to the petitioner against the lawless act of Bihar Government which kept him in illegal detention for over fourteen years after acquittal. An important question to be determined by the Court was whether it could grant some compensation or exemplary costs against the State under Article 32 of the Constitution for illegal detention in the Jail. The Supreme Court observed, “The refusal of this Court to pass order of compensation in favour of the petitioner will be doing mere lip service to any Fundamental Right to liberty which the State Government has so grossly violated”\(^{67}\).

The duty of the Court is not only limited in revealing the truth and giving punishment to the accused but must take steps to prevent the repetition of the same offence in future. In *Sebastian M. Hongary v Union of India*\(^ {68}\), the petitioner a student of political science in Jawahar Lal Nehru University and a member of Naga community from Manipur, filed a writ petition to know the whereabouts of the two respectable persons of his village, C Daniel and C Paul who according to him were detained by the army personnel on 10 March 1982. The Government failed to produce them in the Court and also expressed inability to do so. The Court found that the explanation of the Government was incorrect and untenable. In fact, the truth was that these two persons had met an unnatural death. The Court, in these circumstances, keeping in view the torture, the agony and mental oppression undergone by the wives of the persons directed to be produced, instead of imposing fine on the Government for civil contempt of Court, required that “as a measure of exemplary costs as is permissible in such cases,” the Government must pay rupees one lakh to each one of the aforesaid two women.

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\(^{65}\) AIR 1980 SC 1087.

\(^{66}\) AIR 1983 SC 1086.

\(^{67}\) Id. at 1089.

\(^{68}\) AIR 1984 SC 571
The Supreme Court itself expressed the need of amending the law by the State to control atrocities by the police and to prevent the offending officials escaping from liability due to lack of law. The Supreme Court pressed upon the Government to amend the law appropriately so that policemen, who commit atrocities on persons who are in their custody, are not allowed to escape by reason of paucity or absence of evidence. Police officer alone and none else can give evidence as regards the circumstances in which a person in their custody comes to receive injuries while in their custody. Bound by ties of a kind of brotherhood, they often prefer to remain silent in such situations and when they choose to speak they put their own glass upon facts and pervert the truth. The result is that persons, on whom atrocities are perpetrated by the police in the sanctum sanctorum of the Police Station, are left without evidence to prove who the offenders are. While dealing with the appeal in case of State of U.P. v Ram Sagar Yadav, the Court said, “The law as to the burden of proof in such cases may be re-examined by the legislature so that handmaids of law and order do not use their authority and opportunities for oppressing the innocent citizens, who look to them for protection”. In C. Ram Kanda Reddy v State, it was held that where a citizen has been deprived of his life or liberty otherwise than in accordance with the procedure prescribed by law, it is no answer to say that the said deprivation was brought about while the officials of the State were acting in discharge of the ‘sovereign function’ of the State. Suit for compensation against the State when an under trial prisoner in jail lost his life due to failure or neglect of its officers to perform their duties, will be maintainable. The Court pointed out that this is the only mode in which right to life guaranteed by Article 21 can be enforced.

Gauri Shanker Sharma v State of U.P., is the best example to show the difficulty faced by the prosecution side to show that the police had used third degree method, when the deceased died under their custody. In most of cases direct evidence may not be possible and only judicial mind could reveal the truth and the dedication for achieving its purpose would help to protect the rights of the citizens. The Supreme Court observed that the High Court committed an injustice by acquitting the accused. The Court failed to consider that direct evidence may not be possible in case of custodial torture and the Courts must be more conscious while dealing with the cases of police atrocities. There would be chances of making inaccurate accounts to help out their colleagues. As they are

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69 AIR 1985 SC 416.
70 AIR 1989 AP 235.
71 AIR 1990 SC 709.
in charge of the official records they can easily manipulate it. These are common defects seen in most of the cases of custodial torture. The Court further explained that death in police custody must be seriously viewed otherwise we would help to stride in the direction of Police Raj. It must be curbed with a heavy hand. The punishment should be such as would deter others from indulging in such behaviour and there could be no room for leniency.

The question about liability of State again came up for consideration in ‘Saheli v Commissioner of Police’72. The writ petition was filed under Article 32 of the Constitution by a women’s association claiming compensation for police atrocities. In this case a 9 year old child died due to assault and beating by the police officer. The Supreme Court held that State is liable to pay compensation in case of police atrocities and accordingly it directed the State Government to pay compensation to mother of victim. In this case the Court relied on the People’s Union for Democratic Rights v Police Commission of Delhi73, where State was held liable to pay compensation. The Court also considered the principle invoked in Vidyawati’s74 case, that the Common Law immunity never operated in India. It had also emphasised the inapplicability of the Kasturi Lal’s75 case, in which the sovereign immunity was upheld to determine the vicarious liability of the State, which was distinct from the State’s liability for contravention of Fundamental Rights to which the doctrine of sovereign immunity has no application.

These are clear cases of excess by the police. It also proved that how violation of the human rights of the citizen can be committed by the officials. These developments have simultaneously overruled the outdated concept of sovereign immunity in all such cases of failure of perversions by the officers of the State. Rudal Shah and Bhim Singh powered their way to assert the right of the Court to award compensation in cases of unconstitutional and malafide detentions but held a view that instead of a blanket proposition to fix the limits of compensation, it would be desirable to determine the issue on a case to case basis. This far reaching verdict of the Rudal Shah not only put the scope of Article 21 to go beyond a mere declaration of the constitutionality of an illegal detention but also go further to confer the remedy available under the very Article, as the power to award the compensation is to be found in Article 32 of the Constitution of India.

72 AIR 1990 SC 513.
73 (1989) 4 SCC 730 (In this case one of the labourers when demanded wages for the work done by him the police tortured him to death. The Court directed to pay Rupees 75000/- as compensation to the legal heirs of the victim).
74 Supra note 19.
75 Supra note 20.
Thus, the State cannot anymore seek the cover hitherto available to it under Article 300 of the Constitution76.

The trend set by the Supreme Court in broadening the horizons of the compensatory juristic approach to alleviate the pain and anguish caused by the abuse of police power by the minions of the State can be seen in a cross section of cases from Susheelamma v State of Karnataka77, Krishnappa v State of Tamilnadu78, Gokul Chandra Jena v Director General of Police and Others79 and Lakshmi v Sub-Inspector of Police, Nagamalai Pudukotti Police Station, Madurai80. In Union Carbide Corporation v Union of India81, Misra, C.J. stated, “we have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future....... there is no reason why we should hesitate to evolve such principle of liability”.

In Nilabati Behera v State of Orissa and Others82 case, the deceased was taken to police custody and the next day his body was found on the railway track with multiple injuries. The burden was on the respondents to explain how he sustained injuries which caused his death. The death was presumed to have caused by the State employees as the State failed to prove their innocence. In these circumstances, it is the duty of the Court to compensate the petitioner for the violation of their guaranteed rights. The principle of sovereign immunity shall be inapplicable in such cases. The Court clarified that, ‘public law proceedings’ are different from ‘private law proceedings’. According to J. Verma, the award of compensation for the infringement of Fundamental Rights guarantees by the Constitution is justified: 1 Where the award of monetary compensation is the only practicable mode of redress available for the infringement made by State or its servants in the purported exercise of their powers, and 2 The enforcement of the Fundamental Rights claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution of India. The Court further clarified by referring the case of Rudal shah in which, Chandrachud, C.J., dealing with this aspect, stated that, "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,

77 1991 CriLJ 2436 (Karnataka).
78 1993 (3) Crimes 64.
80 1991 CriLJ 2269 (Madras).
81 AIR 1992 SC 248.
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.\(^{83}\)

The Supreme Court observed that, 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 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 Supreme Court is of the view that the provisions of Criminal Procedure Code and Indian Penal Code are not enough to repair the damages done to the victims and so the victim needs to be properly compensated. Thus Article 21 could be used in an effective way to protect the human rights of citizens.\(^{84}\)

In \textit{Charanjit Kaur v Union of India}\(^{85}\), an Army officer died while in service in mysterious circumstances. On facts authorities were found guilty of criminal omissions and commissions resulting in great mental agony, physical and financial hardship to the widow and children of the deceased. The Court granted rupees six lakh as compensation and special family pension and children allowance. In this case, Court observed, “it is painful to think about the irresponsible conduct of other officers towards the member of their own fraternity”. While deciding the liability of the State the Court had fixed the liability of the irresponsible officers also.

\textit{Arvind Singh Bagga v State of U.P.}\(^{86}\) is yet another case of police atrocities where police officers subjected a married woman to physical, mental and psychological torture calculated to create fright to make her submit to the demands of the police and abandon her legal marriage. Her husband and family members were also tortured. The Court took serious note of the human rights violation and directed the State to pay compensation to victims. The Court further pointed out that upon such payment it will be open to the State to recover the amount of compensation from the police officers concerned. It could have

\(^{83}\) \textit{Supra} note 66.


\(^{85}\) (1994)2 SCC 1.

\(^{86}\) (1994) 6 SCC 565.
been better if the Supreme Court had made it obligatory for the State Government to recover the amount of compensation from the guilty officials.

In *Dhananjay Sharma v State of Haryana* 87, on filing of false affidavits by the State officials the Court pointed that it would be a great public disorder if the fountain of justice is allowed to be poisoned by anyone resorting to filing of false affidavits or giving false statement and fabricating false evidence in a Court of law.

In *People’s Union for Civil Liberties v Union of India and another* 88, a writ petition filed by the People’s Union for Civil Liberties under Article 32 for the issuance of a writ of Mandamus or other appropriate writs to institute judicial inquiry into the fake encounter by Imphal police on 3 April 1991 in which two persons were killed to take appropriate action against the erring officials and to award compensation to the members of their family. The Court accepted the report of the learned District and Sessions Judge that additional and usual powers were given to the police to deal with terrorism and observed, “There is no doubt that police can use force in disturbed area to prevent terrorism and nobody can say that the police should wait till they are shot at, but the present case appears to be one where two persons along with some others were just seized from a hut, taken to a long distance away in a truck and shot there. This type of activity cannot certainly be countenanced by the Courts even in the case of disturbed areas. The question, however, arises whether it is open to the State to deprive a citizen of his life and liberty otherwise than in accordance with the procedure prescribed by law and yet claim an immunity on the ground that the said deprivation of life occurred while the officers of the State were exercising the sovereign power of the State?...Can the Fundamental Right to life guaranteed by Article 21 be defeated by pleading the archaic defence of sovereign functions? Does it mean that the said theory clothes the State with the right to violate the Fundamental Right to life and liberty, guaranteed by Article 21? In other words, does the said concept constitute an exception to Article 21? Article 21 does not recognize any exception, and no such exception can be read into it by reference to Clause (1) of Article 300. The Fundamental Rights are sacrosanct. They have been variously described as basic, inalienable and indefeasible. The founding-fathers incorporated the exceptions in the Articles themselves -wherever they were found advisable, or appropriate. No such exception has been incorporated in Article 21, the archaic concept of immunity of sovereign functions, incorporated in Article 300(1), as an exception to Article 21 is not...

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88 AIR 1997 SC 1203.
acceptable. True is that the Constitution must be read as an integrated whole; but, since the right guaranteed by Article 21 is too fundamental and basic to admit of any compromise, any exception in to it by a process of interpretation is also not acceptable. It must be presumed that, if the founding-fathers intended to provide any exception, they would have said so specifically in Part-III itself”. The Court further held,“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 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 damage which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortuous 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”.

In *Inder Singh v State of Punjab*\(^89\), according to the Court, the report of CBI which investigated the case as per its directions clearly established that the police was guilty of illegal abduction and detention of the persons. The Court directed the State of Punjab to pay to the legal representatives of each of the said seven persons an amount of Rupees 1,50,000 within two weeks. It further directed that the guilty persons should be identified by the State and it should endeavour to recover the said amount which is the taxpayer’s money. The Court further directed that disciplinary inquiries must be started against those police officials who were responsible for delaying the registration of the complaint earlier and the guilty officials must be proceeded against.

In *Ajaib Singh v State of U.P.*\(^90\), the writ petition filed by parents of Rishi Pal who died while in the custody. The jail and police authorities gave concocted explanation for the death. The Supreme Court relying on *D.K. Basu’s*\(^91\) case held that the State Government is responsible for the death of the deceased and ordered to pay Rupees 5 lakh as compensation within three months to the petitioner without prejudice to the rights of the legal heirs of the deceased to claim compensation in private law proceedings if so

\(^89\) *AIR 1995 SC 312.*
\(^90\) *AIR 2000 SC 3421.*
\(^91\) *Supra* note 52.
entitled in law. In order to fix the public accountability, it was further directed that the State Government shall take disciplinary action against those responsible for death.

In *State of Punjab v Vinod Kumar*\(^{92}\), the learned Single Judge of the P&H High Court while hearing the writ petition in respect of the alleged disappearance of three persons, *inter alia*, directed that by way of an interim measure the State Government is to pay a sum of Rupees 2 lakh each to the wife and children of the persons disappeared allegedly due to police atrocities. It was made clear that such payment was to be made without prejudice to the right of those persons to claim compensation against the State or any other person who may be ultimately found responsible in the matter. In order to fix the public accountability of the officials for violation of the human rights of those persons, the learned Judge also directed the State Government to accord necessary sanction as provided under Section 197 of Criminal Procedure Code for the prosecution of the guilty officials concerned without any delay when asked by CBI.

*R.D. Upadhya v State of A.P.*\(^{93}\) case points out the sad state of affairs concerning the human rights of prisoners. In this case, it was brought to the notice of the Court that a lunatic undertrial prisoner was languishing in jail for over 30 years and no action was taken by the Court and the jail authorities. Even the medical treatment was provided only after the High Court intervened. Thus, there had been total violation of Article 21. Considering the undertrial’s mental and physical health and the fact that he had no known relative either, the Supreme Court, as an interim measure directed a sum of rupees 2 lakh to be paid by the State by way of donation to the Missionaries of Charity, where he was accommodated for the time being. The Supreme Court expressing its anguish pointed out that the authorities are required to act according to law. The Supreme Court expressed the inadequacy of the remedy and observed, “Money award cannot, however renew a physical frame that has been battered and shattered due to callous attitude of others. All that the Courts can do in such cases is to award such sums of money, which may appear to be giving of some reasonable compensation, assessed with moderation to express the Court’s condemnation of the tortious act committed by the State”.

In *State of Maharashtra v Christian Community Welfare Council of India and Another*\(^{94}\), Court permitted the State to recover the amount of compensation paid by it to

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\(^{92}\) (2000) 9 SCC 742.

\(^{93}\) (2001)1 SCC 439.

\(^{94}\) AIR 2004 SC 7.
the widow of the deceased from the officers/officials concerned found to be responsible for the misdeeds which made the State to pay compensation.

In the case of *Munshi Singh Gautam v State of M.P.*\(^95\), one person was brought to the police station in the night in order to extort confession and beaten to death and his dead body was thrown near a *Nala*. Keeping in view the dehumanizing aspect of the crime, the flagrant violation of the fundamental rights of the victim of the crime and the growing rise in the crimes of this type, where only a few come to light and others don't, the Court recommended that, “The Government and the legislature must give serious thought to the recommendation of the Law Commission and bring about appropriate changes in the law not only to curb the custodial crime but also to see that the custodial crime does not go unpunished. The Courts are also required to have a change in their outlook approach, appreciation and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the cases of custodial crime so that as far as possible within their powers, the truth is found and guilty should not escape, so that the victim of the crime has the satisfaction that ultimately the majesty of law has prevailed”.

The Court further pointed out that this Court has in a large number of cases expressed concern at the atrocities perpetuated by the protectors of law and quoted the Justice Brandeis’s observation, “Government as the omnipotent and omnipresent teacher teaches the whole people by its example, if the Government becomes a law breaker, it breeds contempt for law, it invites everyman to become a law unto himself”\(^96\). 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 guardians of law destroy the human rights by custodial violence, torture and 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. The concern which was shown in *Raghubir Singh's case*\(^97\) more than three decades back seems to have fallen to deaf ears and the situation does not seem to be showing any noticeable change.

\(^95\) AIR 2005 SC 402.
\(^96\) *Ibid.*
\(^97\) *Supra* note 65.
The anguish expressed in several cases including *Gauri Shankar Sharma v State of U.P.*98, *Nilabati Behara v State of Orissa*99 and *D.K. Basu v State of W.B.*100 seems to have caused not even any softening attitude to the inhuman approach in dealing with persons in custody. But at the same time, there seems to be disturbing trend of increase in cases where false accusations of custodial torture are made, trying to take advantage 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.

It is the duty of the police, when a crime is reported, to collect evidence to be placed during trial to arrive at the truth. That certainly would not include torturing a person, be he an accused or a witness to extract information. The duty should be done within four corners of law. Law enforcers cannot take law into their hands in the name of collecting evidence.

In *Sube Singh v State of Haryana*101, the Supreme Court again emphasized the ensuring of compliance with the requirements laid down regarding arrest and detention. The Court suggested re-orientation in police training to bring in a change in the mindset and attitude of the police personnel in regard to investigations for recognizing and respecting human rights by them. The Supreme Court observed that 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. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a Civil Court, in enforcement of the private law remedy in tort, nor come in the way of the Criminal Court ordering compensation under Section 357 of Criminal Procedure Code.

P&H High Court in *Basant Singh v State of Punjab*102 writ petition filed by father of the deceased directed the State to pay compensation of Rupees 3 lakh to legal heirs of deceased. In this case, Counsel for the petitioner had relied upon the decision of the Court

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98 Supra note 71.
99 Supra note 82.
100 Supra note 52.
101 AIR 2006 SC 1117.
102 2008 CriLJ 4455 (P&H).
in *Gurdev Singh v State of Punjab and Another*103, in which Court held that the deceased may have been a hard core terrorist or a wanted criminal or whatever nomenclature one can use to describe an outlaw but at the time he was entitled to full protection of the police and the police was duty bound to protect his life. Persons detained in police custody have as much right to life as ordinary citizens. They are also entitled to be tried in accordance with law. In this case one may refrain from holding that Gurcharan Singh’s death was in a false encounter but one cannot help restraining that Gurcharan Singh had died in custody. “No person shall be deprived of his life and personal liberty except according to procedure established by law” is the Constitutional mandate and this principle must be upheld at all times. The only solace that can be provided to the heirs of the deceased is reasonable compensation.

In *State of Punjab v Paramjeet Kaur*104, the Supreme Court awarded compensation of Rupees 1,50,000 to the petitioner in case of custodial disappearance of petitioner’s husband. In *Tej Singh v State*105, Court held that torture and beating has no connection with discharge of official duty. Sanction for prosecution under Section 197 of Criminal Procedure Code is not required.

P & H High Court in case of *Nachattar Singh Alias Khanda and Others v State of Punjab*106 held “Taking all the circumstances into consideration i.e. five years rigorous imprisonment which the appellants have undergone, mental agony and torture they have gone through, the loss of face they have suffered during the trial and till the date i.e. for the last 13 years, an irreparable damage which has been done to them psychologically and physically cannot be repaid with any amount of money. They have demanded a compensation of Rupees 20 lakh each, which in the present circumstances is a fair amount. We award Rupees 20 lakh each to all the appellants, which shall be paid by the State of Punjab within 30 days from date of passing of this order. The Chief Secretary, Punjab and the Home Secretary, Punjab are directed to deposit a sum of Rupees one crore with the Registrar of the Punjab and Haryana High Court, which shall be further paid to the appellants”.

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104 2009 (2) RCR (Criminal) 614 (SC).
105 2009(2) RCR (Criminal)427 (DELHI).
In *Sakshi Sharma and Others v State of Himachal Pradesh and Others*, the High Court granted compensation of Rupees 15, 60,000 for custodial violence and directed the suspension of the erring police officials.\(^{107}\)

In *Hardeep Singh v State of Madhya Pradesh*\(^{108}\), the appellant was engaged in running a coaching centre where students were given tuition to prepare for entrance test for different professional courses. On certain allegation, he was arrested and taken to police station where he was handcuffed by the police without there being any valid reason. A number of daily newspapers published the appellant’s photographs and on seeing his photograph in handcuffs, the appellant’s elder sister was so shocked that she expired. After a long and delayed trial, the appellant, Hardeep Singh, filed a writ petition before the High Court of Madhya Pradesh at Jabalpur that the prosecution purposefully caused delay in conclusion of the trial causing harm to his dignity and reputation. The learned single Judge, who dealt with the matter, did not find any ground to grant compensation. On an appeal being preferred, the Division Bench observed that an expeditious trial ending in acquittal could have restored the appellant’s personal dignity but the State instead of taking prompt steps to examine the prosecution witnesses delayed the trial for five long years. The Division Bench further held there was no warrant for putting the handcuffs on the appellant which adversely affected his dignity. Be it noted, the Division Bench granted compensation of Rupees 70,000. The Supreme Court held that, the compensation of Rupees 70,000 was too small and did not do justice to the sufferings and humiliation undergone by the appellant. In the facts and circumstances of the case a sum of Rupees 2 lakh would be an adequate compensation for the appellant and would meet the ends of justice.

In *Dr. Mehmood Nayyar Azam v State Of Chattisgarh And Others*\(^{109}\), appellant-doctor was arrested in respect of alleged criminal offences and sent to police custody. Self-humiliating words were written on a placard and the appellant was asked to hold it and photographs were taken. The photographs were circulated in general public. The Court observed, “On a reflection of the facts of the case, it is luculent that the appellant had undergone mental torture at the hands of insensible police officials. He might have agitated to ameliorate the cause of the poor and the downtrodden, but, the social humiliation that has been meted out to him is quite capable of destroying the heart of his


\(^{108}\) (2012) 1 SCC 748.

\(^{109}\) (2012) 8 SCR 651.
It has been said that philosophy has the power to sustain a man's courage. But courage is based on self-respect and when self-respect is dented, it is difficult even for a very strong minded person to maintain that courage. The initial invincible mind paves the path of corrosion. As is perceptible, the mindset of the protectors of law appears to cause torment and insult and tyrannize the man who is helpless in custody. There can be no trace of doubt that he is bound to develop stress disorder and anxiety which destroy the brightness and strength of the will power. It has been said that anxiety and stress are slow poisons. When torment is added, it creates commotion in the mind and the slow poisons get activated. The inhuman treatment can be well visualized when the appellant came out from custody and witnessed his photograph being circulated with the self condemning words written on it. This withers away the very essence of life as enshrined under Article 21 of the Constitution”. The Apex Court has granted sum of Rupees 5 lakh to the appellant and ordered to realize the amount from the erring officers in equal proportions from their salary as thought appropriate by the competent authority of the State.

It is now a well accepted proposition that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only 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. In India, Government is for the people, of the people and by the people. Law is for the people and people are not for the law. The utmost object of any law is to create an atmosphere of trust, equality and fearless co-existence among the people irrespective of status, caste, creed or religion. As discussed above, the directive principles of State policy set some goals for the State to achieve. But the State fails to evolve any law for the welfare of the families of the victims of the custodial torture. The present day requires a social welfare legislation from the Government for the families of the victims of custodial torture. As remarked by V.R. Krishna Iyer, (Justice), “Welfare legislations calculated to benefit weaker classes, when their vires is challenged in Court, cast an obligation on the State, particularly when notice is given to the Advocate General, to support law, if necessary, by brandeis brief and supply of socio-economic circumstances and statistics inspiring the enactment. Courts cannot, on their own, adventure into social research outside the record and if Government lets down legislature in Court by not illumining the provisions from the angle of the
social mischief or economic menace sought to be countered, the victims will be the class of beneficiaries the State professed to protect.”

The General Assembly of the United Nations on 29 November 1985 adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, constituted an important recognition of the need to set norms and minimum standards in International Law for the protection of victims of crime. The United Nations Declaration recognized four major components of the rights of victims of crime- access to justice and fair treatment, restitution, compensation and assistance. The role of the victim of a crime in our Criminal Justice system, which follows the Common Law colonial tradition, is restricted to that of a witness in the prosecution of an offence. This stems from a negative perception of the victim of a crime as a person who has “suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their Fundamental Rights.”

Resultantly, the Criminal Justice system acquires a ‘vertical dimension’ and becomes a means of formal social control by the State which takes over the prosecution of the offender to the exclusion of the victim.

In case of human rights violation by the State the only remedy available to the aggrieved is to file a writ petition under Article 32 or 226 of the Constitution. Now the judiciary use Article 21 to promote compensatory jurisprudence. Even though there is no express provision in the Constitution the Apex Court is very much in favour of granting relief in case of violation of right as the reservation made in Article 9(5) of the International Covenant on Civil and Political Rights, 1966, “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation” has lost its relevance also. The Writ Court, after conducting summary trial grants ex-gratia payments or interim relief. The Court felt the compensation issued in the name of interim relief or ex-gratia payment was not adequate. So the Writ Court itself expressed inability in granting the full compensation and it expressed that issuing the interim relief would not preclude the petitioner from claiming the compensation from the Civil Court. In some cases it directed the petitioner to approach the Civil Court for getting compensation. Even then the Court itself expressed its doubt of getting compensation from the Civil Court where sovereign immunity of the State was a defence, because in

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Civil Court the theory of sovereign immunity is recognized better than public law domain. Thus the aggrieved has to face several hurdles for getting justice from the Court.

Difficulty faced the victim is that the very same cause of action is pending in different Courts, one for getting speedy justice and other for getting compensation and for giving punishment to the wrongdoer. No one cares to look into the State of condition of the families of the victims of the custodial death who lost their only bread winner. The Government whose foremost duty is welfare of the people, not bothered to bring any legislation for the welfare of the families of the victims of the custodial death. The families of the victims of custodial death lost regular income, wife lost a protecting husband and children lost a caring father. In this way, every member of the family lost some one or the other for no fault on their part. There all hopes dashed to ground. The lumpsum monetary compensation is not an appropriate and only remedy in case where the victim is the only breadwinner for the family. In such a case the family is not only in need of lumpsum monetary compensation but also requires monthly income to supplement the income lost. The custodial death of a breadwinner also affects the right to education\textsuperscript{113}, right to health\textsuperscript{114}, right to shelter\textsuperscript{115} and right to livelihood\textsuperscript{116} of the dependants of the victim under Article 21 of the Constitution of India.

Now the judiciary has began to take bold steps in applying compensatory jurisprudence without considering the privilege of the State but in most cases interim relief was given. The writ is a valuable right which cannot be allowed to be stripped to the wilful defiance of authorities in cases of State atrocities or wilfully flouted by the State authorities and which results in shaking the confidence. It is high time to make modifications in the procedural system as well as in the legal system. Even though the wrongful act is committed by the enforcement agencies, according to the present system it is necessary to get permission from the department to take action against them.

\textsuperscript{113} J.P. Unnikrishnan v State of A.P., AIR 1993 SC 2178.
\textsuperscript{114} State of Punjab v Mohinder Singh Chawla, AIR 1997 SC 1225.
\textsuperscript{115} U.P. Avas Avam Vikas Parishad v Friends Co-operative Housing Society Ltd., AIR 1996 SC 114.
\textsuperscript{116} Madhu Kishwar v State of Bihar, AIR 1996 SC 1864.