Chapter III

**Constitutional Torts**

The essential basis of tort is the violation of a duty fixed by law. The interest worthy of protection is recognized in tort law, through the judicial recognition of the concerned interest or through legislative enactments. The violation of duty is thus recognized by law.

Many important interests of a citizen are protected in the form of fundamental rights. The Constitution of India protects life, various liberties, equality etc. The essence of fundamental rights is to put a limitation on the legislature and executive in relation to the interest of the individual. If the State were to exceed the limit so fixed and encroach upon the interest protected by fundamental rights, there is a violation of a Constitutional duty by the state. If the disability on the State and the immunity of the citizen are ignored, the protection of the interest through the Constitutional norms is made meaningless. When an interest so protected by fundamental rights is thus violated, the Constitution provides for a redressal of grievance involved by approaching the High Court and Supreme Court by invoking the Writ Jurisdiction. Though according to the original notion of Writs, they were concerned only with the validity of the decision making process and not with the merits of a violation by a State agency, the courts

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30 *Donghue v. Stevenson* 1932 AC 562.
32 Article 12 to 25.
in India started giving some compensation in addition to declaring the action of the state invalid by relying on the flexible phraseology used in the Constitution. This welcome development has added the category of ‘Constitutional Torts’ to protect the interests of the people.

**Theories which support Constitutional torts in India**

The Constitutional framers had an idea to incorporate the Bill of Rights into our Constitution as fundamental rights. These rights are regarded as superior to all other rights under the Indian Constitution. Parts III and IV of the Constitution define the nature and scope of the Indian State’s human rights obligations and it clarifies the jurisprudence of the rights guaranteed under the Constitution. The fundamental rights act as a restriction on the actions of the state and if it exceeds the power, legal liability arises. The liability of the State in India and its jurisprudential basis for the award of compensation seems to be two fold under the Constitution. Firstly, the State has a legal duty to protect the guaranteed rights, and it must compensate the victim if it acts contrary to it. Secondly, the Writ powers are available to the superior courts to ensure that the State does protect these rights and these powers are not to be used in a hyper...

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33 Writs in the nature of Article 32 and 226.

Article 32 (2) The Supreme Court shall have power to issue direction or orders or writs including writs in the nature of habeas Corpus mandamus prohibition quo warranto and certiorari whichever may be appropriate, for the enforcement of any of the rights conferred by this part.

Article 226 (1) Notwithstanding anything in Article 32 every High Court shall have power throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority including in appropriate case any Government within those territories directions, orders or writs including writs in the nature of Habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

technical fashion. In order to be effectively redressed for the breach of duty by the State, the victim must be compensated by the State.\textsuperscript{35}

According to Dr Justice Anand, the constitution is the fundamental law of the land and if the action of the States is found to be unconstitutional, the courts are empowered to eliminate those acts. The courts are the guardian of those rights and have to uphold the Constitution. So the accountability of the Judges are not only towards their conscience but also to the people upon whom the sovereignty vests.\textsuperscript{36} From this it can be concluded that the courts are bound not only to protect and guard the basic rights of the people but also to declare the acts as invalid and compensate the victim for the violation of guaranteed rights.

The scope of the Constitutional torts depends on the scope of the remedy and on the scope of fundamental rights. These remedial aspects will be discussed in a later chapter. Here we propose to examine how the scope of Constitutional torts has got extended dimension in our system due to the development in the Constitutional interpretation of Article 21 of the Constitution.

\textbf{Development of Article 21 in the human rights perspective}

Traditionally, the court had only limited jurisdiction to interfere in cases of arrest and illegal detention as those functions were treated as Sovereign functions. The High Courts and the Supreme Court under Article 226 and 32 had only


limited jurisdiction of issuing immediate relief to the victims. While interpreting
the Constitution the court had followed a very narrow interpretation.

Of late the concept of personal liberty under Article 21 has been a point of
discussion. The Indian judiciary took several steps to include the human rights
norms into the scheme of the Indian Constitution through Article 21. This
Article provides that ‘no person shall be deprived of his life or personal liberty
except according to the procedure established by law’. Since the Constitution
came into force this has been interpreted in different ways.

The scope was first considered while deciding A.K. Gopalan v State of
Madras. In this case the petitioner was detained under the Preventive Detention
Act 1950 and he moved the court for his release on the ground that his right to
move freely throughout the territory of India was infringed because of the order of
detention. When the order was challenged as being in violation of Article 19 (1)
d, the right to move freely throughout the territory of India, the court answered
the issue in the negative and held that the purpose of the Article was not to protect
the generalized right but to protect the limited right of passing within India as well
as from one State to another State and the court concluded that the order of
detention passed under this Act did not offend Article 19 (1) (d) of the

37 While interpreting Article 21 of the Constitution the court referred, Article 9(3) of the International
Covenant on Civil and Political Rights provides that persons awaiting trial should be released, subject to
guarantee to appear or trial. Article 28 of the principles on Equality of the Administration of Justice of the
Indian Constitution that National laws concerning provisional release, custody pending or during trial shall
be so framed as to eliminate any requirement of pecuniary guarantee, Article 16 (2) of the principles of
freedom from arbitrary arrest and detention provides to ensure that no person shall be denied the possibility
of obtaining provisional release on account of lack of means, other provisional release than financial
security shall be provided.

38 AIR1950 SC27.
Constitution. As far as the scope of Article 21 was concerned, the court clarified that the words 'procedure established by law in Article 21 is to be given a wide and fluid meaning and the expression 'due process of law' as used by the U.S. Constitution could only mean State made laws. So it was held that Article 19 and 21 are mutually exclusive and hence the reasonability test as applied in Article 19 is not to be applied in Article 21.

Article 21 was construed as a guarantee against executive action unsupported by law. Article 21 had a narrow interpretation that it was not open to a person whose fundamental rights are denied and had no chance to contend that the procedure prescribed by the law was not complied with. According to this interpretation, only the legislature had the final say to determine the procedure which curtails the personal liberty of a citizen in a given situation and also that the legislature decides the way in which procedural safeguards would apply. Article 21 served as a restraint against the executive actions which could not proceed against an individual to curtail his personal liberty without any authority of law. For example to arrest a person, a valid law is required. Personal liberty has been interpreted in a restricted sense of freedom from arrest, imprisonment or other physical coercion and the personal liberty meant liberty related to the body of a person alone.

After the internal emergency in India, the Forty -Fourth Amendment was made with the intent to ensure that the fundamental rights are not restricted or taken away by a transient majority in Parliament and it is necessary to ensure
safeguard against such contingency in future and to ensure that the people themselves have a voice in determining the form of government under which they are to live.

While deciding a case namely *R. C. Cooper v. Union of India*\(^{39}\) the scope of Entry 42 in List 111 of the 7th schedule of the Constitution which confers power on the Parliament and the State legislature, to legislate with the respect to acquisition and requisition of property, the Court took the view that the right to property is the highest right and it includes ownership, estates and interests which are capable of transfer. The extent of protection against the infringement of a fundamental right is considered not by the object of legislature and not by forms of action but its direct operation upon the individual’s rights. The court also made the same clear in *Gopalan’s case*. Article 19 (1) (f) and 31 (2) are interrelated. Thus it is not the object of the authority making the law impairing the right of the citizen not the form of action that determines the protection he can claim, it is the effect of the law and of the action upon the right which attracts the jurisdiction of the court to grant relief.

From this it was made clear that while interpreting the Constitutional provision, the main thrust must be in promoting the rights of the people. The Constitutional courts are entrusted with power and duty to interpret law for the protection of basic and fundamental rights dealt with in the constitution. There are certain areas which require restraint on the State action, where the chances of

\(^{39}\) AIR 1970 SC 564.
abuse or misuse are more. But for the realization of human rights, the positive action of the State is also necessary. The Judiciary has to take into account, all these circumstances while interpreting the constitutional provisions.

In Meneka Gandhi v. Union of India, the court was interpreting Section 10(3) (c) of the Passport Act which authorizes the passport authority to impound a passport if it deems it necessary to do so in the interest of sovereignty and integrity of the state and security of the State, or if it would affect the friendly relationship with the foreign country. Thus her passport was impounded by the Central government and this was challenged through a Writ Petition on the ground of violation of fundamental right guaranteed under Article 21 of the Constitution. She contended that the order of impounding her passport is null and void.

The court clarified that the freedom of speech and expression, is not confined within the geographical boundary and in the same way right to travel includes travelling outside the country and so impounding one’s passport for an indefinite period would affect his or her fundamental right to move freely.

The Supreme Court declared that the expression “procedure established by law” in Article 21 means that the law should be prescribed with some procedure and if arbitrary and fanciful, it may lead to depriving a person’s liberty. The procedure must be just, fair and reasonable and the court has the power to judge the fairness and justness of procedure established by law. The court held that Article 14, 19 and 21 are not mutually exclusive but they are interrelated. So the

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40 AIR 1978 SC 597.
expression personal liberty has got an expansive interpretation covering a variety of rights. It made a change that deprivation of life and personal liberty can be made only with a procedure and such procedure must be fair and reasonable. Thereafter in a series of cases the Supreme Court has widened the scope of Article 21. It includes negative as well as positive meaning.

The entire law relating to bail was humanized by abandoning the monetary bail and allowing them to remain free when trial is pending. The Supreme Court also reminded that expeditious trial is also essential to have a reasonable and fair procedure. The court as a protector and guarantor of fundamental rights also took the affirmative step and directed the state to comply with its obligation of providing free legal aid to the poor and to have access to justice as dealt with in Article 39 (A). So while granting relief through Writ Jurisdiction the judiciary took a bold step in promoting human rights jurisprudence and Constitutional jurisprudence. The attempt was to prevent the executive from playing with the rights of the citizen, which would make them more responsible for their duty of guarding the constitutional rights of the people. With the development of human rights jurisprudence, the Judges began to think that the Constitution is an organic instrument which must be interpreted creatively with a view to protect the constitutional values and must strengthen human values. The liberties and the rights guaranteed in the Constitution are not to be misused and it should be

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41 Article 39 (A) of Directive Principles of State Policy to ensure equal access to justice to the people irrespective of their caste, creed or resources
ensured that, it carries with it duties and responsibilities. The right to education has got wider interpretation in *Unni Krishnan v. state of A.P.*, relying on the principle that while interpreting Article 21 the court should be able to expand the reach and ambit of fundamental right and thus it was held that the right to receive education up to the primary stage is a part of Article 21 of the Constitution. The same way the Supreme Court in *P.Rathinam v Union of India* held that

"The right to live with the human dignity and the same does not connote continued drudgery. It takes within its fold some of the fine graces of civilization which makes life worth living and that the expanded concept of life would mean the tradition, culture and heritage of the person concerned""

Thus the right to life includes physical and mental health. The right to life embraces not only physical existence but requires the quality of life. There are several other rights which have been held to be part of the right to life. They are right to go abroad, right to privacy, right against solitary confinement, right to legal aid, right to speedy trial right against handcuffing, right against the delayed prosecution, right against custodial violence, right against public speaking, right to doctors assistance, right to shelter etc. Any way the Supreme Court began to recognize several rights as fundamental rights by interpreting Article 21 of the Constitution. Thus the courts began to give interim relief in certain cases by

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43 AIR1993 SC2178.
44 AIR1994SC1852.
humanitarian consideration in *Munna and others v. State of U.P.*<sup>45</sup>, Miss Marie Andre v. Stat Delhi Admn and others<sup>46</sup>

**Criminal justice by the Constitutional courts**

When police brutality and custodial torture became a common phenomenon, the constitutional courts felt that it is an urgent necessity to guard and protect the constitutional rights of the citizens. Then the Supreme Court has found that reinterpretation given in *Menaka Gandhi*’s case can be used as a tool to improve the present legal system. The key to the judicial activism was that the phrase used’ the procedure established by law’ in Article 21 does not mean any procedure laid down by a statute but it must be a just and fair procedure and not arbitrary, fanciful. So in case of arbitrary acts there would be violation of Article 14 and the arbitrary procedure is considered as no procedure at all and it is against Article 21. In the exercise of writ jurisdiction, under Article 32 of the Constitution, the Apex Court, in cases of custodial torture committed by the officers of the state, Article 21 of the constitution used to promote compensatory jurisprudence. The injustices like Custodial death, torture, illegal detention, arrest, handcuffing, atrocities against women and children violate the rights guaranteed under Article 14, 19 and 21 of the constitution.

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<sup>45</sup> AIR 1982 SC 806 In this case the court directed the state of Uttar Pradesh that the children below the age of 16 must be detained in children home instead of detaining them in the jail along with other prisoners.

<sup>46</sup> AIR 1983 SC1092. In this writ petition under Article 32 a foreign national undergoing life imprisonment suffering from cancer sought permission to go one year to her native land for better treatment, on humanitarian grounds her permission was granted on a condition of return after an year.
Reasons which led to the idea of Constitutional Torts

The judiciary could promote human rights jurisprudence in the area of personal liberty by recognizing and including more and more rights in its writ jurisdiction. With the application of dynamic constitutional jurisprudence, the court can quash an order of detention and arrest if it is not according to law. Then the question arose whether the court can award compensation to the one who had already suffered detention and bodily harm at the hands of the state or whether they have the recourse to the civil court for getting ordinary remedy available from there.

Any way for the first time an issue of constitutional importance and deprivation of right to life or personal liberty guaranteed under Article 21 and the compensation to the victim of police excesses was raised in the important case popularly known as Bhagalpur blinding case. In Khetri v State of Bihar\(^7\) the police authorities had blinded certain prisoners and the counsel for the blinded prisoners asserted a constitutional right to get compensation for the damage caused by police excesses. This raised an important constitutional question that when the state deprive the right to life and personal liberty of a person it can be done only according to the procedure established by law. Then the Supreme Court got an opportunity to think as to what relief could be given for the violation of constitutional rights. Can the court grant relief for the violation of Article 21? Or what relief can the court give for the violation of Constitutional right?

\(^7\) AIR1981 SC 928.
Justice Bhagwathi observed:

"Why should the court not be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious fundamental right to life and personal liberty?"

By considering the inhuman act which violated the guaranteed right of Article 21 of the citizens, the court said that it was not a legal problem but a human one because the blinded prisoners who were undergoing treatment at Rajendra Prasad Ophthalmic institution New Delhi were likely to be discharged from the hospital and their vision was so totally impaired and it was not possible to restore it by any medical or surgical treatment.

The question arose whether the state was liable to compensate for the violation of their fundamental right under Article 21 of the constitution as the prisoners were deprived of their eyesight by the police officers who were government servants acting on behalf of the government and so the court directed the state of Bihar to provide them the best treatment at state cost. Thus all the blinded prisoners were sent to the All India Medical Sciences, New Delhi to be provided with medical relief to the victim at the state cost. The state was directed to meet the expense of housing of these men in a blind home at Delhi.

The same issue arose in *Sant Bir v. state of Bihar*48 where the victim was a criminal lunatic even though he was perfectly sane and fit for discharge but remained under detention illegally for over 15 years. The court directed to release

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48 AIR 1982 SC 1470
the prisoner and remarked that it was a matter of shame for the society to think that he was detained in prison for a period of fifteen years without any justification. The court said that there is a need of compensating the victim for the unlawful act of enforcement agency but left the issue unanswered.

In both these cases the Apex court expressed its concern about the grant of any compensation to the victims of state excesses but actually failed to grant the same because of lack of law. These two cases led the judges to think that they are helpless in case of violation of rights of the people by the state.

In a welfare state, the state has to ensure that the security to the life and liberty of the citizens which are interfered due to the act of the officials of the state. It is an urgent need to keep the officials within their sphere and that the victims do not remain unredressed for the harm they suffered. But the state officials may not have the economic stamina required for paying reparation to the victim.

**Emerging constitutional torts jurisprudence in India**

In this landmark decision in *Rudul Sah v. State of Bihar*\(^4^9\), the court set up human rights jurisprudence to rectify the dilemma which existed in the present system that Article 32 cannot be used as a substitute for enforcement of fundamental rights which are already available through civil courts. By the time, this writ petition came before the Supreme Court on November 22, 1982 the

\(^4^9\) AIR1983 SC1086.
petitioner had already been released by the jail authorities on October 16, 1982 thus making his prayer for release meaningless.

According to the existing legal system, the court can only quash the order and direct the victim to approach the civil court or to issue an order of release and compensation for the violation of this fundamental right\(^\text{50}\). There is no justification in telling the victim to approach the civil court for getting effective remedy. A judge must continuously mould the law as to serve the needs of the time, he must not be merely mechanical, but he must be an architect, engaged in building a civilized society and it is on his work the civilized society depends\(^\text{51}\). If the judges refuse to give remedy on the ground of lack of activist approach, it would amount to perpetuating the sufferings\(^\text{52}\).

If the power of the writ court is limited to passing order of release from illegal detention what is the remedy for the violation of his fundamental from the constitutional court? The aggrieved must get effective remedy from the Court where he approached with his grievance of negation of fundamental rights. The effective way is to ensure that the violation of right could reasonably be prevented and due compliance with the constitutional mandate reasonably be assured.


\(^{51}\) Justice Binodkumar Roy, judge of the Allahabad High Court, *Role of Judiciary in the present day context* AIR1998 Journ17.

\(^{52}\) Ibid p 19.
The court observed that

"The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection, the powers of the state as a shield".

Having been convinced of the situation, the Supreme Court concluded that merely releasing the petitioner, without compensating the victim for the violation of his fundamental right would be doing mere lip service to his fundamental right to liberty which the state government had so grossly violated. Hence the court articulated Article 21 of the Constitution for providing compensation to the victim. The Court not only released him from the jail but also granted interim compensation without prejudice to his right to file a civil suit for compensation.

Through this path breaking decision, the judges laid down new jurisprudence to protect individual right and personal liberty and made it clear that no lawless acts or violation of human rights by the state can be encouraged and this attitude improved the capacity and the effectiveness of the Supreme Court in redressing the grievance of the victims due to state atrocities.53 If the power of the court is limited in passing the order for release from illegal detention it would be denying the payment of monetary compensation for the violation of basic right, because remedy from civil courts depend on the defense of immunity of the state.

53 Vikram Raghavan, TheCompensatingVictims' of Constitutionals Torts :Learning FromThe IrishExperience  AIR1998 journ 100
Administrative defect leading to flagrant infringements of fundamental rights cannot be corrected without repairing the damage done by the officials of the state. An important break through made by this decision in the field of victimology jurisprudence and the judicial concern in repairing the damage done by the employee due its administrative defect leading to flagrant violation of fundamental right resulted in making the government more responsible. In this case, the Apex Court used the law enforcing machinery in reinforcing the legitimacy and credibility of the court particularly in protecting the weaker sections of the society. Rudial Shah is a shift from the traditional tort law, and with this decision the constitutional tort was recognized by the judiciary.

**Development of Constitutional torts**

After the decision in Rudul Sah in a series of cases the courts began to award compensation for the violation of constitutional right guaranteed under Article 21 of the Constitution. The other two cases like Sebastian Hongray, Bhim Singh also got special attention from the court, with regard to human rights violation by the officials of the state. This trinity of the cases reminded the court to safeguard the constitutional rights of the citizens and to compensate the victim and their legal heirs. The constitutional torts mostly applied in giving compensation to the victims of police atrocities like custodial death, torture, arrest and illegal detention and the other victims who suffered human rights violation due to

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55 N.R.Madhavan Monen, Governmental Lawlessness – SC's Break through judgment 'The Hindustan Times 9 (10 Nov,1983)
negligence of the officers of the state, including medial negligence and victims of riot and victims who suffered injury and to the legal heirs of those who lost life due to hazardous industry.

**Custodial violence**

In this portion the study is concentrated with the application of constitutional torts in case of atrocities of the enforcement agencies. The torture in custody flouts the basic rights of the citizens recognized by our constitution. Although there is no provision in the Constitution prohibiting cruel, inhuman and degrading punishment or treatment the court has evolved this right from other provisions of the Constitution namely Article 21 in conjunction with Article 14. The human rights violation includes custodial death disappearance, torture, arrest and illegal detention

a) **Death due to torture**

In a democratic country where there is a civilized system instituted for the welfare of the citizen, if the citizens rights are violated it is the duty of the legislature and the judiciary to protect and safeguard their rights. Now the custodial death or death due to encounter and the disappearance are common. So it is necessary to see whether the principle of constitutional torts could effectively be worked out for compensating the loss.

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In *Saheli*\(^{57}\) when a small boy died due to police beating and assaults the claim for compensation filed by his mother, the defense of sovereign immunity was raised by the state, and this was refused because of the infringement of the constitutional right guaranteed under Article 21. The judiciary read the constitutional law into torts law by superseding the common law of torts and made the state liable. In this case the court also expressed the need of recovering the compensation from the offending officials.

Justice B.C. Ray and S. Ratnavel Pandian J. J expressed that

"An action lies for damages for bodily harm which includes battery assault, false imprisonment, physical injuries and death. In case of assault, battery and false imprisonment the damages are large and represent a solatium for the mental pain, distress, indignity, loss of liberty and death."

Here the writ petition was allowed without considering whether the claim was under writ or civil and the right violated was fundamental or legal.

Thus the court established that it is universal in nature covering writ jurisdiction as well as civil jurisdiction, if the official who acts on behalf of the state commits any wrong which results in human rights violation, the state would be vicariously liable for it and the right to compensation is the remedy available before the court.\(^{58}\) However the principle evolved in *Rudul Shah* had limitations

\(^{57}\) AIR 1990 SC 513.

\(^{58}\) Bishnu Prasad Dwivedi, *From Sah to Saheli: A New Dimension to Government Liability* P110, 1994 Vol36:1, JILI
which had been removed in this case by awarding compensation in this writ petition without referring to Article 21 of the Constitution for the loss of life.

The court crystallized Article 21 to give compensation for the breach of duty by the state under public law jurisdiction and directed the state to pay compensation in *Nilabati Behera v State of Orissa*. The monetary compensation through writs for violation of human rights and fundamental freedom is an acknowledged remedy to uphold constitutional guarantee and this remedy affords monetary relief to the aggrieved persons.

Dr A.S. Anand made a rule:

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

Thus the courts are under an obligation to make the state or its servants accountable to the people by compensating them for the violation of their fundamental rights. Otherwise the law remains as stagnant which would result in the abuse of power and erosion of liberty and freedom of the people. The court

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60 B.P. Singh Seghal *Human Rights in India, Monetary compensation for violation of Human Rights* (2004) P. 412
criticized that the custodial violence strikes at the root of rule of law. This matter is a serious concern because it is committed by the persons who are supposed to be the protectors of law. It is committed under the authority of law. No civilized nation can permit the custodial torture. In this context the court had to clarify the decision in *kasthurilal*, supporting the defense of sovereign immunity of the state as this was not overruled till now, it was answered that sovereign immunity is not applied in case of any act of the State in contravention of fundamental rights of the people. In case of violation of Article 21, and for the breach of duty, the liability of the state would be based on strict liability. Thus the torture and assault by the state and its functionaries would affect the life and personal liberty of the citizen.

In this type of breach of public duty by the state, the Supreme Court and High Courts exercise its public law jurisdiction to award compensation to the victims in addition to private law remedy for tortious actions and punishment under criminal law. The Supreme Court is of the view that provisions in Cr. P. C. and I.P.C. are not enough to repair the damage done to the victim and so the victim needs to be compensated properly. Extension of compensatory jurisprudence to cases of misuse of police powers makes the law justice oriented and a landmark in our human rights jurisprudence. Thus in this case, Article 21 could be used in an effective way to protect the human rights of the citizen. Mr. Justice Anil Dev Singh, Judge of Delhi High Court, awarded Rs. 5.5 lakhs compensation to the

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widow of a young man of 22 years, on 15th October 1996, who had been killed in police custody in 1988. He said that “despite several judgments of the Supreme Court, the state had not been able to prevent custodial death. Torture is still preferred to scientific techniques for the purpose of eliciting information from the accused and the witness.

He added “such incidents strike at the very foundation of law. Deprivation of life without due process of law is banned and barred under Article 21 of the Constitution. Yet such incidents take place. Those who think that they can detect and eradicate crime by resorting to crime are in fact stoking the fire which they want to extinguish. The police can surely interrogate a person accused of an offence but they cannot torture him to extract information, otherwise tyranny will replace law.”

In a Habeas Corpus petition when the government failed to produce the persons taken into custody and when they expressed their inability to produce them in Sebastian M Hongray v Union of India the Supreme court presumed that the two persons might have been killed while in army custody and by taking into consideration of the irreparable loss to the bereaved members of their family, resulting in the violation of Article 21 by using the writ jurisdiction under Article 32 of the Constitution, the court awarded compensation to the legal heirs of the victim for an act done by state employees in the exercise of sovereign function.

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64 P. M. Bakshi’s Encyclopedia of writ law (2004 Edt), pp.64,65.
65 AIR1984 SC1020.
In *A.O. Leihao Devi v. State of Manipur* the Guwahati High Court awarded a compensation of Rs. 1,50,000/- to the victim’s wife because Manipur Rifles men fired and killed the driver of a jeep who allegedly refused to halt at a check post on being asked to do so. The concept of sovereign immunity has become inapplicable in case of human rights violations whether it is writ, civil or appellate jurisdiction. The only requirement is that the violation of the fundamental rights should be proved. Here also the Court initiated the action for compensating the violation of constitutional rights. The same way in *Mrs. Cardino & others v. Union of India* Mr. Antony Cardinao a store keeper in the mental hospital Panaji was arrested by police on the allegation of misappropriation of money and while in custody he died on 10th Oct 1979 due to torture and atrocities by the police. On dismissal of the petition claiming the compensation filed in the trial court on the ground of sovereign immunity, his wife approached the High Court. By refusing the plea of sovereign immunity, the Bombay High Court directed the State of Goa to pay Rs. 200,000/- to the legal heirs of the deceased for the violation of Article 21 of the Constitution.

Similarly for the death of a boy under judicial custody, due to injuries received by him at the hands of state officers, and failure on the part of authority

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66 AIR 1999Gau 9 see also 1995 SCC 9 (Cri) 556. In *Kewal patil v state of UP* when the wife claimed compensation under Article 32 for the violation of Article 21 the Supreme court concluded that the killing of Ramjit was in utter violation of the provisions of Article 21 of the Constitution, and the state was directed to pay Rs 1 lakh to the legal heirs of Ramjit

67 1990 ACJ 804.
in giving sufficient reasons how the injuries were caused, the court awarded Rupees One lakh to the parents of the boy in *Chellammal v. state of Tamil Nadu*68. From these cases, it is apparent that the Supreme Court of India has created constitutional torts to protect the rights and liberties of the people from the state agencies.

There are a number of similar cases of death due to the atrocities of the enforcement agencies and the compensation provided by the writ court. A very innovative development took place under Article 226 and 32 of the Constitution in *D.K.Basu v. State of West Bangal*69, where the court recognized that the compensation can be awarded to the victims of torture in police custody as this would be an infringement of fundamental right guaranteed under Article 21 of the Constitution. There are allegations of torture, which is one of the worst crimes in the civilized society governed by rule of law which falls within the ambit of Article 21. In almost all cases it was found that the state functionaries become the law breakers, which affects the right to life and liberty of the citizens. So the Supreme Court examined the custody jurisprudence and after referring to Article 9 (5) of ICCPR which provides compensation to the victim’s of unlawful arrest and detention and formulated modalities for awarding compensation and the accountability of the police officers concerned. Repairing the wrong done and giving judicial redress for the legal injury is the compulsion of judicial

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68 (2000)Cri L.J. 906 (Mad)
69 (1997)1 SCC 416.
Now in recent cases the Supreme Court of India has extended the scope of Article 21. In the light of these cases the judiciary which has always shown a lenient view in its interpretation and to incorporate more and more rights within the ambit of the concept of personal liberty. In *Charnjit Kaur v. Union of India*71, the court said that there is gross negligence and callousness on the part of the authority and there has been the mental torture and physical and financial hardship caused to the widow and the two minor children of an army officer and that the authority acted with the culpable negligence and cynical indifference and so directed the Union of India to pay compensation of Rs. Six lakhs to the widow and children. Thus the constitutional law supersedes the common law of torts. If the State infringes the constitutional rights, it has to compensate the injured person and the desire of Judges is reflected in their creative interpretation, in protecting the rights of the people, which emerged as compensatory jurisprudence, by causing the death of sovereign immunity72 and the birth of constitutional torts. The authority should make a change in their outlook and attitude towards their citizens. If a public officer abuses the authority by his act or omission; an action may be maintained against him73.

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71 AIR1994 SC1491.


73 (1994)1 SCC243
b) **Arrest and illegal detention and torture**

Arrest, illegal detention and torture by the police infringe Article 21 of the Constitution and so constitutional torts can be applied by the judiciary in such cases.

Twelve days after the decision in *Rudual Shah* in a case, namely *B.C. Orason v State of Bihar* the Supreme Court awarded Rs 15,000/- as compensation to an under trial who was detained in the lunatic asylum for six years who had been certified as a fit case for discharge. Since then the number of cases against the state atrocities had been pouring in to the writ courts. The Apex Court began to award compensation in cases where the facts were revolting outrageous and unusual indicating clear callousness on the part of authorities, for the enforcement of the fundamental rights.

In *Bhim Singh's case*, when the petitioner alleged that his fundamental rights under Article 21 and 22 (1) were violated the court found that any order of release was of no meaning as he had been released at the time of hearing. So the court felt the need of applying the compensatory jurisprudence, in order to give a lesson to the State that their employees do not commit tortuous acts in the name of sovereign functions. Here his constitutional and legal rights were invaded due to the abuse of power by the authorities, so the court exercised its writ jurisdiction to give appropriate remedy to enforce constitutional jurisprudence.

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76 AIR 1986 SC 494.
The trend of following human rights jurisprudence by way of compensating the victims by the Supreme Court in the exercise of writ jurisdiction was revealed through the trinity of cases Rudual Shoh Sebastian Hongray\textsuperscript{77} and in Bhim Singh\textsuperscript{78}. Thus the reluctance of Indian Parliaments in recognizing Article 9(5) the right to compensation for the violation of basic right has lost its relevance. So the courts began to acknowledge and recognize the constitutional torts.

The judiciary's approach is commendable and the principle of constitutional torts is very essential for protecting the fundamental rights of the people especially in a welfare state, where the chances of interference with the rights of the people are more. When a police constable wrongfully wounded a person by a gun shot resulting in the amputation of his right leg, in *State of Gujarat v. Govindabhai Jakhubai*\textsuperscript{79} the court gave remedy under public law by discarding the plea of sovereign immunity. The court clarified that the remedy available in public law is not only to civilize the public power but also to assure the citizen that they live under the legal system where rights and interests are protected and preserved.

In *PeopleUnion for Democratic Rights v. Police Commissioner. Delhi Police Headquarters* where one of the laborers taken into custody by the police for doing some work, demanded wages and was beaten to death by the police, the state was directed to pay Rs 75000/- as compensation money. In all these cases,

\textsuperscript{77} AIR 1984 SC 541
\textsuperscript{78} AIR 1986 SC 494.
\textsuperscript{79} AIR 1999 Guj 316. For facts refer Chapter IV.
the right to life and personal liberty were infringed due to the act of the police and this was remedied by the court by compensating the victims or their legal heirs.

c) **Hand cuffing**

In a case, an under trial prisoner was handcuffed and taken through the streets in a procession by the police during investigation violating the rights of *Ravikant Patil*, the suspect. This was done by the police with prior announcement and publicity. Such acts are without any justification and are a violation of his human right guaranteed under Article 21. The state was held liable for this action and was directed to pay compensation. There are a number of similar cases.

d) **Death due to the negligence of the officials of the state**

This portion deals with the death due to the negligence of the officials of the state even if there is no direct action from the part of the officials, but occurs due to their negligent acts, the negligence causing injury to the rights guaranteed under Article 21. For this breach of duty, the resulting damage must be compensated by the state as monetary compensation. When a convict was killed in jail due to the act of co-accused in *Kewal Patil v. State of Uttar Pradesh* the Apex court holding that his right to life under Article 21 was guaranteed even in the jail and his death occurred due to the failure of the jail authorities to protect him, awarded an amount of Rs 1 lakh as compensation to the victim.

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80 (1991)2 SCC 373.
81 *Ibid*
In spite of the information given by the undertrail prisoner about the risk to his and his father's life and threats received by them, the prison administrators failed to take steps to increase his security in *C.RamaKonda Reddy v .State of A.P.*\(^{82}\) resulting in the death of the prisoner and injuries to the petitioner, even though the trial court dismissed the suit relying upon the decision of *Kasturirilal* on the ground of maintaining jail as sovereign activity of the government. In a civil appeal filed by the challa Ramakrishna Reddy and his four other brothers and the widow of the deceased, the Andhra Pradesh High Court (the bench consisting of S.Saghir Ahamad and D.P. Wadhwa J.J.) treated this as the failure or negligence on the part of these officials in guarding the jail and ensuring the safety of the prisoners. The Court opined that

'since the right to life was part of the fundamental right of a person and that person cannot be deprived of his life and liberty except in accordance with the procedure established by law the suit was liable to be decreed as the officers of the State in not providing adequate security to the deceased who was lodged with his son in the jail had acted negligently.'

For the violation of Article 21, the personal liberty guaranteed under the Constitution, the court directed the State to pay compensation by refusing the plea of sovereign immunity.

\(^{82}\) AIR 1989 A.P.235.
The Supreme Court concluded that the liability of the government for the tortuous acts of its employees were to be decided according to public law and the compensation was awarded to the victim.

e) Medical negligence.

In recent times we hear of the disheartening incidents which flagrantly violated or deprived the fundamental rights guaranteed under Article 21 of the Constitution by the state run hospital doctors. Doubt arise as to their accountability to the general public for the professional negligence or Are these hospital doctors licensed to invade the right to life of the People? Is there any remedy available to redress those infringed with money compensation within the constitutional scheme? Or whether the judiciary is incompetent to provide remedy or relief for the breach of public duty within the public law jurisdiction? Such questions made the constitutional courts active, creative and took innovative interpretative skills to make effective its public law jurisdiction\(^3\). In a welfare state, it endeavours to implement the Directive Principles of State Policy with a high sense of responsibility, including adequate medical facilities for ensuring sound health. The government discharges this duty by running hospitals and health centers. The government hospital run by the state and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Due to the negligence and heartless attitude of the doctors of the government hospital, timely

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\(^3\) Dr. A. Ranghua Reddy, Liability of Government Hospital and Breach of Right to Life AIR 1998 Journal 154.
medical treatment may not be available and for this breach of public duty the
courts are empowered to give compensatory relief under the public law domain
even though there is no express provision in the Constitution; Article 21 is used
for protecting right to life. Article 21 of the Constitution imposes an obligation on
the state to safeguard the right to life of every citizen. It was clarified that the
liability would arise in case of gross medical negligence of the doctors as in Spring
Meadows Hospital v. Harjolahlwalia.84

In Bholi Devi v. State of Jammu and Kashmir85, the doctor had been
instructed not to give injection and this lack of care and attention, resulted in the
death of patient and so the legal heirs were entitled to get compensation. Here
even if there was no fault of his own under the concept of’ No Fault Liability”
compensation was allowed. So the court allowed the compensation for medical
negligence.

The jurisdiction of writ court in granting the compensation was considered
in Kalabati v. State86. This was relating to medical negligence where the death of
the patient was due to the wrong administration of nitrous oxide instead of
Oxygen. This was on account of the negligence of the staff of the government
hospital and the court directed it to deposit an interim compensation.

84 AIR1998 SC 1801. In this case the only child was brought to this hospital due to high fever and after he
was administered certain medicine and injection by an unqualified nurse without prior test, the child
collapsed and suffered cardiac arrest and as there was no oxygen cylinder the child suffered irreparable
brain damage rendering in to vegetable state for the rest of his life. For this the hospital was held liable and
directed to pay a compensation of Rs12.50 lakhs to the child and Rs 5 lakh to the parents.
85 AIR 2002 J&K 65.
86 AIR 1989 HP8
Medical Negligence of the officials of the state while exercising social welfare function:

Medical ethics demands the duties to be performed by the medical practitioners with reasonable care and skill, failure or negligence gives rise to vicarious liability. The family planning programme was under the control of government including government officials and the medical officer. In *State of Haryana v Santra*\(^\text{87}\) for the negligent act of the medical officers for not performing the complete sterilization operation, the state was vicariously held liable for the act.

In this case the operated eyes of the patients were irreversibly damaged owing to the post operative infection of the Intraocular cavities of the operated eyes. Despite anti-biotic medication both oral and local for the infection, the operated eyes had been completely damaged. Enquiry report revealed that the source of infection was the saline used on the eyes at the time of surgery. When the injury occurred to the patients from the free eye camp conducted in the name of social service by the state at Khurja in Uttar Pradesh, the Supreme Court through writ jurisdiction under Article 32 in *A.S.Mittal v State of U.P.* (the bench consisting of Ranga Natha Misra and M.N.Venkatachaliah J.J.) directed the state to pay Rs. 12,500/-to each of the victim in addition to the relief already given by the State.

\(^{87}\) AIR 2000 SC1888.
The writ court has got the jurisdiction to award compensations to the victim or to the legal heirs of the victim if gross negligence was committed by the specialized doctors because they owe more duty towards the patients. If the doctor had given instruction to the junior doctor the way in which he had to give treatment then also liability would be on the doctor who had given such an instruction and this is based on the principle of Liability without fault. If there was clear evidence of negligence then *res ipsa locquiter* would be applied to decide the liability of the doctor. This constitutional remedy was evolved by the judiciary because of their judicial conscience of preserving and protecting the fundamental rights of the people. This practical mode of enforcing the fundamental rights preserves and protects the rule of law.\(^88\).

f) *Negligence of the authority*

There are instances where human rights violation occur due to the negligence of the officers of the state. In some cases it would affect the dignity and honesty of the citizen and it would amount to violation of fundamental right guaranteed under Article 21 of the Constitution.

In *Lucknow Development Authority v. M.K.Gupta*\(^89\), (the bench consisting of Kuldip Singh and R.M.Sahai J.J.) the court held that harassment of a common man by the public authorities is legally not permissible. Even after depositing the amount in time, the state committee failed to allot flat to the respondent,

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\(^{89}\) (1994)1.SCC 243.
according to the scheme. The State Commission by its order dated February 15th 1990 directed the appellant to pay 12% interest and also to hand over the building after completing the construction in June or to hand over the flat to the respondent by April 5, 1990 after determining the deficiency and the estimated cost to be refunded by April 20th, 1990. The authority later handed over the flat but it was without completing the construction. Instead of complying with the order the authority challenged the validity of the order on the ground of jurisdiction. This appeal filed by the authority was dismissed. Since the cost of the construction was estimated by the architect as Rs. 44,615/-, it was held that the state was accountable for the lawless act of its officials and the public authorities acting in violation of constitutional and statutory provision must be accountable for their behaviour. By taking into consideration the sufferings of the common man, the court directed the state to pay compensation from the public fund. Here the Appellate court took action under Article 14 of the constitution for its arbitrary action or unconstitutional action by the servants of the government and said that while imposing liability on the state it indirectly become a burden on the people. The court took the view that the award of compensation for harassment by public authorities not only compensated and satisfied the individual but also helped to cure the social evil.