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## **Judicial Sympathy without Systemic Remedy – The Unfulfilled Promise of Equitable Compensation for Wrongful Prosecution in India**

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*\*Mrs. Geetika Jain  
Ph.D Scholar (Law)  
Banasthali Vidyapith*

*\*\*Dr. Momina Zahan  
Assistant Professor,  
Faculty of Law.  
Banasthali Vidyapith*

### **ABSTRACT**

Wrongful prosecution represents one of the most profound failures of constitutional governance, where State power, designed to protect liberty, becomes the instrument of its destruction. In India, while courts have intermittently recognized the injustice suffered by victims of wrongful arrest, detention, and prosecution, the legal system has failed to translate judicial sympathy into systemic remedy. Compensation remains discretionary, fragmented, and dependent on constitutional litigation rather than grounded in enforceable statutory rights. This paper critically examines the Indian compensation regime for wrongful prosecution and argues that it operates within a paradigm of symbolic justice rather than structural justice. By analyzing constitutional tort jurisprudence, Art. 21 jurisprudence, and public law remedies, the study demonstrates how judicial compassion has not evolved into institutional accountability. Through a comparative and human rights lens, the paper exposes the normative gap between moral recognition and legal obligation. It argues that India's compensation framework reflects a deeper constitutional failure to recognize wrongful prosecution as a structural rights violation rather than a procedural anomaly. The paper concludes that without statutory institutionalization, rehabilitative justice mechanisms, and accountability structures, judicial sympathy will remain morally expressive but legally ineffective, leaving victims trapped between recognition and repair.

**Keywords:** *Wrongful Prosecution, Equitable Compensation, Constitutional Tort, Article 21, Judicial Discretion, Human Dignity, Restorative Justice, Comparative Constitutionalism, India.*

### **INTRODUCTION**

The legitimacy of constitutional governance rests upon the State's commitment to protect liberty, dignity, and equality through the exercise of lawful power. Criminal prosecution represents one of the most coercive manifestations of that power. When exercised against innocent individuals, it

becomes not merely an error of law but a failure of constitutional morality. Wrongful prosecution produces a form of injustice that is uniquely destructive because it is inflicted by institutions that are constitutionally authorized to act in the name of justice itself.<sup>1</sup>

In India, the phenomenon of wrongful prosecution has become structurally embedded within the criminal justice system. Over-policing, coercive investigation practices, custodial violence, fabricated evidence, forensic unreliability, prolonged undertrial detention, prosecutorial overreach, and judicial delay create conditions where innocence is frequently subordinated to procedural efficiency and institutional convenience. The criminal process itself becomes punitive, irrespective of outcome. Acquittal, while legally significant, offers only symbolic restoration. It removes formal criminal liability but does not restore lost years, social dignity, psychological stability, family life, or economic security. The stigma of prosecution operates independently of conviction, producing long-term social and economic exclusion. In this sense, wrongful prosecution creates a condition of permanent vulnerability, where freedom is formally restored but substantively denied.

Indian courts have repeatedly expressed moral concern for victims of wrongful detention and prosecution. Through constitutional tort jurisprudence and public law remedies, the judiciary has awarded compensation in select cases, recognizing that mere release from unlawful custody does not repair constitutional injury. Yet these judicial interventions remain isolated, discretionary, and structurally limited.<sup>2</sup>

## **WRONGFUL PROSECUTION AND CONSTITUTIONAL HARM**

Wrongful prosecution is often framed as a malfunction of procedure, faulty investigation, erroneous prosecution, or judicial error. These framing obscures the deeper constitutional nature of the harm. Wrongful prosecution is not simply a mistake within the system; it is a misuse of sovereign power. The State alone possesses the authority to arrest, detain, prosecute, and punish. When this authority is exercised against innocent individuals, it transforms constitutional power into constitutional violence. The harm inflicted is qualitatively different from private wrongs because it is produced through the machinery of legality itself.

Art. 21 of the Indian Constitution guarantees that no person shall be deprived of life or personal liberty except according to procedure established by law. Judicial interpretation has expanded Art. 21 into a repository of substantive rights, including dignity (*Francis Coralie Mullin v. Administrator, Union Territory of Delhi*),<sup>3</sup> livelihood (*Olga Tellis v. Bombay Municipal*

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<sup>1</sup> Kent Roach, *Wrongful Convictions, Wrongful Prosecutions and Wrongful Detentions in India*, 35 Nat'l L. Sch. India Rev. 250, (2024), <https://doi.org/10.55496/wwqa3810>.

<sup>2</sup> G.S. Bajpai, *Wrongful Prosecution in Terror Related Cases: A Criminal Law Critique*, 2018 SSRN Elec. J., <https://doi.org/10.2139/ssrn.3182362>.

<sup>3</sup> (1981) 1 SCC 608.

*Corporation*),<sup>4</sup> mental autonomy (*Common Cause v. Union of India*),<sup>5</sup> and reputation (*State of Bihar v. Lal Krishna Advani*).<sup>6</sup>

Wrongful prosecution violates each of these dimensions simultaneously. It deprives individuals of bodily liberty, psychological integrity, social dignity, economic security, and civic identity. The criminal label becomes a form of punishment independent of conviction. From a constitutional perspective, harm arises not at conviction but at prosecution itself. Arrest, detention, public accusation, trial exposure, incarceration, and prolonged uncertainty collectively produce punishment-like consequences even in the absence of guilt. This transforms wrongful prosecution into a structural constitutional wrong, not merely a procedural error.

### **THE ILLUSION OF LEGAL RESTORATION THROUGH ACQUITTAL**

The legal system treats acquittal as the restoration of innocence. However, this notion reflects a formalistic understanding of justice that ignores lived reality. Acquittal restores legal status but does not restore social existence. Individuals who are wrongly prosecuted often face permanent reputational damage, unemployment, social ostracization, psychological trauma, and family disintegration. The stigma of criminal accusation survives legal vindication. In many communities, acquittal is perceived as technical escape rather than moral innocence. This creates a contradiction between legal innocence and social punishment. The law proclaims restoration while society enforces exclusion. Compensation mechanisms exist to bridge this gap between legal recognition and social repair. However, in India, the absence of institutional compensation frameworks leaves victims trapped between symbolic justice and material abandonment. Judicial sympathy acknowledges suffering but does not reconstruct lives.<sup>7</sup>

### **THE INDIAN COMPENSATION FRAMEWORK - FRAGMENTATION AND DISCRETION**

India lacks a statutory regime governing compensation for wrongful prosecution. The Code of Criminal Procedure, 1973, provides compensation schemes under Sec. 357 and 357A, but these provisions apply to victims of offences, not victims of State-inflicted injustice. This produces a normative contradiction, victims of private crime receive statutory compensation, while victims of State power are relegated to discretionary constitutional remedies.

Compensation for wrongful prosecution exists only through constitutional litigation under Art. 32 and 226. Courts have developed compensation jurisprudence through the doctrine of constitutional

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<sup>4</sup> (1985) 3 SCC 545.

<sup>5</sup> (2018) 5 SCC 1.

<sup>6</sup> (2003) 8 SCC 361.

<sup>7</sup> Rashaan A. DeShay & John L. Worrall, *Prosecution and Wrongful Convictions*, in *Encyclopedia of Criminology and Criminal Justice* 4070, (2014), [https://doi.org/10.1007/978-1-4614-5690-2\\_36](https://doi.org/10.1007/978-1-4614-5690-2_36).

tort. In *Rudul Sah v. State of Bihar*,<sup>8</sup> court awarded compensation for unlawful detention after acquittal, holding that release alone does not remedy the violation of Art. 21. In *Nilabati Behera v. State of Orissa*,<sup>9</sup> court held that compensation for custodial death is a public law remedy independent of private tort claims. In *D.K. Basu v. State of West Bengal*,<sup>10</sup> court reaffirmed that State abuse of power triggers constitutional compensation obligations.

These cases reflect judicial compassion and moral clarity. However, they do not constitute a systemic framework. There is no statutory right, no compensation authority, no eligibility criteria, no rehabilitation mechanism, and no accountability structure. Compensation depends on judicial discretion, litigation capacity, and institutional sympathy. This produces a regime of equitable discretion, not equitable justice.

### **STRUCTURAL LIMITS OF CONSTITUTIONAL TORT JURISPRUDENCE**

The doctrine of constitutional tort in India emerged as a progressive judicial response to State-inflicted injustice. It reflects the judiciary's attempt to provide remedies where statutory frameworks are absent. However, constitutional tort jurisprudence, as it currently operates, is structurally incapable of delivering systemic justice for victims of wrongful prosecution. Constitutional tort is inherently reactive rather than preventive. It functions through ex post adjudication, addressing injustice only after harm has occurred. Victims must initiate litigation, approach constitutional courts, and persuade judges to exercise discretionary powers. This structure privileges access to legal resources and institutional literacy, thereby excluding the most vulnerable victims of wrongful prosecution.

Moreover, constitutional tort jurisprudence lacks normative clarity. Courts have not developed consistent principles governing eligibility, standards of proof, or quantum of compensation. In some cases, compensation is awarded for unlawful detention, in others, courts limit relief to declaratory remedies. This inconsistency reflects the absence of doctrinal consolidation.<sup>11</sup> Judicial reasoning often frames compensation as an exceptional remedy rather than a constitutional right. This language of exceptionality reinforces discretion and weakens entitlement. The absence of statutory benchmarks means that compensation operates as judicial charity rather than constitutional obligation. As a result, constitutional tort jurisprudence remains morally expressive but institutionally weak.

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<sup>8</sup> (1983) 4 SCC 141.

<sup>9</sup> (1993) 2 SCC 746.

<sup>10</sup> (1997) 1 SCC 416.

<sup>11</sup> Dianne L. Martin, *Distorting the Prosecution Process: Informers, Mandatory Minimum Sentences, and Wrongful Convictions*, 39 Osgoode Hall L.J. 513, (2001), <https://doi.org/10.60082/2817-5069.1472>.

Indian courts have repeatedly expressed deep moral concern for victims of wrongful detention and prosecution. Judicial language in compensation cases reflects empathy, constitutional conscience, and recognition of human suffering. However, sympathy alone cannot substitute for systemic capacity.

Courts are not institutionally designed to administer compensation regimes. They lack administrative infrastructure, rehabilitative mechanisms, and monitoring systems. Judicial orders of compensation are isolated interventions, not components of an integrated reparative system. This creates a structural mismatch. Courts recognize injustice but lack the institutional tools to repair it. Compensation becomes episodic, fragmented, and symbolic. Judicial sympathy thus operates in a vacuum of institutional incapacity. Without statutory frameworks and administrative bodies, courts cannot transform compassion into structure.<sup>12</sup>

### **INCONSISTENCY AND INEQUALITY IN COMPENSATION JURISPRUDENCE**

The discretionary nature of compensation produces deep inequality. Victims with access to constitutional courts, legal representation, and institutional support are more likely to receive relief. Marginalised individuals, undertrial prisoners, and socio-economically disadvantaged groups remain invisible. Compensation quantum varies widely across cases, with no objective criteria. Similar harms produce radically different outcomes. This inconsistency undermines the principle of equality before law. Judicial remedies become contingent on narrative persuasiveness, judicial temperament, and case visibility rather than objective rights. This creates a system of selective justice, where compensation is available to some but inaccessible to most.

India's legal architecture structurally erases victims of State-inflicted injustice. There is no category of "victim of wrongful prosecution" in statutory law. Legal recognition exists only for victims of offences, not victims of State power. This invisibility has normative consequences. What the law does not recognise, institutions do not repair. Victims of wrongful prosecution exist outside welfare schemes, rehabilitation frameworks, and victim support systems. Judicial sympathy acknowledges suffering, but institutional silence perpetuates abandonment. This produces a paradox of constitutional recognition without institutional protection.<sup>13</sup>

Judicial compensation often serves a symbolic function. They acknowledge wrongdoing, recognize suffering, and satisfy constitutional conscience. However, symbolism without structure produces moral satisfaction without material repair. Symbolic justice performs recognition but not reconstruction. It soothes institutional guilt without transforming institutional practice.

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<sup>12</sup> *Damages for wrongful arrest, detention and malicious prosecution - Liability issues*, 43 J. for Jurid. Sci., (2018), <https://doi.org/10.18820/24150517/jjs43.v1.4>.

<sup>13</sup> *Malicious Prosecution. Basis and Requisites of Action. Wrongful Institution of Patent Interference Proceedings*, 22 Harv. L. Rev. 230, (1909), <https://doi.org/10.2307/1324208>.

Compensation awards become moral statements rather than systemic solutions. They resolve individual cases without altering structural conditions that produce wrongful prosecution. This transforms justice into performance rather than practice.

India's compensation regime is defined by a persistent gap between recognition and repair. Courts recognized injustice, but institutions do not repair it. Sympathy is expressed, but structures remain unchanged. This gap reflects a deeper constitutional failure to translate moral values into legal architecture. Rights are recognized without remedies. Dignity is affirmed without restoration. Liberty is proclaimed without reparation. This gap is the defining feature of India's fragile compensation regime.

## **INTERNATIONAL HUMAN RIGHTS LAW AND THE DUTY TO COMPENSATE**

International human rights law treats wrongful prosecution and wrongful deprivation of liberty as grave violations of fundamental rights that generate a legal duty of reparation. This duty is not framed as moral sympathy or discretionary relief, but as enforceable legal obligation embedded in binding international instruments. Art. 9(5) of the International Covenant on Civil and Political Rights explicitly provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. Art. 14(6) further mandates compensation where a person has been convicted and subsequently exonerated due to a miscarriage of justice. These provisions establish compensation as a right, not charity.<sup>14</sup>

India, as a signatory to the ICCPR, has accepted these obligations internationally. However, the absence of domestic legislation implementing these provisions reflects a persistent normative gap between international commitment and constitutional practice. This gap reveals a form of institutional denial, where human rights are affirmed externally but neglected internally. UN human rights jurisprudence further conceptualizes reparation as a holistic obligation comprising restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. This framework recognizes that monetary compensation alone cannot repair structural injustice. Reparative justice must include psychological recovery, social reintegration, institutional reform, and symbolic restoration of dignity. Under international law, wrongful prosecution is thus not a procedural anomaly but a human rights violation that triggers comprehensive obligations of repair.

## **COMPARATIVE CONSTITUTIONAL MODELS OF COMPENSATION**

Comparative constitutional systems demonstrate that effective compensation regimes are built on statutory and institutional foundations rather than judicial discretion. These systems transform compensation from episodic relief into enforceable entitlement.

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<sup>14</sup> Jixi Zhang, *Fair Trial Rights in ICCPR*, 2 J. Pols. & L., (2009), <https://doi.org/10.5539/jpl.v2n4p39>.

In UK, compensation for miscarriages of justice is provided under Sec. 133 of the Criminal Justice Act, 1988, which implements Art. 14(6) of the ICCPR. In *R (Adams) v. Secretary of State for Justice*,<sup>15</sup> the UK Supreme Court clarified that compensation is payable where new evidence shows that no reasonable jury could have convicted the accused. In *R (Ali and others) v. Secretary of State for Justice*,<sup>16</sup> the High Court reaffirmed that compensation under this framework is a statutory entitlement rather than executive discretion. This model institutionalizes compensation through law, ensuring accessibility, predictability, and dignity-based justice.

In US, compensation for wrongful prosecution and wrongful conviction is governed primarily by state legislation. Over thirty-five states have enacted statutory compensation regimes. Although the US Supreme Court declined to constitutionalize innocence as a basis for relief in *Herrera v. Collins*,<sup>17</sup> legislative responses have filled this normative gap. In *District Attorney's Office v. Osborne*,<sup>18</sup> the Court reaffirmed that compensation mechanisms fall within legislative competence. State statutes typically provide monetary compensation per year of wrongful incarceration along with rehabilitative support, reflecting a restorative and reintegrative justice model.

In Europe, Art. 5(5) of the European Convention on Human Rights guarantees an enforceable right to compensation for unlawful detention. In *Wassink v. Netherlands*,<sup>19</sup> the European Court of Human Rights held that compensation must be real and effective, not symbolic. In *Brogan v. United Kingdom*,<sup>20</sup> the Court emphasised that unlawful detention constitutes a structural violation of liberty requiring remedial compensation. European jurisprudence thus treats compensation as part of constitutional accountability rather than discretionary relief. These comparative models demonstrate that compensation becomes meaningful only when institutionalised through statutory and administrative structures.

India's compensation regime stands in stark contrast to these models. While other jurisdictions institutionalize compensation through statutory rights and administrative mechanisms, India relies on discretionary judicial remedies and constitutional tort jurisprudence. This isolates India normatively and institutionally. Victims of wrongful prosecution remain dependent on litigation rather than rights. Compensation remains exceptional rather than universal. Rehabilitation remains absent. Accountability remains symbolic. India's framework reflects a form of constitutional minimalism, where moral recognition substitutes for institutional obligation. This isolation

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<sup>15</sup> [2011] UKSC 18.

<sup>16</sup> [2013] EWHC 72 (Admin).

<sup>17</sup> 506 U.S. 390 (1993).

<sup>18</sup> 557 U.S. 52 (2009).

<sup>19</sup> (1990) 14 EHRR 502.

<sup>20</sup> (1988) 11 EHRR 117.

weakens constitutional legitimacy. A State that recognizes rights but refuses structural repair erodes the moral foundations of constitutional governance.

The absence of a statutory compensation regime produces constitutional incoherence. Art. 21 guarantees liberty and dignity, but the legal system fails to guarantee repair when these rights are violated. Rights exist without remedies. This violates the foundational principle that rights must be accompanied by effective remedies. Without reparative structures, constitutional rights become aspirational rather than enforceable.

Judicial sympathy cannot compensate for legislative silence. Compassion cannot replace structure. Recognition cannot substitute repair. This normative failure reflects a deeper constitutional crisis in the relationship between rights and remedies. India's compensation regime is often described as "equitable". However, equity without structure produces arbitrariness. Discretion without standards produces inequality. Sympathy without systems produces injustice. Equitable compensation, in practice, becomes selective compensation. The language of equity masks the reality of exclusion. Those who can access courts receive relief. Those who cannot remain invisible. This transforms equity into elitism.<sup>21</sup>

A just compensation regime must shift from discretionary compassion to rights-based entitlement. Wrongful prosecution must be legally reclassified from procedural error to constitutional violation. This reconceptualization transforms compensation from judicial benevolence into State obligation. Reparation must be framed as a constitutional duty flowing from Art. 21, not as an extraordinary remedy. Liberty and dignity require restoration when violated by State power. Compensation must therefore operate as an enforceable right, not as judicial discretion.<sup>22</sup> This requires legislative recognition of wrongful prosecution as a distinct category of State injustice. India requires a dedicated Wrongful Prosecution and Miscarriage of Justice Compensation Act. This statute must define wrongful prosecution, wrongful detention, and miscarriage of justice as compensable injuries.

The statute must establish eligibility criteria, evidentiary standards, and burden of proof. Compensation must be automatic upon judicial expansion, acquittal based on innocence, or proof of procedural illegality. Quantum of compensation must be standardized through statutory guidelines based on duration of incarceration, psychological harm, social stigma, economic loss, and loss of opportunity. This transforms compensation into predictable entitlement rather than judicial lottery. Reparation requires institutions, not just courts. A National Compensation Authority must be established to administer claims, assess damages, disburse compensation, and

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<sup>21</sup> G.S. Bajpai, *Wrongful Prosecution in Terror Related Cases: A Criminal Law Critique*, 2018 SSRN Elec. J., <https://doi.org/10.2139/ssrn.3182362>.

<sup>22</sup> Rashaan A. DeShay & John L. Worrall, *Prosecution and Wrongful Convictions*, in *Encyclopedia of Criminology and Criminal Justice* 4070, (2014), [https://doi.org/10.1007/978-1-4614-5690-2\\_36](https://doi.org/10.1007/978-1-4614-5690-2_36).



monitor rehabilitation. This authority must include legal experts, psychologists, social workers, and human rights specialists. Compensation must be holistic, not merely monetary. Rehabilitation must include counselling, medical care, employment assistance, education reintegration, and identity restoration mechanisms. Reparative justice must restore life, not merely compensate for loss.

## **PREVENTIVE CONSTITUTIONALISM AND STRUCTURAL REFORM**

Compensation must be linked to prevention. Reparative regimes must incorporate institutional accountability mechanisms. Investigative accountability, prosecutorial responsibility, and judicial oversight must be integrated into compensation systems. Wrongful prosecution must generate institutional consequences, not merely financial payouts. This creates preventive constitutionalism, where repair and reform operate together. Compensation becomes deterrence. Justice becomes structural. Courts must shift from benevolent arbiters to constitutional guarantors. Their role must be to enforce statutory rights, not distribute discretionary compassion.

Judicial sympathy must evolve into judicial enforcement. This transformation strengthens constitutionalism by anchoring justice in institutions rather than personalities. India's compensation regime for wrongful prosecution reveals a tragic paradox, deep judicial empathy coexisting with systemic abandonment. Courts recognize suffering, but the State refuse's structure. Sympathy is abundant; systems are absent. This produces a model of justice that is morally expressive but institutionally empty. True constitutionalism requires more than recognition. It requires repair. It requires restoration. It requires structure. Until India moves from judicial sympathy to statutory architecture, from compassion to institutions, and from discretion to rights, compensation for wrongful prosecution will remain symbolic rather than transformative. Justice will continue to be performed, not practiced.

## **CONCLUSION & A WAY FORWARD**

Compensation, even when institutionalized, must not be misunderstood as a complete form of justice. Money cannot restore lost years, erased identities, broken families, or stolen social belonging. It cannot undo stigma, rebuild trust, or reverse psychological damage. At best, compensation is a symbolic and material acknowledgment of harm, not its reversal. Yet even this limited function becomes transformative only when embedded within a broader architecture of restorative justice. True reparative justice requires recognition, restoration, reintegration, and reform. Recognition affirms that harm occurred and that the victim was wronged by the State. Restoration seeks to rebuild dignity, agency, and autonomy. Reintegration ensures social belonging and economic stability. Reform prevents recurrence. Without this fourfold structure, compensation risks becoming transactional justice, a payment that closes files without healing lives.

India's failure is not merely legislative or institutional; it is conceptual. Wrongful prosecution is still treated as an aberration, not as a structural risk of coercive State power. This framing individualizes harm and absorbs institutions. A rights-based democracy must instead acknowledge wrongful prosecution as an inevitable systemic risk within criminal justice systems, requiring structural safeguards rather than moral apologies.

This reforming transforms the philosophy of constitutional accountability. The State ceases to appear as a benevolent authority that occasionally errs and emerges instead as a powerful institution that must be permanently accountable for the violence it can inflict on the law. Compensation thus becomes not charity, but democratic discipline. In this sense, reparative justice is not merely about victims; it is about constitutional integrity. A Constitution that cannot repair the harm it enables loses moral legitimacy. Liberty without restoration becomes an abstraction. Dignity without rehabilitation becomes rhetoric. Rights without remedies become symbolism.

A mature constitutional order does not fear institutional accountability. It embraces it as the foundation of legitimacy. Reparative structures strengthen, rather than weaken, the State by transforming power into responsibility and authority into accountability. Until India constructs this architecture of responsibility, its justice system will continue to produce what may be called procedural innocence but substantive injustice, acquittals without restoration, freedom without repair, and exoneration without dignity.

In such a system, victims are released from prisons but not from punishment. They exit cages but remain trapped in stigma, poverty, and silence. A constitutional democracy cannot accept this as justice. Repairing the irreparable may be impossible in a literal sense, but refusing to attempt repair is a deeper constitutional failure. The measure of justice is not whether harm can be undone, but whether the State accepts responsibility for the harm it causes and builds institutions to prevent its repetition. Until then, wrongful prosecution in India will remain not merely a legal failure, but a moral one, not merely a procedural defect, but a constitutional wound.