

Executive Accountability at Personal Level in India: In light of Insufficiency and Ineffectiveness of Compensatory Jurisprudence

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Abstract- Fundamental Rights are the most precious rights we as Indian have and even though such rights are not absolute and are capable of being taken away under certain circumstances, they are only allowed to be taken away as such at a high threshold. The branch of executives responsible for arresting and investigating are the police officials. It is expected of them to exercise extreme due care while taking away people's fundamental rights when the law demands such detention. Still, we have a lot of cases at our disposal that reflect absence of such due care resulting in gross violations of fundamental rights of people by way of unlawful detention, custodial torture, harassment, wrongful prosecution etc. The law tries to remedy such violations by providing monetary compensation and even that is not a statutory obligation on state. Only this remedy is insulting, ineffective and insufficient in preventing such instances. The need of the hour is fixing accountability at a personal level of those executive investigating and arresting officials who fail either negligently, carelessly or willingly cause such miscarriage of justice in form of fines, imprisonment, loss of office.

Indexed Terms- Compensation, Fundamental rights, Personal Accountability, Police, Violation

I. INTRODUCTION

Meaning of Irresponsible use of powers: A prosecution instituted maliciously against someone or a prosecution leading to acquittal instituted without reasonable or probable cause. Here, reasonable or probable cause would mean and honest belief in the guilt of accused based upon a full conviction, founded upon existence of circumstances which would lead an ordinary, prudent and cautious man to

the conclusion that the person charged is probably guilty of the crime imputed¹.

A prosecution instituted without 'good faith' would also be included within the purview of wrongful prosecution. This leads to abuse of legal process by wrongfully setting the law in motion. Section 52, IPC gives a negative definition of the term 'good faith', says that no act is done in good faith if it is done without "due care and attention" where due care denotes degree of reasonableness in the care sought to be exercised². When holding an office requiring skill or care, merely good intention is not enough but such care skill as the duty reasonably demanded for its due discharge. Absence of 'good faith' can, therefore, be understood to mean negligence or carelessness;³ i.e. a prosecution instituted negligently without due care and attention would also be included within this work.

What is the research problem?

Fundamental Right of Dignified Life and Liberty is one of the most important and cherished right that the people of this country have. But it is capable of being alienated, since no right is absolute. However, due to this right being the most basic and fundamental, the situations where it can be taken away must be special and having a high threshold. State machinery, primarily police have been given this power by the laws of this country. To preserve and protect these rights and to prevent the misuse, abuse or irresponsible use of such powers, there must be deterrence to such possibilities.

Simply put, Police has the power to take away our most basic fundamental rights if the legal prerequisites of a law are met, hence to make sure that police doesn't casually exercise such powers and snatch away people's fundamental right in a country

where bail applications can take years to be heard, and people have on record undergone decades (~40 years) in jail without trial⁴, they (police) must be faced with personal negative consequences such as Imprisonment, Fine and termination from office depending upon the gravity of mens rea involved.

The current system of compensatory jurisprudence fails to create a deterrent effect since there is no severe personal accountability instead people's money is given back to the people (victim of state in each instance) as compensation and that too doesn't happen often. The Protection of Human Rights Act, 1993, empowers the National Human Rights Commission to inquire into instances of illegal detentions, wrongful convictions, incarcerations, and other human rights violations. After conducting an inquiry, NHRC can recommend that the state government pay compensation and initiate proceedings against erring officials.

However, NHRC's recommendations are not binding on state governments. Its recent annual report 2018-19⁵ reveals that out of the 691 cases where compensation was recommended, governments complied only in 125 cases—just 18%. Its annual report 2019-20⁶ reveals that out of the 437 cases where compensation was recommended, governments complied only in 113 cases— just 25%. This shows that NHRC lacks power, both in ensuring compensation for miscarriages of justice, and in holding the officers accountable.

We all need something to lose to be on our best behavior, just like Citizens can face jail/fine if they break the law, people in private sector can lose jobs if they do not meet the requirements, police officials investigating and arresting people must be made accountable personally for their irresponsible use of these sacred powers.

When police gets the information of an offence (sue moto included), instead of just arresting accused because they can, they must ask themselves:

- What are the essentials of the offence in question?
- Do those essentials meet in present scenario in accordance with Supreme Court's interpretation?
- Is it absolutely a must to arrest said person?

- Are the circumstances of such a nature as to convince a reasonable, prudent and cautious man that the accused must have committed the offence in all probability he is being accused of?

Executive (police officials investigating and arresting) have these powers. There are numerous instances where people have suffered for decades and then acquitted by the High Courts or Apex Court.⁷

You have the power to take away my liberty; therefore you must be extra careful that you use such powers responsibly and not causally. But, if you do use them casually, then you must be held accountable personally.

Why is this research required?

There would not have been a need for research in this domain, had there were not millions of pending cases and overburdened state because in case where the courts and state machineries were not as burdened as they are today, it would be much easy for such people to get bail or released much sooner (If we were to be optimistic). However, since it is not the case and we are not living in utopia as much as we want to, we have to address this issue. Moreover, there is gap in existing research as far as it is concerned with Executive accountability on personal level.

Provisions for Arrest were not made to be used irresponsibly by the Executives. Courts keep saying that "Bail, (not Jail) is the Rule", but Police officials do arrest people simply because they can, just because the offence the accused is charged with is Cognizable (Accused can be arrested immediately without permission of court).

People get arrested, thrown in jail, stay under trial for decades and then acquitted a lot of times. No accountability to the Executive who were irresponsible in arresting without enough proof to be justifiably cost a man his right to life and liberty. In some cases compensation is given, but let's be honest, they don't pay it out of their pockets, but out of the taxpayer's money. They are never held accountable for what they did. No Penalty, No Fine, No Jail, No Job Termination, Nothing!!

We need more stringent standards regarding when to use the power of arresting persons, and throw them in the deep wells of justice system and also the consequences of not adhering to such standards by the police officials who do so.

Currently, majority of the discussion when it comes to providing remedy to victims of miscarriage of justice revolves around giving monetary compensation to those suffered. Is that enough?

The High Court of Delhi in its Order dated 30th May, 2017 in the case of Babloo Chauhan @ Dabloo vs. State Govt. of NCT of Delhi, 247 (2018) DLT 31, expressed grave concern about the state of innocent persons being wrongfully prosecuted, incarcerated for crimes that they did not commit. The Court highlighted the urgent need for a legislative framework for provided relief and rehabilitation to victims of wrongful prosecution, incarceration and asked the Law Commission to undertake a comprehensive examination of the aforesaid issued and make a recommendation thereon to the Government of India.

Internationally, the issue of wrongful prosecution, incarceration, and conviction of innocent persons is identified as ‘miscarriage of justice’ that takes place after a person has been wrongfully convicted but is later found to be factually innocent basis a new fact / proof coming to light.

Law commission’s 277th report, 2018 looks at the issue from the context of Indian Criminal Justice system and recommends ‘wrongful prosecution’ to be the standards of miscarriage of justice, as against ‘wrongful conviction’ and ‘wrongful incarceration’. ‘Wrongful prosecution’ would include cases where the accused was not guilty of the offence, and the police and / or the prosecution engaged in some form of misconduct in investigating and / or prosecuting the person. It would include both the cases where the person spent time in prison as well as where he did not; and cases where the accused was found not guilty by the trial court or where the accused was convicted by one or more courts but was ultimately found to be not guilty by the Higher Court.

The commission made many recommendations, one of those was, *‘The Commission at this time, accordingly, recommends enactment of specific legal provision for redressal of cases of miscarriage of justice resulting in wrongful prosecution - covering both the substantive and procedural aspects; i.e. a statutory and legal framework establishing the mechanism for adjudicating upon the claims of wrongful prosecution, and inter alia award payment of compensation by the State, if so determined. Consequently, creating a statutory obligation on the State to compensate the victims of wrongful prosecution, and a corresponding statutory right of compensation for the said victims. And, in such cases where the State pays compensation for the errant acts of its officials, it can seek indemnification from the concerned officials, and also initiate appropriate proceedings against them in accordance with law.’*

However, the law commission’s recommendations met the same fate as any other body whose advice is not binding on the government. That is why we, as members of research fraternity should strive to bring this issue into light.

II. INSTANCES OF HUMAN RIGHT AND FUNDAMENTAL RIGHTS VIOLATION IN INDIA

Jagjivan Ram Yadav, arrested in 1968 released on bail after about 40 years in 2006 without even charges being framed against him for killing his sister-in-law because the authorities had lost the papers. He was forgotten by the authorities until Supreme Court released him out on bail at the age of 70 in 2006. His family had long ago given him up for dead⁸.

Shankar Dayal, arrested in 1961 for allegedly attacking a fellow villager with knife shockingly spent 45 years in jail awaiting trial for a crime that carries a three-year sentence if he had been convicted. In 2006, it was finally decided by authorities to try and free him in a few weeks⁹.

Vishnu Tiwari, arrested in 2000 for allegedly raping and committing offences under SC/ST (Prevention of Atrocities) Act on complaint of a women from his village, who said that Vishnu assaulted her while returning from the fields. In January, 2021,

Allahabad High Court declared him innocent and acquitted him after 20 years in prison after observing that he was wrongfully convicted. Tiwari was 43 years old at the time of acquittal with 600 rs. in hand that he received from jail authorities with the knowledge that almost all his family members are dead except his younger brother¹⁰.

Habil Sindhu, an Orissa tribal man arrested in 2003 for allegedly murdering 3 people including a two year old boy. He was convicted by the trial court and finally acquitted by the Sessions Court in 2021 after 18 years in prison living as a convict at the age of 48. According to the prosecution, Sindhu had brutally murdered two young men and a baby, who were his neighbors, on January 1, 2003 in course of his practice of witchcraft. Unable to afford a competent lawyer to defend him in the case, Sindhu had relied on a government lawyer. When he appealed against the conviction in the high court, the superior court observed that he was not properly defended in the case and that there were inconsistencies in the trial. The HC ordered that a retrial be conducted with an experienced and competent lawyer representing Sindhu. 'It is clear that the police, without conducting a proper investigation, had charged an innocent man with three murders. He (Sindhu) lost 18 precious years of his life behind the bars. We will soon approach the high court to ensure that he gets compensation for it as per the law,' said his lawyer Asit Kumar Otta¹¹.

127 Muslim Men who attended a seminar on Muslim education were arrested in year 2000 on charges of terrorism and after 20 years acquitted by a Surat Court in year 2020. 5 out of 127 men died while prison. Police arrested all of them under various sections of the Unlawful Activities (Prevention) Act (UAPA), a stringent anti-terror law, and charged them with being members of the banned Students Islamic Movement of India (SIMI) and for organizing the meeting to "promote and expand" SIMI's activities. The Surat court, in its March 6, 2021 order, said the prosecution had failed to produce "cogent, reliable and satisfactory" evidence to establish the accused belonged to SIMI or had gathered to promote the group's activities. The court ruled they cannot be held guilty under UAPA¹².

Ali Mohammad Bhatt, arrested since 1996, acquitted in 2019 by Rajasthan High Court, 23 years after he was accused of terror attacks in Delhi and Rajasthan, branded a terrorist and left to rot in prison, 48-year-old Ali Mohammad Bhat returned home to Srinagar, only to find his parents had died of heartbreak while he languished in jail for a crime he never committed. The Rajasthan High Court acquitted Bhat earlier this week after the prosecution failed to provide evidence of a conspiracy and link between him and main accused Dr Abdul Hameed. Bhat returned home a free man, but one who had more than two decades of his life stolen from him¹³.

These are only a few examples of gross lack in meeting the standard due care that the police officials investigating and arresting an accused must adhere to.

III. STATUTORY REMEDY IN INDIA FOR WRONGFUL ACCUSATION

Section 250 of the Code of Criminal Procedure makes special provision for the payment of compensation to the accused person in cases where he is discharged or acquitted on the ground of finding no reasonable ground existing for initiating such prosecution. Section 250 of the Code of Criminal Procedure, covers only those specific cases where case has been instituted upon a complainant or upon the information given to police or to the Magistrate accusing some person of having committed certain act or offence triable by a Magistrate and the case should have been ended in an acquittal when the Magistrate trying the case should have found that complaint or the information given was false and either frivolous then the Magistrate may order the informant to pay compensation. However, such an order for compensation cannot exceed the amount of fine the magistrate is empowered to impose as per CrPC.

The amount of fine that can be imposed by a magistrate of first class is Rs. 10,000 and by a magistrate of second class is Rs. 5,000 as per section 29 of the CrPC. Clearly, this is too little to remedy cases of gross human rights violation as discussed above.

Section 358 applies when any person has been caused to be arrested by the police, at the instigation of a person and the Magistrate finds that such arrest was caused on insufficient grounds, than he may order a sum of rupees not exceeding one thousand¹⁴ to be paid to the victim of such arrest. In these instances the State is to proceed against the erring officials and release the amount awarded as compensation. Section 358 aims at protecting the constitutionally guaranteed personal liberty of the person under Article 21 of the Constitution of India and also save them from illegal and arbitrary arrest, even without reference to any accusations or charge leveled against such person¹⁵.

IV. JUDICIAL INTERVENTION IN REMEDYING VICTIMS OF MISCARRIAGE OF JUSTICE

The Constitution of India did not have provisions relating to compensation for victims of violation of fundamental rights by actions of state directly or through its agents. It was the Hon'ble Supreme Court however, which came up with the idea of compensatory jurisprudence by liberally interpreting the provisions of the constitution harmoniously such as Article 32, Article 21 etc. The Supreme Court was of the opinion that there was no point in constitutional remedies until and unless it is supported by monetary compensation to the victim for the wrongful violation of his fundamental rights by agents of state.

The jurisprudence of granting compensation to the victim on violations of their fundamental rights on the hands of state and its agents started with the famous ruling of Hon'ble Supreme Court in *Rudal Shah v. State of Bihar* in 1983 by giving a liberal interpretation of Article 21 of the Constitution of India, 1950. In this case, the petitioner Rudal Shah was unlawfully kept in detention for 14 years after the order of his release and was paid 30,000 Rs. compensation after his representatives filed a writ petition of *habeas corpus* under article 32 of the Constitution of India for his release. The Apex Court held that 'the petitioner's detention in the prison after his acquittal was wholly unjustified'¹⁶. This case brought about a revolutionary breakthrough in human rights jurisprudence by granting monetary compensation to an unfortunate victim of State

lawlessness on the part of the Bihar Government for keeping him in illegal detention for over 14 years after his acquittal of a murder charge.

Later, in 1986, the Apex Court again dealt with a writ petition of *habeas corpus* under article 32 of the Constitution of India in the case of *Bhim Singh v. State of Jammu and Kashmir* where again the police officials were found to be guilty of unlawful detention. Petitioner was illegally arrested and detained, therefore preventing him from attending the assembly session and thus, depriving him of his constitutional rights. He was awarded Rs. 50,000 as compensation for violation of his fundamental rights¹⁷.

The court has also granted compensation of Rs. 1,50,000 to victims of custodial violence as in the case of *Nilabati Behra v. State of Orissa* in 1993 to the mother of the deceased who died while in custody due to torture.¹⁸

Later, in 1997, the Apex Court also laid down 11 pointer guidelines in the case of *D. K. Basu v. State of West Bengal* till necessary legislations are made in matters of arrest or detention to be followed by the police officials failing to comply with the above requirements, apart from rendering the official concerned liable for departmental action, would also render him liable to be punished for contempt of court and the proceedings for contempt of court could be instituted in any High Court of country, having territorial jurisdiction over the matter. These guidelines are as follows;

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

2. That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also

be countersigned by the arrestee and shall contain the time and date of arrest.

3. A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person know to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

4. 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 within a period of 8 to 12 hours after the arrest.

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

6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the 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.

7. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, 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 and the police officer affecting the arrest and its copy provided to the arrestee.

8. The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.

9. Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illegal Magistrate for his record.

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

11. A police control room could be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."¹⁹

Since then, hundreds of Supreme Court and High Court judgments are following the jurisprudence of providing compensation to the victims of fundamental rights on the hands of state or its agents. But no mitigation in such instances reflects that this is ineffective and insufficient to actually prevent cases of miscarriage of justice.

Analyzing these judgments, it can be seen that the best the judiciary can do is give compensation to the victim. But to effectively prevent such gross lapse in due care while dealing with the most precious rights the Constitution provides to the people, what we need is not just compensatory jurisprudence rather a mix of compensatory and penal jurisprudence that simultaneously address the need of the rehabilitation of victim and the personal accountability of executive officials involved in the violation of the fundamental rights of the victim.

V. CAN INTERNATIONAL LAW HELP?

India is a party to ICCPR. Under Article 9(5) of the ICCPR, it says;

'5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.'

Under para 41 of the final report submitted in 1993 by Professor Theo van Boven, then United Nations Special Rapporteur on the right to restitution, compensation, and rehabilitation for the victims of gross violations of human rights and fundamental freedoms, he had noted *"The issue of State responsibility comes into play when a State is in breach of the obligation to respect internationally recognized human rights. Such obligation has its*

legal basis in international agreements, in particular international human rights treaties, or in customary international law."²⁰

India is also a signatory to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment since 1997 but has not ratified it. Article 14 of the convention says;

'1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.'

India's delay in ratifying such instruments intended for the purpose of protecting human rights have met with criticism from all directions all over the world.

However, monistic theories of International law find no application in contemporary world order other than simply putting an ethical obligation on the state. Indian State ratified International Covenant on Civil and Political rights in 1979 with reservations declaring *'Further under the Indian Legal System, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State.'*²¹ Such a reservation is within the legal competence of the Parliament no matter how much one argues against it. Hence, one cannot make the argument technically that India is in breach of its International obligation by not having created a right to compensation as a legally enforceable right. If such a right is created in India for victims of human rights and fundamental rights violation on the hands of executives (police officials investigating and arresting), it would still be a partial step towards preventing such instances in the first place. There have been articles arguing for making the remedial compensation as a legally enforceable right²² but even that is ineffective to prevent such violation of human and fundamental rights by the executive (police officials investigating and arresting) for the reasons of lack of a mechanism fixing their accountability at a personal level rather than spending

taxpayer's money as a deflecting tool to *shush* the victim and society when violations are done on the part of police officials responsible for investigating and arresting the accused.

CONCLUSION

International law can't help us until Indian Parliament makes a law in sync with the utopian models of International Human rights law. Indian Judiciary must not be left to decide each and every case separately based on its discretion in absence of a law in place. Which puts this task of convincing our people and in turn our political representatives that such a law is the need of the hour, on shoulders of people from academic and research community to write papers based on rational and articulated thoughts to put pressure on policy makers to formulate such a law creating a mechanism that demands high standard of care on executive (police officials investigating and arresting) failing to meet which they could face personal penal accountability that might include loss of office, exemplary fines, imprisonment etc.

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