CHAPTER VI

DILUTION OF ARTICLE 300 AND INNOVATION OF CONSTITUTIONAL TORT UNDER ARTICLE 21 OF INDIAN CONSTITUTION

Introduction

Article 300 of the Indian Constitution, is not sufficient to safeguard the rights and liberties of individuals, when their rights are infringed by the servants of the State. The first part of Art 300 deals only with the nomenclature of the parties to a suit for proceedings, but the second part defines the extent of liability by the use of words ‘in the like cases and refers back for the determination of such cases, to the legal position before the enactment of the Constitution. The legitimate activities of the State, are no longer confined to the traditional functions such as defense, foreign affairs and public administration. It now extends to dispensing of social services of different varieties in economic and political upliftment of the community. Law has to grow in order to satisfy the ever growing needs of the fast changing society. State is not a digital mechanism to draw a perfect line between the sovereign functions and non sovereign functions. This distinction, developed during British era, stands discarded today because of its practical absurdity.
6.1 Reason for the Development of Constitutional Tort

The Constitution aims to strike a balance between the State’s actions and the interest of general public. With the new development of functions, powers and duties in a welfare State, for deciding question of State liability the concept of sovereignty is not a satisfactory test. The National Commission to Review the Working of the Constitution in its consultation paper on “Liability of State in Tort” expressed the following:¹

“From the present State of the law relating to liability of the State in tort in India, it is apparent that the law is neither just in its substance, nor satisfactory in its form. It denies relief to citizens injured by a wrongful act of the State; on the basis of the exercise of sovereign function - a concept which itself carries a flavor of autocracy and high-handedness. One would have thought that if the State exists for the people, this ought not be the position in law. A political organization which is set up to protect its citizens and to promote their welfare, should, as a rule, accept legal liability for its wrongful acts, rather than denounce such liability. Exceptions can be made for exceptional cases - but the exceptions should be confined to genuinely extraordinary situations”.

¹ National Commission to Review the working of the Constitution, A Consultation Paper on Liability of The State in Tort, 6 (Vigyan Bhavan, Delhi 2001)
The committee also observed:

“There are several other serious defects in the present position. The foundation of the present law is Article 300 of the Constitution, its language necessarily takes one, through successive steps of (what may be called) tracing back of the genealogy of the law, to a moment of time residing in the 19th Century—that too, to a moment when the country was governed or dominated by alien rulers. The law is, in effect, based upon archaic provisions. In this sense, Article 300 has turned out to be a weak foundation, on which to build up an edifice of the law on the subject”.

As a result of dissatisfaction with the application of dichotomy rule, a new judicial trend has manifested itself in the area of State liability under the guidance of the Supreme Court of India. By the ‘dynamic Constitutional jurisprudence’, the Supreme Court is evolving ‘compensatory jurisprudence’ by which the Court is diluting Article 300 of the Constitution and innovating the Constitutional tort under Article 21 of the Constitution.

Now the Apex Court is prepared with new tools and devise new remedies for the purpose of protecting the most precious Fundamental Right to life and personal liberty. Thus the Court can award compensation to any person, who may have unduly suffered detention or bodily harm or ill-treatment or mental stress or sexual

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harassment at the hands of the employees of the State. The victim, can move a writ petition for these purposes, rather than take recourse of an ordinary civil suit.

Thus the liability of State for tortious acts of its servants under article 300 is expanded by applying Article 21 of the Constitution. *Rudul shah v. State of Bihar* marked a milestone and made a shift in Indian tort law. Traditional tort law is about questions of liability loss and compensation and is in an area of private law. With Rudul Shah, Constitutional tort was recognized by the Court. The identification and penalizing of erring officers or agents of the State are left to the State. The introduction of compensation as a Constitutional remedy strengthens the rights of affected individuals which is available through writ jurisdiction of the Supreme Court and High Courts under Article 32 and 226 of the Constitution. Article 32(1) provides that the Supreme Court shall have power to issue directions 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) reads that “notwithstanding anything contained in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction to issue 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 Warrantee and
Certiorari or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose”.

6.2 Rule in Kasturilal and Fundamental Rights

The acceptance of the defense of sovereign functions of the State and the concomitant immunity, of the State from liability has been distinguished and it has now, limited application. Rule in Kasturilal\(^3\) is outdated, but till now it is not overruled. In establishing norms of accountability of the police and the armed forces particularly, the violations of fundamental rights to life and liberty have gained more importance. The Rule in Kasturilal is applicable to instances of the tort of conversion and its principles does not extend to fundamental rights violation. In *Nagendra Rao v. State of A.P.*,\(^4\) the Supreme Court held that in *Kasturilal* case, the property had been seized while exercising the power of arrest under Sec.54 (IV) Cr.P.C and the power to search and apprehend a suspect under Cr.P.C, being among the inalienable powers of the State, probably the principle of the sovereign immunity in the conservative sense was extended by the Court. But the same principle would not be available in large number of other activities carried on by the State by enacting a law in its legislative competence. At present, while fixing liability of State for the wrongs committed by its servants, Kasturilal decision has limited application. It often leads to confusing results. It is becoming very difficult for the Courts to maintain the distinction between sovereign and

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\(^3\) Kasturilal *v.* State of U.P., AIR 1965 SC 1039.

\(^4\) (1994) 6 SCC 205.
other functions of State. The modern welfare State is assuming more and more positive functions, taking care of the individual liberty.

6.3 Constitutional tort and the objectives of the Indian Constitution

In the Constituent Assembly, Nehru declared that the object of the assembly was to draw up the Constitution where it would be guaranteed and secured to all the people of India: justice, social, economic and political; equality of status of opportunity before the law, freedom of thought, expression, belief, faith, worship, and action subject to law and public morality. Its leadership fully shared the proposition that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. It pledged itself, “to achieve in cooperation with the UN the promotion of universal respect for and observance of human rights and fundamental freedoms.”

The promulgation of Constitution of India, on 26th January, 1950 is a great landmark in the history of the development of the concept of fundamental rights in India. The preamble, fundamental rights and the directive principles of State policy together provide the basic rights of the people of India. The Preamble to the Indian Constitution, reads as follows:5

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a [SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC] and to secure to all its citizens:

**Justice**, social, economic and political

**Liberty** of thought, expression, belief, faith and worship

**Equality** of status and of opportunity and to promote among them all;

**Fraternity** assuring the dignity of the individual and the unity and integrity of the nations;

The word ‘sovereign,’ emphasizes that India is no more dependent or a colony of any foreign country or authority. Both internally and externally it is independent. It consistently upholds the principle of self determination. Since independence, India maintained that the principle of self determination is co-existent with the principle of sovereign equality. This is in consonance with Article 1 of the International Covenant on Civil and Political Rights, 1966. The word ‘socialist’ was added in the preamble by the Constitution (Forty Second) Amendment Act, 1976. This amendment added flavor to the goal of socio-economic justice.

The word ‘secular’ was also added in the preamble by the same amendment. This word proclaims that the State, has no religion of its own and all
persons shall have the right to profess, practice and propagate religion of their own and they shall be equally entitled to freedom of conscience.

The expression ‘democracy,’ implies that the Constitution has established a form of State which gets its authority from the will of the people. The expression ‘democratic republic’ assures the people of India, the right of equal participation in the polity.

Justice, Liberty, Equality and Fraternity, are the essential characteristics of democracy find a place in the preamble of the Constitution.

The word ‘fraternity’, expressed in the preamble stress the importance of brotherhood, because India is pluralistic country with different religions, races, cultures, languages etc. It emphasizes unity in diversity and intergrity of the nation. It also assures the dignity of the individual. Individual dignity, is a combination of all aspects like political, social, moral and economic life. Fundamental rights are considered as the Magnacarta of the Constitution. According to Justice Bhagwathi, “the fundamental rights represent the basic values cherished by the people of this country, since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a ‘pattern of guarantees on the basic structure of human rights and impose negative
obligations on the State not to encroach on individual liberty in the various dimensions”.

6.4 Personal Liberty under Article 21

Indian judiciary made sincere efforts to protect personal liberty of man and to see that the personal liberty of man is not violated by the State.⁶ The Expression ‘Personal Liberty’, is of the widest amplitude ‘covering a variety of rights,’ which goes to constitute the personal liberty of man. “The spirit of man is at the root of Article 21, personal liberty makes for the worth of a human person. Bhagwathi J., observes that Article 21 embodies a Constitutional value of supreme importance in the democratic society.⁸ Krishna Iyer J. has characterized Article 21 as the procedural Magna Carta, protective of life and liberty.⁹ In fact Article 21, is the heart of the fundamental rights.¹⁰ ‘The word ‘life’ in Article 21, does not mean merely animal existence but living with ‘human dignity’.

Article 21, lays down that, no person shall be deprived of his life or personal liberty except according to procedure established by law. The scope of this Article, was first considered while deciding freedom from imprisonment or other bodily restraint except in accordance with laws of the land, is cherished as virtually essential to the protection of rights to life and liberty.

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⁶ Maneka Gandhi v Union of India AIR 1978 SC 597.
⁷ Jitendra Panday, Ravikant Dubey, Civil Liberty Under Indian Constitution, 187( Deep and Deep publication, 1995)
⁸ Francis Coralie v Union territory of Delhi, AIR 1981 SC 746, 752.
¹⁰ Unnikrishnan v. State of Andhra Pradesh AIR 1993 SC 2178
Initially Article 21 guaranteed the right to life and personal liberty to citizens only against the arbitrary action of the executive and not from legislative action. The right guaranteed in Article 21 is available to ‘citizens’ as well as ‘non citizens’. The meaning and the scope of personal liberty came up for consideration of the Supreme Court for the first time in *A.K.Gopalan v State of Madras*. In this case the petitioner was detained under the Preventive Detention Act 1950. He challenged the detention on the ground that it was violative of right to move freely throughout the territory of India saying that, Article 19(1) (d) is very essence of personal liberty that is guaranteed under Article 21 of the Constitution. The Supreme Court held that the ‘personal liberty’ in Art 21 means nothing more than the liberty of the physical body that is freedom from arrest and detention without the authority of law. The Court also look the view that Arts. 19 and 21 deal with different aspects of liberty. Art .21 is a guarantee against deprivation of personal liberty while Art.19 affords protection against unreasonable restriction on the right of movement. Further, the Court held that Article 19 and 21 are mutually exclusive and hence the reasonability test as applied in Article 19 is not applied in Article 21. Thus Article 21 served as a restraint against executive actions, which could not proceed against an individual, to curtail his personal liberty without any authority of law.

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11 AIR 1950 SC 27
In *Gopalan* case, the Supreme Court interpreted the ‘law’ as ‘State made law’ and rejected the plea that by the term ‘law’ in Art 21 meant not the State made law but the principles of ‘Natural Justice’.

The ratio laid down in *Gopalan* case, has not been followed by the Supreme Court in *Kharak Singh v State of U.P.*\(^{12}\) In that case, validity of certain police regulations which, without any statutory basis authorized the police to keep under surveillance, persons whose names were recorded in the ‘history-sheet’ maintained by the police in respect of persons who are or are likely to become habitual criminals, surveillance as defined in the impugned regulation included secret picketing of the house, domiciliary visits at night, periodical inquiries about the person, an eye on his movements, etc. The petitioner, alleged that this regulation violated his fundamental right to movement in Article 19(1) (d) and personal liberty in Art.21. The Supreme Court held that personal liberty was not only limited to bodily restraint or confinement to prisons only, but was used as a compendious term, including within itself all the varieties of rights which go to make up the personal liberty of a man other than those dealt within Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, ‘personal liberty’ in Article 21 takes in and comprises the residue.

In the words of chief Justice Bhagwathi\(^{13}\) there is a perpetual conflict between the interest of the accused and the fundamental interest of the society.

\(^{12}\) AIR 1963, SC 1295.

\(^{13}\) P.N.Bhagwati, ‘Human Rights in the Criminal Justice System’, 27 (1) *JILI* , 1965
Over emphasis on the protection of one interest is bound to have an adverse impact on the other and an even balance has to be struck between the two imperfects. In R.C. Cooper v. Union of India, the Supreme Court held that 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 individuals rights.

The Supreme Court, in Meneka Gandhi v Union of India, widened the scope of the words ‘personal liberty’. It overruled Gopalan’s case and held that Articles 14,19 and 21 are not mutually exclusive but they are interrelated. In this case, the Court held that the fundamental right of personal liberty includes implicitly the right to free legal aid, right to speedy trials, right to dignified treatment in prison, the grant of liberal bail, protection against torture, cruelty, inhuman acts or degrading treatment or unlawful punishment etc.

The Supreme Court has strongly condemned the tendency of continuing to detain person as criminal lunatics for long periods even after they have became sane. In Sant Bir v. State of Bihar, the Court directed to release 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 same unanswered.

14 AIR 1970 SC 564
15 AIR 1978 SC597
16 AIR 1982 SC1470
6.5 Compensation under Constitutional Tort

The latest trend, in the area of personal liberty is the development of ‘compensatory jurisprudence’ in the Indian Constitution, which is evolving by the Supreme Court. Till recently, the Constitutional Court can quash an order of detention or arrest if such order is against law or violating fundamental rights guaranteed under Part 111 of the Constitution. But today, the question, is whether the Court can award compensation to a person who may have unduly suffered detention or bodily harm at the hands of the employees of the State, and whether the victim, can move a writ petition for this purpose rather than bring an action before an ordinary civil Court.

The issue of compensation for the illegal deprivation of personal liberty had come up in numerous cases. But initially the Court avoided providing compensation for the violation of fundamental right under Article 21 of the Constitution. The important question raised in *Katri v. State of Bihar*\(^\text{17}\) was: would the State be liable to pay compensation for acts of its servants outside the scope of their power and authority affecting the life or personal liberty and thus infringing Art.21? In this case the petitioners were blinded in the police custody; they claimed compensation for the violation of their rights under Art 21. But the State contended that the wrong was inflicted by the police and moreover for the breach of Constitutional right the State could not be held liable to pay compensation to

\(^{17}\) AIR 1981 SC 928.
the person wronged. However the Court directed the State to bear certain expenses of the prisoners and to pay Rs.300 to each. This was the first case in the Constitutional history which laid down foundation to pay compensation by the State to the victim for the violation of Constitutional right by the police excesses. Bhagavati, J, observed that the Court ought to be prepared to forge new tools and device new remedies for vindicating the fundamental right to life and personal liberty. In this case, the Court directed the State of Bihar to provide them the best treatment at State cost and pay Rs.300 to each for the violation of their fundamental rights under Article 21 of the Constitution, as the prisoners were deprived of their eye sight by the police officers, who were State servants acting on behalf of the State. Thus all the blinded persons were sent to the All India Medical Sciences, New Delhi to be provided with medical relief, at the State cost. The State was directed to meet the expense of housing of these men in blind home at Delhi. The dynamic judicial activism in Rudul Shah v State of Bihar, affirmed the dilution of Art 300 and innovation of Constitutional Tort under Art. 21 of the Indian Constitution. This is a criminal case where the petitioner was acquitted by the Sessions Court. But he was released only after fourteen years due to the negligence of the prison authorities. Meanwhile a writ petition was filed for his release from the jail and compensation for illegal detention. In this case the State, argued that even though the Sessions Court acquitted him, he was detained in jail for a period of fourteen years on the ground of insanity. But there was no

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18 AIR 1983 SC 1086.
evidence of insanity produced before the Court, showing that he was insane during the time of detention. The fact was that, at the time of the petition came before the Court he was already released and the writ petition became infructuous. But the Supreme Court did not want to leave the matter in traditional manner. It interfered to establish the reason for unlawful detention and to provide proper remedy for violation of fundamental right under Article 21 of the Indian Constitution. Taking into consideration of all these things the Court evolved a new remedy of providing compensation to the victim of tortious acts done by the servants of the State. The Court directed the State of Bihar to pay Rs. 30000/- in addition to Rs.5000/- and also clarified that this order would not preclude the petitioner from claiming compensation from the civil Court.

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

The Court also held that this order will not preclude the petitioner from bringing a suit to recover appropriate damages from the State and the erring officials.

In State of Tamil Nadu v Ganesan, the killing of L.T.T.E Supremo Velu Pillai Prabhakaran by Sri Lankan army in May, 2009 created agitations in various parts of the State of Tamil Nadu. Under these circumstances, on 20. 5. 2009, son of these writ petitioner travelled in the State owned bus. At about 2 P.M, near the Panchayat Office in Thiruppuvanam in Sivagangai District, certain persons hurled patrol bombs in to the bus. In the explosion, three persons sustained injuries. One of them is Irulaiya the petitioner’s son who was severely injured, died in the hospital. Alleging failure on the part of the police in protecting the life of their son, the parents of the deceased have filed the writ petition seeking compensation.

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19 (2013) 7 MLJ 297 (Mad)
The Court held that there was negligence on the part of the police and ordered the State to pay Rs. 10, 00,000/- as compensation. In this case the Court rejected the claim of sovereign immunity of State and observed that the officers of the State, ordained with duty of maintaining law and order, had failed to protect the life, liberty and property of person and such failure amounts to dereliction of duty, holding the State liable under Public Law.

This landmark case, created a new era in the field of State liability. In this case the Supreme Court, without making any reference to ‘sovereign immunity,’ has deviated from its own interpretation of law under Article 300 of the Constitution in the ends of justice taking recourse to Article 21 of the Constitution.

6.6 INSTANCES OF CONSTITUTIONAL TORT

6.6. a) Custodial death

When a person is taken in to custody, it is the paramount duty of the police officials is to protect his body life and liberty under Article 21 of the Constitution. In *Lawyer’s Forum for Human Rights v. State of West Bengal,*20 the Court held that the police authority has a duty of care towards the arrested accused. The Court also observed that the position of the Courts on the use of torture in custody is not a categorical. It is one thing to use third degree method for the purpose of extracting confession and for getting information. But, everything has got its own limit and this third degree method of torture is not permissible in civilized society.

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It cannot be used in such a manner which causes the death of a prisoner”. In the above case, the Calcutta High Court awarded compensation of Rs.1 Lac to the widow of the deceased person, who died in police custody.

The negligent and inhuman behavior of the enforcement agencies of law and order are another important factor for the extension of tortious liability of the State. India is a democratic and welfare country which means that the State is duty bound to respect the value of human life. In case of custodial death, the State has to take responsibility to protect the dependants of the deceased person. Otherwise the concept of justice as laid down in the preamble will be defeated.

In Sebastian M. Hongray v. Union of India, the petitioner belonged to the Naga community of Manipur, filed a writ of Habeas Corpus to know the whereabouts of two notable persons in the village. In fact, they were detained by army personnel’s on March 10, 1982. They did not turn to village till March 15, 1982. Their wives filed a complaint before Deputy Commissioner in this regard. Later they approached the Superintendent of Police. Since there was no reply they filed Habeas Corpus Petition.

The Supreme Court, directed to serve notice to the authorities concerned. In the counter Statement they submitted that they were not arrested but they had been called for attending the identification parade conducted to find out the suspects involved in the allegation and they had been allowed to go.

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21 AIR 1984 SC 571.
In this case, the State of Manipur claimed privilege on the ground of public interest. But the Court did not accept the plea of the State and directed the authorities to produce the persons missing (Daniel and Paul). The authorities could not produce the persons even after serious steps taken.

The Supreme Court, directed the Union of India, to award exemplary costs of Rs.1 lakh to each of the woman and came to a conclusion that they might have met with unnatural death due to illegal custody and torture. The Court also held that the State is duty bound, to protect the individuals. The irreparable loss of the members of the family, resulted with the violation of fundamental right under Article 21 of the Constitution. The importance of this judgment is that, the Court awarded compensation to the legal heirs of victim, for an act done by the servants of the State, in exercise of sovereign functions.

The death in police lock-up caused by infliction of custodial violence was compensated by the Court in Christian Community Welfare Council of India v. State of Maharashtra. In this case, the Court found that Junior Adam was beaten to death by the Police personnel, an agency of sovereign power acting in violation of fundamental rights under Article 21. The Court observed that time has come, when the State government must rise to the occasion, by striking the balance between the life of a person in police custody and the power of law enforcing agencies to bring the criminals to book by appropriate rules or providing

22 (1995) Cri LJ 4223
guidelines to the police personnel in such matters. The Court, directed *inter alia*, that the State government has to constitute a committee consisting of its Home Secretary, Law secretary and Director General of Police within 15 days and that the committee submits its report to the State government, within three months. The Court also directed the State government to issue necessary instructions to all police officials that every detainee shall be medically examined, before being taken to a magistrate, and every third day thereafter, and the medical reports be entered in the station house diary.

The problem of custodial death, in police custody makes the Court to direct the State to act. The Supreme Court, is of the view that the provisions in Cr. P. C and I.P.C are not enough to repair the damages done to the victim and so the victim needs to be compensated properly. The police can surely interrogate a person accused of an offence but they cannot torture him to extract information, otherwise tyranny will replace law. A boy died under judicial custody, due to injuries received by him at the hands of State officers. When the authorities failed to give 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*.

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23 In Geet Sangma v. State of Nagaland 1994 ACJ 792 the Court ordered the State of Nagaland to pay the petitioner wife Rs. 1,50,000/- “in the nature of a palliative” with interest at 12 percent per annum if is was not paid within three months of the order in a case of death in police custody.


26 (2000) *Cri L.J.* 906 (Mad)
In *Rajen Gogoi v. Union of India*, Manik Gogoi, allegedly an active member of the ULFA, was apprehended by the Army. He died in their custody. The Army authorities said he had succumbed to injuries sustained while attempting to escape. The enquiry report of the District and Sessions Judge, contradicted this claim. The Court, concluding that it was a case of death in custody and the ministry was directed to pay Rs 2,50,000/- to his father.

In case of death due to custodial violence, the Courts have repeatedly held that the State shall be held liable to pay compensation. In *Peoples Union for Democratic Rights v. Police Commissioner, Delhi*, when one of the labourers demanded wages for the work done by him the police tortured him to death. The Court directed to pay Rs. 75000/- as compensation, to the legal heirs of the victim. While deciding this case the Court considered the principles laid down in *Vidhyawathi* case, and held that when there is a claim under public law, for violation of fundamental rights, the doctrine of sovereign immunity has no application and the remedy under Article 32 and 226 of the Constitution is available.

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27 1996 ACJ 310.
28 Similarly in Ratlavat Chandi v. State of A.P ,1996 (2)ALT 850 the Court ordered Rs. 1 lac as compensation, and Rs. 10000 as costs, to be paid to the family of a rick Shaw puller who had been tortured, and who died in custody.
29 AIR 1990 SC 513.
30 AIR 1962 SC 933.
31 The Court had also emphasized the inapplicability of the rule laid down in Kasturilal Ralia Ram Jain v. State of Uttar Pradesh, AIR 1965 SC 1039.
Another important case in this area is *Golak Chandra Jena v. Director General of Police*\(^{32}\) in which the petitioner’s son was taken into custody for the alleged crime. There was no information of his whereabouts. The police also did not inform anything. As usual, when there was pressure, the police said that he committed suicide while in custody. The fact was that, the police did not hand over the dead body to his relatives because it was cremated by the police. The reasonable suspicion, is that the police might have tortured him by that he died in the custody. A magisterial enquiry was conducted and in his report it was stated that the death of the petitioner’s son was due to the suicidal hanging. The Court did not rely upon the report and held the authority as guilty of custodial death. The Court also directed the State to pay Rs. 30,000/- as compensation. It is to be noted that, the Constitution, guarantees right to life and liberty to all including an accused person.

The problem in deciding the cases like death due to torture by the enforcement agencies of the State is a greater judicial concern. Lack of proper uniform law to fix liability is another setback. So in most of the cases, the Courts award exgratia payment to the affected persons. Most of the errant officials escape from liability. In *Nilabati Behara alias Lalitha Behera v. State of Orissa and others*,\(^{33}\) *Nilabati Behera*’s son was taken into police custody and was detained there for interrogation in connection with a theft case. He was hand

\(^{32}\) 1992 *Cri LJ* 2901  
\(^{33}\) AIR 1993 SC 1960.
cuffed with another accused and tied together. His mother visited and saw the cruel situation. Next day his dead body was found on a railway track. It is a clear case of custodial death and Nilabati Behera claimed compensation.

According to the police, he escaped from custody and was run over by train. But the fact was that the police did not register a case regarding escape from police custody. The police did not deny anything regarding arrest of the boy and his police custody. It is the duty of the respondents, to explain the nature of death and the injuries sustained on the body of the deceased person. The medical report clearly revealed that there was no chance to cut off the rope and escape. This is a clear case for violation of Article 21 of the Constitution.

In this case, the State failed to prove their innocence. So the death of the boy was presumed as custodial death caused by the servants of the State. The Supreme Court\textsuperscript{34} held that the State is liable to pay compensation.\textsuperscript{35} The Court said that the sovereign immunity cannot defeat the claim for the enforcement of fundamental right. The defense of sovereign immunity, is not available applicable against violation of fundamental right. The wrong doer and the State must be responsible and accountable if the person is taken into custody of police and has been deprived of his life without due process of law.\textsuperscript{36}

\textsuperscript{34} The Bench consisting of J. P. Verma, Dr. A. S. Anand and Venkata Chala J.J.
\textsuperscript{35} The Court referred Rudul shah, Sebastian Hongrey, Bhimsingh and Saheli where the State was held liable to pay compensation by custodial death.
\textsuperscript{36} The remedy is available under Articles 32 and 226 of the Constitution.
The *State of Tamil Nadu v. Pulliammal*,\(^{37}\) gives another instance of custodial violence. In this case one Panchuraj had been arrested by the police in connection with alleged offences punishable, under the Tamil Nadu Prohibition Act 1937. He was severely assaulted by the police, before he was taken to the Central Prison, Madurai. While he was in the custody of the jail authorities, his health condition deteriorated. As a result of injuries caused to his internal organs due to the police assault, he died. Meanwhile, in order to avoid their liability the jail authorities sent letters purportedly written by Panchuraj, to his house stating that he was keeping good health. The Revenue Divisional Officer, who conducted an enquiry as directed by the district collector, submitted a report as if the death was due to pulmonary tuberculosis, a natural cause. However the Court, after an appraisal of the evidence came to the conclusion that Panchuraj was tortured inhumanly while he was in the custody of police and the same led to his unfortunate death. The Court held that the death was due to custodial violence and that concerted efforts were made by the jail authorities and police to project it as a natural death due to pulmonary tuberculosis. This was a clear case of custodial violence and death. The Court awarded a sum of Rs. 2,00,000 as compensation to the widow for the death of her husband.

This case also shows that in Constitutional tort, for violation of fundamental right, the defense of sovereign immunity does not sustain. Hence, in the writ as well as in the writ appeal the High Court of Madras rightly held that the
State was liable to pay compensation for the death of Pancharaj due to custodial death.

In *Sunitha v. State of National Capital Territory of Delhi and Others*, the policemen arrested and seized Rs. 1, 30,000 from the deceased, who was an employee of the Haryana State Electricity Board. While in custody, he was beaten up and tortured and third degree method was followed. In fact, the deceased had withdrawn the above specified amount from his provident fund account in order to give the same to his sister since she has lost her husband due to cancer. As a result of torture he suffered bodily injuries. The police took him to hospital. But the doctor declared him dead. The medical report also confirmed custodial death. The wife of the deceased person, filed a writ petition before the High Court to claim compensation. The High Court awarded Rs.3 lakhs as compensation. On appeal, the Supreme Court, enhanced the amount to 5 lakhs.

By awarding the enhanced compensation, the Court reiterated that it is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law. While the citizen is in its custody, preservation of human life is of paramount importance which the Courts are bound to protect.

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6.7 Compensation for Torture in Prison

*D.K.Basu v State of West Bengal,*\(^{39}\) is a case in which all those matters related to torture of prisoners are outlined and steps to be taken by the authorities to end such torture was given in the form of guidelines by the Court. It is observed that, ‘custodial violence’ and abuse of police power is not only peculiar to this country but it is widespread. It has been the concern of International community, because the problem is universal and the challenge is almost global. The UDHR, which marked the emergence of a worldwide trend of protection and guarantee of certain basic human rights, stipulates in Article 5, ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. Further the Court held that, the custodial death is the worst crime in a civilized society governed by the Rule of Law. The right inherent in Article 21 and 22 (1) of the Constitution require to be protected. Any form of torture or cruel, inhuman or degrading treatment would fall within the ambit of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. The precious rights guaranteed by Article 21 of the Constitution of India, cannot be denied to convicts, under trials, detenues and other prisoners in custody, except according to the procedure established by law and by placing such reasonable restrictions as are permitted by law.

\(^{39}\) (1997) 1 SCC, 416.
The word ‘torture’ has not been defined in the Constitution or in other
penal laws. Torture of a human being by another human being is, essentially an
instrument to impose the will of the ‘strong’ over the ‘weak’ by suffering. The
word ‘torture’ today has become synonymous with the darker side of the human
civilization. The fact remains that, torture is more widespread now than ever
before. “Custodial torture” is a naked violation of human dignity and degradation,
which destroys to a very large extent, the individual personality. It is a calculated
assault on human dignity.

In this case, the Court laid down detailed guidelines to be followed by
the Central and State investigation and security agencies in all cases of arrest and
detention till legislative measures are taken.

a. The police personnel carrying out the arrest and handling to interrogation
of the arrest should bear accurate, visible and clear identification and name
tags with their designation. The particulars of all such police personnel who
handle or interrogation of the arrestee must be recorded in a register;

b. The police officer carrying out arrest of a person shall prepare a memo of
arrest and such memo must be attested by at least one witness, who may be
either a member of the family of the arrestee or a respectable person of the
locality from where the arrest is made;
c. A person who has been arrested or detained shall be entitled to have one
friend or relative or other person known to him or having interest in his
welfare informed as early as possible;

d. The time, place of arrest and venue of custody of an arrestee must be
notified by the police, where the next friend or relative of the arrestee lives
outside the district or town through the legal aid organization in the district
and the police station of the area concerned, telegraphically with in a period
of 8 to 12 hours of arrest;

e. The person arrested must be aware of his right to have someone informed of
his arrest or detention as soon as he is put under arrest or is detained;

f. An entry must be made in a diary at the place of detention regarding the
arrest of the person which shall also disclose the name of next friend of the
person who has been informed of the arrest and the names and particulars of
the police officials in whose custody the arrestee is;

g. The arrestee should, where he is so requests, be also examined at the time of
his arrest and major and minor injuries, if any, present on his or her body,
and must be recorded at that time. The “inspection memo “must be signed
both by the arrestee and the police officer affecting the arrest and its copy
provided to the arrestee.
h. The person should be subjected to medical examination by a trained doctor within 48 hours during his detention or by a doctor on panel of approved doctors appointed by Director, Health Services of the concerned State or Union territory. The Director, Health Services, shall prepare such a panel for all tahsils and districts as well;

i. Copies of all documents including the memo of arrest should be sent to the area Magistrate for his record

j. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

k. A police control room should be provided at all district and State head quarters, where information regarding the arrest and place of custody of the arrestee shall be communicated by the officer causing the arrest within 12 hours of effecting the arrest and it should be displayed conspicuously on the notice board of the police control room.

In this case, the Court went to the extent of saying that since compensation was being directed by the Courts to be paid by the State, which has been held vicariously liable for the illegal acts of its officials, the sentencing policy of the judiciary in torture related cases, against erring officials in India has become very strict. For an established breach of fundamental rights, compensation can now be awarded in the exercise of public law jurisdiction by the Supreme Court and High Courts, in addition to private law remedy for torture action and punishment of
wrong doer under criminal law. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrong doer. In the assessment of compensation, the emphasis has to be on the ‘less’ and not on punitive element. The objective is to apply balm on the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal Courts in which the offender is prosecuted.

6.8 Compensation for Sexual Harassment;

In the penal laws of all countries, sexual offences against women occupy a significant place and out of all the crimes, the one which shocks the conscience, and shakes its roots, and is the most heinous, is rape.\(^4\) It is a crime and is violative of the victim’s most cherished fundamental right, namely, right to life which includes right to live with human dignity as contained in Article 21,\(^4\) In Chairman, Railway Board v Chandrima Das,\(^4\) a woman from Bangladesh was gang raped by the employees of railways in a room at ‘Yatra Niwas’ of Howrah station at Calcutta. In this case, the question was raised whether fundamental rights can be expanded and extended to give relief to foreign nationals or not? The Court held that relief can be granted to the victim for violation of Article 21 of the

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\(^4\) Shri. Bodhisattwa Gautham v Miss Subhra Chakraborty, AIR 1996 SC 922
\(^4\) AIR 2000 SC 988
Indian Constitution. The Court held that the word ‘life’ has been used in Article 21 of the Constitution and recognized basic rights of women. Hence there is no reason, why it should be given a narrow meaning. According to the tenor of the language used in Article 21, it will be available not only to every citizen of this country, but also to a ‘person’ who may not be a citizen of the country. When the police officers subjected a married woman to physical, mental and psychological torture calculated to create fear to make her submit to the demands of the police and abandoned her legal marriage, the right to life and liberty of the woman is under the threat. The same thing happened in, *Aravinder Singh Bagga v State of UP,*\(^{43}\) where the Supreme Court treated it as a fundamental rights violation committed by the officials of the State and made it obligatory on the State and directed payment of Rs.10000/- as compensation. In this case, the Court also informed the State to recover the money from the erring officials. This was a welcome step taken by the judiciary to protect the life and liberty of women. In *State of Maharashtra v Chandra Prakash Kewal Chand Jain,*\(^{44}\) the police sub inspector raped a teenager, newly married Shammi Banu under duress, after putting her husband under wrongful confinement on a fictitious offence. The Court held that when a person in official uniform committed such a serious crime of rape on a young girl in her late teens there was no room for sympathy or pity. The Court compensation and held that the punishment in such case is stringent.

\(^{43}\) AIR 1995 SC 117.

\(^{44}\) AIR1990 SC 658
In *Delhi Domestic Working Women’s Forum* case, the petitioner Women’s Forum through a public interest Litigation brought the pathetic condition of four domestic women servants who were raped by seven army personnel in a running train while travelling by the Muri Express from Ranchi to Delhi. The victims were helpless tribal women, belonging to State of Bihar. Notwithstanding the occurrence of such barbaric assault on the person and dignity of women neither the central government nor the State government has bestowed any serious attention as to the need for rehabilitation and the Court expressed serious concern about the increase of crimes against women in recent times and suggested that the defects in criminal laws be removed soon. The Court observed as followed:

“The defects in the present system are firstly, complaints are handled roughly and are not given such attention as is warranted. The victims, more often than not, are humiliated by the police. The victims have invariably found rape trials a bad experience. The experience of giving evidence in Court has been negative and destructive. The victims often say, they considered the ordeal to be even worse than the rape itself. Undoubtedly, the Court proceedings added to and prolonged the psychological stress they had to suffer as a result of the rape itself”.
In view of this, the Court laid down the following guidelines for trial of rape cases-

1) The complaints of sexual assaults cases should be provided, with legal representation. Such a person must be well acquainted with criminal justice. The victims advocate’s role, should not be only to explain to her the nature of proceedings, to prepare her for the case and to assist her in the police station and in Court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind consulting or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complaints interests in the police station represents her till the end of the case.

2) Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed State at the police station and the guidance and support of a lawyer at this stage would be of great help to case.

3) The police should be under a duty to inform victim, of her right to representation before any questions were asked of her and the police report should State that the victim was so informed.

4) A list of advocates willing to act in these cases should be kept at the police station for victims who did not have any particular lawyer in mind, or whose own lawyer was unavailable.
5) The advocate shall be appointed by the Court on application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay advocates would be authorized to act at the police station before leave of the Court was sought or obtained.

6) In all rape trials anonymity, (name not to be disclosed), of the victim must be maintained, as far as necessary.

7) It is necessary, having regard to the directive principles contained under Art. 38 (1) of the Constitution, to set Injuries Compensation Board. Rape victims frequently incur substantial loss. Some, for example are too continue in employment.

8) Compensation for victims shall be awarded by the Court on conviction of the offender and by the criminal injuries compensation board whether or not a conviction has taken place. The board will take in to account pain, suffering and shock as well as the loss of earnings due to pregnancy and child birth if this accrued as result of rape.

The National Commission for Women be asked to frame schemes for compensation and rehabilitation to ensure justice to victims of such crimes. The Union of India shall then examine and take necessary steps to implement them at the earliest
With increasing awareness and emphasis on gender justice there is an increase in the efforts to guard against such violations. Moreover resentment towards incidents of sexual harassment is also increasing. In *Visaka v State of Rajasthan*, a petition was brought as a class action by certain social activists and NGO’s with the aim of focusing attention towards the societal aberration and assisting in finding a suitable method for the realization of the true concept of gender equality” and preventing sexual harassment of working women in all workplaces through the judicial causes. The immediate cause for the filing of the writ petition was an incident of brutal gang rape of a social worker in a village of Rajasthan. However, no mention was made of that case because it was the subject matter of a criminal case. But the incident revealed the hazards to which a working women was exposed and the depravity to which sexual harassment can degenerate and the urgency for safeguards by an alternative mechanism to fulfill this deeply felt and urgent social need. The judgment delivered by J.S.Verma C.J, on behalf of *Sujatha v. Manohar and B.N.Kirpal JJ*, highlighted the fact that each incident of like nature results in violation of fundamental rights of “Gender Equality” and right of life and liberty. It is a clear violation of rights under Articles 14, 15 and 21 of the Constitution. This class action under Article 32 of the Constitution was for this reason and a writ of mandamus in such a situation if it is to be effective needs to be accompanied with directions for prevention, as the violation of this fundamental right is a recurring phenomenon.

45 AIR 1997, SC, 3014.
Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation and the creation of a mechanism for its enforcement is of the legislature and the executive. Thus, the power of the Court under Article 32, for the enforcement of fundamental rights and the executive power of the union have to meet the challenge of protecting working women from sexual harassment and of making their fundamental rights meaningful.

According to the Court: “Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognized basic human right”. The Supreme Court, considered it necessary and expedient for employers in work places as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women. These are:

i) It shall be the duty of the employer or other responsible persons in workplaces or other institutions, to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

ii) For this purpose, sexual harassment includes such unwelcome sexually determined behavior (whether directly or by implication) as;
a. Physical contact and advances;

b. A demand or request for sexual favours;

c. Sexually – colored remarks;

d. Showing pornography;

e. Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances where under the victim of such conduct, has a reasonable apprehension that in relation to the victim’s employment or work whether she is drawing salary, or honorarium or voluntary, whether in State, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory, for instance, when the women has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

iii) All employers or persons in charge of workplaces, whether in the public or private sector, should take appropriate steps to prevent
sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

a. Express prohibition of sexual harassment as defined above at the workplace should be notified, published and circulated in appropriate ways;

b. The rules and regulations of State and public sector bodies relating to conduct and discipline should include rules and regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender;

c. As regards private employers steps should be taken to include the aforesaid prohibition in the Standing Orders under the Industrial Employment (Standing Orders) Act, 1946;

d. Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at workplaces and no women employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

iv) Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.
In particular, it should ensure that victims or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

v) Where such conduct amounts to misconduct in employment, as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

vi) Whether or not such conduct constitute an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer’s organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time-bound treatment of complaints.

vii) The complaint mechanism, referred to in (six) above, should be adequate to provide, where necessary, a complaints committee, a special councilor or other support service, including the maintenance of confidentiality.

The complaints committee should be headed by a woman and not less than half of its members should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such complaints committee should involve a third party, either NGO or some other body, who is familiar with the issue of sexual harassment.
The complaints committee must make an annual report to the State Department concerned of the complaints and action taken by them.

The employee and person in charge will also report on compliance with the aforesaid guidelines, including on the reports of the complaints committee to the State Department.

viii) Employees should be allowed to raise issues of sexual harassment at worker’s meetings and in other appropriate forum and it should be affirmatively discussed in employer-employee meetings.

ix) Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.

x) Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

xi) The Centre / States are requested to consider adopting suitable measures including legislation to ensure that guidelines laid down by this order are also observed by employers in the private sector.
xii) These guidelines will not prejudice any right available under the Protection of Human Rights Act, 1993.

xiii) It was directed by the Court that the guidelines and norms would be strictly observed in all workplaces for the preservation and enforcement of the right to gender equality of the working woman. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field.

The judgment reveals that when the State functionaries, involve in any activities which amounts to sexual harassment, the State is vicariously liable for violation of Article 21 of the Constitution.

6.9 Police Atrocities

The primary function of a State is to maintain law and order and to bring internal peace. Police officers are discharging and executing these functions to safeguard the life of individuals. While discharging these functions, the police officials must also act in accordance with law. They cannot exceed their limit. But when they go beyond their limits, they are answerable and at the same time the State is liable to pay compensation for violation of right to life and personal liberty under Article 21 of the Indian Constitution. Police atrocities and liability of the State to pay compensation, nowadays are very common and the Supreme Court in *Saheli v. Commissioner of Police*,46 a son of Kamlesh Kumari, aged 9

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46 AIR 1990 SC 513
years, died owing to beating and assault by the station house officer of the police station. It was held that, she was entitled to get damages for the death of her son. Thus the State was responsible for the tortious acts of its employer.

The Supreme Court also views the police atrocities very seriously.

In *State of Gujarat v. Govindbhai Jakhubhai*, the plaintiff was a contractor working on the construction of the Rajendranagar Dam. On 22.4.1976, as he was proceeding on the highway after his work, he was informed that a truck driver who was carrying some of his labourers was being manhandled at the police outpost. When he intervened, and required the constable to desist from beating the driver, the constable excited and abusive, got another police man to bring him his rifle, and shot the plaintiff on his right thigh. The bullet injury did not heal and the right leg was consequently amputated above the knee cap. The plaintiff claimed damages from the State and constable for the illegal and wrongful use of the fire arm, for which tortious act the State, was vicariously liable. The civil Court found for the plaintiff and decreed compensation of Rs.1, 98,000/- at six percent interest per annum from the date of the suit till payment.

The State contended that it was not liable for unauthorized and deliberate acts of its employees and as such vicarious liability of the State does not arise. The State further submitted that manning the police outpost by the constabulary was an essential part of the exercise of the sovereign function of the State of

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47 AIR 1999 Guj 316.
maintenance of law and order. Therefore even if it was established that the constable had committed the tortious act in discharge of his duties, the State could be held vicariously liable.\textsuperscript{48}

Any police atrocity, be it custodial or otherwise, which results in death or injury to a person is violation of fundamental rights guaranteed by Article 21 of the Constitution. The defense of sovereign immunity, would in such cases be alien to the concept of guarantee of the fundamental right to life and personal liberty causing injury or death by police excesses would be a clear violation of such right and such wrongful acts even if referable to the sovereign functions of the State of maintenance of law and order will not immune the State, from its strict liability which arises due to the violation of the fundamental right to life and personal liberty.

Thus the State must adequately compensate for a wrong done irrespective of the fact that it was done by the employee during the course of employment which is relatable to the sovereign functions of the State such as maintenance of law and order. The nature of the liability that arises because of the violation of fundamental rights would remain the same, irrespective of the forum from which the remedy is sought. It cannot be said that though for violation of the fundamental right to life by tortious acts of a State employee the Superior Court may in its extraordinary powers award compensation notwithstanding the availability

\textsuperscript{48} The constable had, in 1980, been convicted by the High Court under section 326 I.P.C and sentenced to six months Rigorous imprisonment and a fine of Rs. 550/-. 
of the alternative forum, that liability changes its colour when the remedy is sought in the civil Court.  

In *Ravikant Patil v. State of Maharashtra*, the petitioner, an under trial prisoner, was handcuffed and bound down with ropes without any justification. He was paraded through the streets, although there was no record to show that he was likely to escape from police custody. The High Court, directed payment of compensation of Rs. 10,000/- and ordered the entry of (adverse) remarks with service books of the police officers concerned. It is also noted that an action for damages lies for bodily harm by the police which includes battery, assault, false imprisonment, physical injuries and death. The State will be held tortiously liable for this act.

Excessive or unwarranted use of force by the police, constitutes a ground for seeking relief. The rude behavior of police ended in the death of a woman in *Mariyappan v. State of Tamil Nadu*. The incident took place in November 1990, when the woman was assaulted by a constable during a prohibition raid while she pleaded that her nephew was on his way to buy medicines for her child and should not therefore be apprehended, but the constable pushed her to the ground which subsequently ended in her death. The Court directed to initiate criminal

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50 (1990) ACJ 106 Bom.
51 The High Court in R. Gandhi v. Union of India. AIR 1989 Mad 205 directed the State to pay Rs. 33,19,033/- as compensation (as recommended by the district collector) to those families of Sikhs and others in Coimbatore, who were the victims of arson and rioting in the wake of the assassination of the former Prime Minister, Indira Gandhi.
53 2000 Cri LJ 4459.
proceedings against the police constable and also directed the State to pay 2 lakh compensation to her family.\textsuperscript{54}

The power of the police to arrest a person for valid reason is justifiable. At the same time he has to use reasonable force as required for the same. In Dr. \textit{Ranjit Reang v. State of Tripura} and others,\textsuperscript{55} a medical officer was arrested without any specific case and was humiliatingly assaulted by the police. He was slapped by the police, which resulted in perforation of his left ear drum and loss of hearing. A petition was filed against the Tripura State and the police personal for the unauthorized detention and physical force on the petitioner, the High Court of Gauhati (Agartala bench) directed the State to pay compensation and observed that in a society where Rule of law is paramount and when there is no evidence to suggest that the petitioner resisted the police from arresting him, no force whatsoever could perhaps be justified. The use of force and assault on the petitioner by the police, obviously transgressed the authority of the police to make an arrest even if the arrest is considered to be justified. The police must not exceed the powers, which have been entrusted to it and it must duly perform duties which have been laid upon it does not do so, they must answer for it. The State must be considered answerable and also to vicariously liable to pay damages.

To determine liability of State under Constitutional Tort, the only requirement is that the violation of the fundamental right should be proved. In

\textsuperscript{54} While deciding this case the Court directed the State to pay the amount with the “right to be indemnified by and take such action as may be available to then against the wrong doer.

\textsuperscript{55} 1989 Mad 205.
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 fired and killed the driver of jeep who allegedly refused to halt at a check post on being asked to do so. The concept of sovereign immunity was not considered by the High Court. Any police atrocities lead to violation of fundamental rights, the Constitutional Court will render justice to the affected person.

The Court has awarded compensation to the widow of a convict who was killed in jail by a co-accused while serving his sentence under Section 302 I.P.C. as it resulted in deprivation of his right contrary to law and in violation of Art.21. A prisoner does not cease to have Constitutional right, except to the extent he has been deprived of it in accordance with law. His death was caused due to the failure of jail authorities to protect him. Accordingly, the Court directed the State to pay a compensation of Rs.1,00,000 to the widow and children of the deceased. In Kewel pati 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 Ramji, was in 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 Ramji.

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56 AIR 1999 Gau 9.
57 (1995)3SCC 600
6.10. Custodial Violence

In *Lawyer’s Forum for Human Rights v. State of West Bengal*, the Calcutta High Court held that, the police authority have a duty to take care to the arrested accused when a man is taken into custody Court it is the paramount duty of the police officials to protect his body. While awarding compensation of Rs. 1 lakh, to be paid to the widow of a man who died in custody observed that the award of monetary compensation for custodial violence has been justified as being “the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers.” In *Solgabai Sunil Pawar v. State of Maharashtra*, the strict liability principle was reasserted, and the defense of sovereign immunity was rejected by the Court.

In almost all the custodial deaths, the police authorities use to pretend as innocents and won’t accept any liability. But the Supreme Court, is very particular in protecting the basic rights of the people ruled that unless a plausible explanation is given by the police authorities which is consistent with their innocence the obvious inference is that the fatal injuries were inflicted to the person in police custody resulting in death, for which the authorities are responsible and liable. The Supreme Court in *Nilabati Behara v. State of Orissa*, allowed a writ petition under Article 32 for human rights violation and awarded compensation. This was

58 (1997) 1Cri. LJ 1762
60 1998 Cri LJ 1505 at 1508 (DB)
a case, where a petitioner claimed compensation for the death of her son in police custody. The facts are gruesome and relate to arrest, police custody and death next day, with dead body found near railway track.

The Supreme Court, laid down a number of propositions, one of which was that in such circumstances, when death was unnatural and there were multiple injuries the burden was clearly on the respondents to explain how the deceased sustained the injuries which caused the death. The respondents argued that, the injuries were caused by accidental fall on railway track after the deceased escaped from custody. But the Court did not accept this. The Court also did not accept a report made by an executive magistrate, an inspector of police.62

Another important case of custodial death in police custody is *Geet Sangnara v. State of Nagaland.*63 In this case, the Court ordered the State of Nagaland to pay the petitioner wife Rs. 1,50,000/- “in the nature of palliative” with interest at 12 percent per annum if it was not paid within three months of the order.64 The death in police lock up caused by infliction of custodial violence was compensated by the Court in *Christian Community Welfare Council of India v. State of Maharashtra*65. Awarding Rs. 1,50,000/- to the wife of the deceased, the Court found that Junior Adam was done to death on account of beatings by the police personal an agency of sovereign power acting in violation and excess of

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62 The Court pointed out that an inquiry under section 176, Code of Criminal Procedure, 1973 is to be made independently by the magistrate.
63 1994 ACJ 792 (Gau).
64 The Court left it to the State to realize the compensation amount from the erring police officers, and observed that it would be in the interests of justice to institute an enquiry into the matter.
65 1994 Mah LJ 1769.
power vested in such agency”. Observing that “Time has come that the State
government rises to the occasion by striking the balance between the life of a
person in police custody and the power of law enforcing agencies to bring the
criminals to book by appropriate rules or providing guidelines to the police
personnel, in such matters” the Court directed inter alia, that the State government
constitute a committee consisting of its Home Secretary, Law Secretary and
Director – General of police within 15 days and that the committee submit its
report to the State government within three months. The Court also directed the
State government to issue necessary instructions to all police officials that, every
detainee shall be medically examined before being taken to a magistrate, and
every third day thereafter, and the medical reports be entered in the station house
diary. No amount of money, will adequately compensate for the loss of life.
Resurrection of life is not within the power of mass. The only way to console the
petitioner and other members of the family is to grant compensation.66

The under trial prisoners who are under custody have fundamental rights
under Article 21 of the Constitution. In Rajen Gagoi v. Union of India,67 Manic
Gagoi, allegedly an active member of the ULFA was apprehended by the army.
He died in their custody. The army authorities said he had succumbed to injuries
sustained while attempting to escape. The Court decided that it was case of death

66 Referring to the great mental agony and pain because of the loss of a loved one in the family the Court
held in Nagatankhui v. State of Nagaland where a 19 year old died in judicial custody, and a number of
injuries were found his person, the Court held the family entitled to Rs. 2 lakh compensation.
67 1996 ACJ 310.
in custody. The Court found the Malik Gogai was 28 years of age, employed in Duliajan and earning Rs. 3381.38. The ministry was directed to pay in Rs. 250 000 to his father. In another case the Court ordered Rs 1 lakh as compensation to a rickshaw puller who had been tortured, and who died in custody.\(^68\)

The Kerala High Court in *State of Kerala v. Maxon John*\(^69\) said that the police are guardian of the law, should never violate the law. In this case, a pre-degree student was arrested and charge sheeted for violation of traffic rules. It was found out that he had been illegally arrested and tortured while in custody, the State was directed to pay compensation.

### 6.11. Encounter Deaths

In a welfare State, no one has the power to take away the life of another without applying proper law and procedure. The Constitution of India, also provides that no one shall be deprived of his life and personal liberty except according to the procedure established by law.\(^70\) In the field of administration of justice, the role of police officials is inevitable. They maintain law and order by applying force if needed. But in some cases they apply excessive force and it may end in encounter deaths. It would be difficult to find out the circumstances which led to that situation. The statistics given by the police Stated that while in 1996, there had been 43 encounters resulting in deaths of 57 alleged criminals, in 1997

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68 Ratlavat Chandi v. State of A. P.
there had been at least 70 deaths and two alleged criminals injured in 47 incidents. The police invariably averred that their attempt was to, apprehend the alleged criminal; that they were fired upon with sophisticated weapons, and that they returned the fire in self defense which resulted in the death of a person. It is noted that, the incidents reveal that there is no symptom of injuries on the body of the police personal and the injuries caused to the deceased were on vital parts of the body. This creates reasonable suspicion on the part of the police and it lead for a concern over liability of the State to pay compensation. The Constitution, the Courts and the laws can act only as aids to strengthen rampats against this tyranny and misrule.\textsuperscript{71}

In Peoples Union for Civil Liberties v. Union of India,\textsuperscript{72} the fact was that the Imphal police had killed two persons in a village of Manipur on 03.04.1991. The Supreme Court directed for an enquiry. The District and Sessions Judge conducted an enquiry in 1995-96, found that there had been no encounter as averred by the police, and that the two deceased persons had been killed in custody. The Supreme Court held that, the present case appears to be on, where two persons along with some others were just seized from a hut, taken a long distance away in a truck and shot there. The Court did not allow the claim of defense under sovereign immunity and applied the ratio of Challa Ram Konda

\textsuperscript{71} A.P. Singh, “Human Rights Indian Context” AIR 2000 (Jour) p.11
\textsuperscript{72} (1997) 3 SCC 433
Reddy and others v Andhra Pradesh,\footnote{AIR 1989 AP 23.} and fixed the liability of the State. The Court thereafter ordered that Rs.1 Lakh be paid to the families of the deceased. It is evident that when right to life is violated, the defense of Sovereign immunity cannot be considered as an exception under Article 300 of the Indian Constitution.

In \textit{Smt. Kamini Bala Talukdar v. State of Assam},\footnote{(1997) \textit{Cri LJ} 874.} it was established in an inquiry that the deceased who was an active member of the ULFA, a banned organization, had been killed in cold blood and there had been no bonafide attempt to apprehend him; the Court awarded Rs.1 Lakh\footnote{In this case the Court found that there was ample opportunity to apprehend him alive. But the police authority wanted to eliminate him.} as compensation.

There are allegations that encounters are staged that victims of such killings are not, in fact, killed in encounters, or that it is innocent persons who lose their lives in such encounters. In \textit{Robindra Nath Chetia v. Union of India},\footnote{1995 \textit{ACJ} 144 (Gau)} the army alleged that a 24 years old victim of an ‘encounter’ killing belonged to the ULFA. An enquiry by the Assistant District and Sessions Judge, Dibrugarh, instituted by the High Court, however, found the explanation of encounter between the army and the extremists neither true nor genuine. The Court therefore, held that the army authority had killed him wrongfully. The Court ordered to pay Rs.60000/- as compensation.
In *M. Chongacha Tangkhul v. State of Manipur and Others*, the father of a 28 year old man, who was killed by security forces, asked that he be paid Rs.20000/- ex gratia which under the State order had to be paid to victims or familiar of “un justified police security forces action”. The Court on finding that the dead man had been a member of the NSCN and was a “hardcore terrorist” accepted the explanation that he had been shot while trying to flee when he was sought to be apprehended. It declined to make the order for payment of exgratia.

The object of the Court to fix liability on State for encounter death is to prevent fake encounter, cold blooded killings etc, but for the death of terrorist no compensation can be awarded. While deciding the case of *Siba Nath Gogai v Union of India*, the Court said. “The Society cannot be asked to cough up compensation for the death of a terrorist in encounter, because that will mean putting a premium or wrong doings”.

6.12 Handcuffing

In the case of handcuffing, the authority is duty bound to give reason for the same. If no explanation is given, it amounts to violation of personal liberty and the State has to compensate the affected person due to wrongful handcuffing. In *Ajmar Singh Lak Nowad v. State of Punjab*, the High Court reasserted the dictum of the Supreme Court in *Prem Shankar Shukla v. Delhi Administration*, and

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77 AIR 1999 Gau 25  
78 (2000) 1 Gau LJ 280  
79 1994 Cri LJ 2430  
80 AIR 1980 SC 1535
awarded Rs.10,000/- to a defense under the Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA), who had been handcuffed. No explanation for the handcuffing was given. The Court condemned the illegalities committed by the police. The Court also said “The Punjab of 1994 is not the same as that of 1992. Earlier, on account of the peculiar situation that prevailed in the State, the high handedness of the police may have been socially accepted or otherwise overlooked. However, the police aberrations must not be allowed to become a habitual conduct. It has dangerous portents”.

In another case, an under trial prisoner was handcuffed and taken through the streets in a procession. This occurred during the investigation of the case by the police. The same was done by the police with the prior announcement and publicity. The Court held that such acts cannot be justified and it amount to violation of rights under Article 21 of the Indian Constitution. It was held that the State was liable to pay compensation.

6.13 Illegal Detention

If a normal person is detained in a lunatic asylum or a mental hospital or a State institute it leads to deprivation of personal liberty and humiliation. If the State official unlawfully detain a person who is not a lunatic in a mental hospital, the State is liable to pay damages to the person aggrieved for wrongful deprivation of personal liberty without authority of law leading to violation of Article 21 of the
Constitution of India. In *Hukam Singh v. State (Delhi Admn)*,\(^{81}\) Hukan Singh, S/o Ramchander was mistaken to be Hukam Singh, S/o Ramsingh, and a proclaimed offender and arrested. He protested his innocence. An enquiry was conducted by the metropolitan magistrate. After one month and nine days he was released. The High Court found that, the petitioner had been deprived of his liberty because of casual, irresponsible and negligent acts of the police officers. The Court has awarded Rs.20,000/- as compensation for illegal detention. In arriving at the compensation to be paid to the wronged Hukam Singh, the Court took into consideration his mental and physical agony and humiliation of his family and the amounts he must have spent in making his application for bail. The High Court’s left it open to the State to fix responsibility and recover the compensation from the officers found to be fault.

In *Daulat Ram v. State of Haryana*,\(^{82}\) a false case foisted on the appellant by two head constables led to his being detained in custody for a few days; the State was directed to pay him Rs.5000/- as compensation. Sixteen years, after *Rudul Shah* was released from Muzaffarpur Central Jail in Bihar where he spent 14 long years after he was acquitted on the unsubstantiated plea that, he had been of un sound mind.\(^{83}\) Similar to *Rudul Shah, Serajuddin Ansari v. Home Secretary, State of Bihar*,\(^{84}\) where Ansari Spent nearly 15 years in custodial institutions in

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\(^{81}\) (1994) 1 ACJ 437  
\(^{82}\) (1996) 11 SCC 711  
\(^{84}\) (1999) 5 SCC 700
Bihar. Similarly also *DG & IG of police v. Premsagar* the Supreme Court affirmed the verdict of the High Court holding that, there had been illegal detention for a period of one month and the compensation of Rs.20,000/- directed to be paid to the defense. *In R.D. Upadhyay v. State of A.P.*,\(^8^5\) the Court directed to pay Rs.2 Lakhs as compensation and said, “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 Courts condemnation of the tortious acts committed by the State.”

The role of judiciary in extending the liability of State for the wrong committed by its servants is the key point for the development of Constitutional torts. In a welfare State, when the State fails to protect the fundamental rights of the people, the Court has the power to interfere and apply the Constitutional provisions to declare the right and pass orders to direct the State to compensate for the loss. Thus under public law, the State has no chance to escape, from liability by presenting the plea of sovereign immunity.

**6.14. Medical Negligence**

To seek medical assistance is one of the fundamental rights guaranteed by Indian Constitution under Article 21.\(^8^6\) Right to life extends the duty of doctors to take care while treating a patient. Particularly the State run hospitals and doctors

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\(^8^5\) (2001)1 SCC 437  
\(^8^6\) Parmananda Katara v. Union of India AIR 1989 SC, 2039.
have public and Constitutional duty to practice their profession carefully. In particular, the practice of medicine and surgery has its pain and rewards. It has its own risk and hazards. The administration of a drug by a medical officer, may have a positive or negative reaction, causing an allergy, trauma or a disability. Sometimes, it may even lead to death. In surgery, there are occasions when no one can say definitely whether a patient to be operated upon will survive or die. If the patient dies, the surgeon faces the prospect not only of forfeiting his reputation, but even of litigation. Now people are aware of their rights under public law and they use to approach the superior Courts to seeks writs. The Courts also declare the rights and render justice through suitable orders. Thus the Constitutional Courts are active, creative and took innovative interpretative skills to make effective its public law jurisdiction. Failure to provide timely medical treatment, leads to breach of public duty. Article 21, does not expressly provide any provision for medical assistance as fundamental right. But the Directive Principles of State policies direct the State to take necessary steps to provide adequate medical facilities to provide health measures to the people. The recent development in judicial activism, proves that the hospitals and doctors are impliedly duty bound to safeguard the life of the citizens through careful medical service and treatment laid down by Supreme Court in State of Haryana v. Santra.

87 Dr. A. Raghunadha Reddy, Liability of State Hospital and Breach of Right to Life, AIR 1998 (Jour) P. 154
89 AIR 2000 SC 1988
In *Dr. (Kumari)Tubassum Sultana v. State of U.P.*,\(^90\) the Allahabad High Court awarded compensation to a lady victim, aged about 18-19 years married only a couple of months ago when operated upon for involuntary tubectomy under Government sponsored family planning scheme. It was most unfortunate that the lady was treated like an animal and then dragged to the operation table, to butcher her motherhood due to the negligence of the government officials. The State Government was directed by the Court, to recover the said amount from salary or otherwise of employees if they are found guilty during departmental proceedings. The State Government, was also directed by the pragmatic Court, to take all necessary steps for the re canalizing operation and to bear entire expenses.

In *Achutrao Haribhau Khodwa and Others v State of Maharashtra*,\(^91\) on 10/07/1963 Chandrikabai, a teacher in a Govt. School got admitted into a Govt. Hospital at Aurangabad for delivery. On the same day she gave birth to a male child. On 13.07.1963 she underwent a sterilization operation subsequent to which she suffered from acute pain and distress. As her condition did not improve she was operated upon for the second time on 19.07.1963, by a different surgeon who recovered a mop from her peritoneal cavity left negligently in her abdomen during the first surgery. However even after the second surgery her condition did not improve and she breathed her last on 24.07.1963.

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\(^90\) AIR 1997 All177.

\(^91\) AIR 1996 S.C. 2377
The Supreme Court, held that the leaving of the mop inside the peritoneal cavity during the first surgery only necessitated the second surgery and even, if it cannot be established as to which surgery had caused her the peritonitis, the claim of the appellants cannot be defeated. The State was directed to pay compensation on the ground of vicarious liability. The suit was instituted ‘in forma pauperis’ before the ordinary civil Court and finally reached finality in the Supreme Court after 36 years.

In Smt. Kalawati and others v State of Himachal Pradesh,\(^92\) the High Court held that where the death of a patient occurs due to the negligence of a Govt. Hospital staff, the writ Court is competent to grant, ad interim compensation under Article 226 of the Indian Constitution. The High Court, stated that it was empowered in the exercise of its writ jurisdiction to award damages in cases where a precious fundamental right like that of life and liberty is violated. It added that, it cannot be debarred or deterred from awarding a reasonable sum by way of compensation as an ad interim or interim measure of a palliative nature, if on the facts and in the circumstances of the case and the basis of the materials on record, its judicial conscience is satisfied, that if a suit were to be filed to recover damages, a decree would follow almost as a matter of course, although the precise amount which would be decreed cannot be predicted. Such a course of action, would not only help in protecting, preserving and enforcing the fundamental right to life but also prevent its violation in other cases, besides, the Court observed

\(^{92}\) AIR 1988 H.P., 5
that, the dependants of the deceased will be saved from penury and undeserved want till fine points of fact and law, which legal ingenuity may discover, are extensively argued, deliberated and adjudicated in a compensation suit, which it can be directed to file for recovering full damages, and till the social proceeding passes through the usual gamut of the trial Court, the appellate Court and the executing Court.

In the aforementioned case, a ward boy removed the anaesthetic machine while cleaning the operation theatre by disconnecting it from the nose pipes by opening a hexagonal nut in the valve unit. After he completed his cleaning job, he placed the machine back in position but reconnected the pipes wrongly as a result of which oxygen & nitrous oxide gas hosepipes got interchanged. The act was not done deliberately but inadvertently. The anesthetist and the surgeon had also failed to check the equipment before embarking on the surgeries which brought about the death of the surgical patients who were operated upon as they were administered nitrous oxide instead of oxygen. The Court thereby ordered, the State Govt. to pay Rs.50000/- to the dependants of the deceased person who had died as a result of the unfortunate episode. In Bholidevi v. State of Jammu and Kashmir,\(^93\) due to the doctor’s negligence the nurse was instructed not to give injection to the patient, which resulted the death of the patient. The Supreme Court directed to pay compensation on the ground of ‘No Fault Liability’.

\(^{93}\) AIR 2002 J&K 65
The Supreme Court observed in *Paschim Banga Khet Mazdoor Samity and Others v. State of West Bengal and other,*\(^9^4\) that the Constitution envisages the establishment of a ‘Welfare State,’ at the federal level as well as the State level. In a ‘Welfare State’ the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Govt. in a welfare State. The Govt. discharges this obligation by running hospitals and health centers which provide medical care to the person seeking to avail these facilities. Article 21, imposes an obligation on the State to safeguard the right to life, of every person. Preservation of human life is thus of paramount importance. The Govt. hospitals run by the State and the medical officers employed therein are duty bound to extend, medical assistance for preserving life. Failure on the part of a Govt. hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under article 21.

In the instant case, there was breach of the said right of a person injured in an accident when he was denied treatment at the various Govt. hospitals which were approached even though his condition was very serious at that time and he was in need of immediate medical attention. Ultimately, he was admitted in a private hospital as an indoor patient and he had to incur an expenditure of Rs 17000/- in his treatment. Since the said denial of the right of the injured person guaranteed under Article 21 was by the officers of the State. The State cannot

\(^9^4\) AIR 1995 SC 2426
avoid its responsibility for such denial of the Constitutional right. In respect of deprivation of the Constitutional rights guaranteed under Part III of the Constitution, the position is well settled that adequate compensation can be awarded by the Court for such violation, by way of redress in proceedings under Article 32 & 226 of the Constitution. The Supreme Court, directed the State to pay Rs.25,000/- to the petitioner as compensation.

In order to ensure the availability of proper medical facilities for dealing with emergency cases, the Court laid down the following guidelines to be followed by the various State States. The State should make sure that:

1. Adequate facilities are available at the primary health centres where the patient can be given immediate primary treatment so as to stabilize his condition.

2. Hospitals at the District level and sub-division level are upgraded so that serious cases can be treated there

3. Facilities for giving specialist treatment are increased and are available at the hospitals at District level and sub-division level having regard to the growing needs.

4. In order to ensure availability of bed in an emergency at State level hospitals there is centralized communication system so that the patient can be sent immediately to the hospitals where bed is available in respect of the treatment which is required.
5. Proper arrangement of ambulance is made for transport of a patient from the primary health centre to the District Hospital or sub-division hospital and from the District Hospital or Sub-Division Hospital to the State Hospital.

6. The Ambulance is adequately provided with necessary equipment and medical personnel.

7. The Health Centre’s and the hospitals and the medical personnel attached to these Centre’s and hospitals are geared to deal with larger number of patients needing emergency treatment on account of higher risk of accidents on certain occasions and in certain seasons.

The Court added that the State cannot avoid its Constitutional obligation in this regard on account of financial constraints.

In Spring Meadows Hospital v. Haroj Ahluwalia,\textsuperscript{95} the Supreme Court declared that every injured citizen brought for medical treatment should instantaneously be given medical aid to preserve life and thereafter the procedural criminal law should be allowed to operate, in order to avoid negligent death.\textsuperscript{96} 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 irreparable brain damage rendering into vegetable State for the rest of his life. For this the hospital was held liable and

\textsuperscript{95} AIR 1998 SC 1801
\textsuperscript{96} This was also affirmed by the Supreme Court in Paramanada Katara v. Union of India, AIR 1989 SC 2039.
directed to pay compensation of Rs 12.50 lakhs to the child and Rs 5 lakh to the parents.

The effort to save the person, should be the top priority not only of the medical professional, but even of the police or any other citizen who happens to be connected with the matter or who happens to notice such an incident of a situation. The Court also went on to State that, whenever a doctor is approached in the case of an emergency and he finds that whatever assistance he could give is not sufficient really to save the life of the person but some better assistance is necessary, it is also the duty of the doctor so approached to render all the help which he could and also see that the person reaches the proper expert as early as possible.

The Court made it clear that unnecessary harassment of the members of the medical profession either by way of request for adjournments or by cross-examination should be avoided so that the men in the medical profession can discharge their duty towards any person who are in need of medical assistance.

*Legal Aid Committee v. State of Bihar*\textsuperscript{97} is a case where, the deputy Superintendent of Railway Police, Jamalpur, State of Bihar narrated the incident that the victim Mahesh Mahto had been injured when the passengers of the railway train were looted by a crowd and they had been beaten up several persons including the victim. Mahto had received serious injuries and had to be taken to

\textsuperscript{97} (1991).3. SCC. 482
the hospital for treatment. There was negligence and failure to give proper medical aid to an injured person taken into police custody resulting in his death. In this case, there was no vehicle available and they hired a rickshaw for the purpose of taking the injured to the hospital. By that time the victim became unconscious. The Court considered that if appropriate action had been taken to give timely medical aid, death would not have happened. In this case the Supreme Court, said that it was an obligation of the police, particularly after taking a person in custody to ensure appropriate protection for him in custody including medical care if such a person needed it and so breach of duty was committed by the State and directed the compensation Rs. 20000/- should be paid by the State of Bihar to the legal representative of Mahesh Mahto. This was a clear case of medical negligence of Constitutional tort.

In *A.S. Mittal v State of U.P.*,\(^{98}\) one Lions Club arranged for eye camp. Due to medical misadventure, irreparable damage was caused to the eyes of patients. The Supreme Court on humanitarian considerations directed the State Government to pay Rs.12,500/- to each of the victims, in addition to the interim relief already paid. The State and medical council had already issued several guidelines in respect of application of medicines and engaging doctors for operation etc. the same position was already discussed in *Kalawati v. State of M.P.*\(^{99}\)

\(^{98}\) AIR 1989 SC 1570

\(^{99}\) AIR 1989 HP 5
Conclusion

The Constitutional Torts emerged out of the concept of Rule of law. When the instrumentalities of State violate the law or go beyond the law, due to which fundamental rights of people are affected, the State is barred from claiming sovereign immunity as a defense. This influenced the development of the principles in extension of liability of the State under Article 21 of the Constitution. In various litigations, the Courts found difficulties in applying traditional tort law to meet situations in India. It is evident that the Constitutional tort has been devised as a public law remedy for violation of fundamental rights, generally infringed by the employees of the State. Speedy disposal and reasonable compensation for victims are possible through Constitutional torts since these are dealt by the Constitutional Courts. Rudul Shah’s case constitutes a landmark in the Constitutional jurisprudence of State liability in tort when a wrongful act of a servant of the State violates Article 21 of the Constitution, the Constitutional Court come forward to pay compensation. In this case, the Court recognized a “surviving right to recover appropriate damages from the State and its erring officials” while commenting “we cannot leave the petitioner penniless until the end of his suit, the many appeals and execution proceedings”.

Thus the liability of State, for tortious acts of its servant under Article 300, is expanded by applying Article 21 of the Constitution. The introduction of compensation as a Constitutional remedy strengthens the rights of affected
individuals under Art.21. The Constitutional remedy is available through writ Jurisdiction of the Supreme Court and High Court under Article 32 and 226 of the Constitution respectively.

From the year 1977 several cases of unlawful detention, custodial death torture in police custody, harassment by public authorities, riot cases, atrocities against women reached the Supreme Court by way of writ petitions under Article 32 of the Constitution or in appeal against the decisions of the High Court under Article 226. Wherever it was found that the act had occurred on account of ill treatment or gross negligence on the part of the police officers or public authorities, compensation was awarded to the injured persons. The State was made vicariously liable to pay the compensation. This led to develop the Constitutional jurisprudence. Recently most of the decisions, where monetary redress is sought by a person against the State for the violation of fundamental rights. Courts now do not approach the matter purely from the point of view adopted in the traditional tort litigation based on sovereign and non sovereign functions. Since the Constitution guarantees not only fundamental rights, but also the right to seek a remedy for the violation of such rights, the victim is entitled to seek remedy under Articles 32 and 226. This does not prevent the victim to approach the ordinary civil Court.

In 1993, when the Supreme Court in Nilabati Behara case declared that the award of compensation by the High Court and the Supreme Court was a remedy
available in public law; based on strict liability for the contravention of fundamental rights to which the principle of sovereign immunity does not apply even though it may be available as a defense in private law in an action based on tort. The same was already acknowledged by the Supreme Court in cases like Sebastian Hongray, Bhim Singh and Saheli cases. The public law remedy under Articles 32 and 226, is readily available for those who are not able to avail remedy under private law. This flexible approach of the Supreme Court strongly would be the development of Constitutional tort to protect the interest of the people.

*D.K. Basu v. State of West Bengal* is another landmark case for the development of Constitutional tort. The Supreme Court denied to accept the defense of sovereign immunity and asserted the vicarious liability of the State which has been developed as precedent from the ratio given in *Rudul Sha* case. The Court also explained that a case of this kind under consideration observes public law proceedings, which are different from private law proceedings in tort. The liability of the State in India and its fundamental basis of award of compensation, are fixed by the Constitutional jurisprudence. The reason is that, the State has a legal responsibility to protect the people by enforcing their guaranteed rights. The scope of the Constitutional torts, depends on the nature of the case where fundamental right is violated. It has got extended dimension in our legal system, due to the development in the interpretation of Article 21 of the Indian Constitution.
The pride of the Nation rests on the development of womenhood. Sexual harassment is an inhuman act against woman. As a welfare State Indian judicial system through the constitutional provision tries to safeguard the dignity, life and liberty of woman. Thus Constitutional tort under Article 21 guarantees compensation to the woman victims whether Indian citizens or foreign. The decisions in ‘Visaka and Chandrima Das’ are landmarks in this aspect.

Right to life includes right to proper treatment, at right time by right medical practitioner with right medical instruments. Constitutional tort under article 21 awards compensation to victims whose rights are infringed by the medical practitioner due to medical negligence. This claim against the breach of public duty by the State is recognized as a right in public law and then the defense of sovereign immunity is not applicable in such cases.