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Judicial Trend in Protecting Human Rights of Persons in Police Custody*

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Abstract
A person is not liable to be arrested merely on the suspicion of complicity in an offence. The date and time of arrest shall be recorded in the memo which must also be countersigned by the arrestee. The right to counsel begins when a person is being interrogated and continues through pre-trial stages to trial and into appeal since it is an essential ingredient of the reasonable, fair, and just procedure. It would be prudent for the police officer to allow a lawyer where the accused wants to have one at the time of interrogation if he wants to escape the censure that the interrogation is carried on in secrecy by physical and psychic torture. However, these formalities are not followed in all cases and all countries. The higher police officials, even though they may privately be critical of the actions of the lower officials, are tending to protect their fellowmen or the government from civil liability.
Keywords: Arbitrary Arrest; Custodial Death; Judicial Review; Torture, Victim

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Tren Peradilan dalam Melindungi Hak Asasi Manusia dalam Penahanan Polisi

Abstrak
Seseorang tidak bertanggung jawab untuk ditangkap hanya karena dicurigai terlibat dalam suatu pelanggaran. Tanggal dan waktu penangkapan harus dicatat dalam memo yang juga harus ditandatangani oleh orang yang ditangkap. Hak atas nasihat dimulai ketika seseorang diinterogasi dan berlanjut melalui tahap pra-peradilan hingga persidangan dan naik banding karena ini merupakan unsur penting dari prosedur yang masuk akal, adil, dan adil. Akan lebih bijaksana bagi petugas polisi untuk mengizinkan pengacara di mana terdakwa ingin memilikinya pada saat interogasi jika dia ingin menghindari kecaman bahwa interogasi dilakukan secara rahasia dengan penyiksaan fisik dan psikis. Namun, formalitas ini tidak diikuti di semua kasus dan semua negara. Pejabat polisi yang lebih tinggi, meskipun mereka secara pribadi mengkritik tindakan pejabat yang lebih rendah, cenderung melindungi sesamanya atau pemerintah dari pertanggungjawaban perdata.
Kata Kunci: Penangkapan Sewenang-wenang; Penahanan Mati; Peninjauan Kembali; Penyiksaan; Korban

Судебные Тенденции В Защите Прав Человека При Содержании Под Стражей В Полиции

Аннотация
Никто не может быть арестован только по подозрению в причастности к преступлению. Дата и время ареста должны быть записаны в памятной записке, которая также должна быть подписана арестованным. Право на консультацию начинается с допроса человека и продолжается на досудебной стадии до суда и апелляции, поскольку это важный элемент разумной и справедливой процедуры. Было бы разумно, если бы полицейский допустил адвоката, которого обвиняемый хочет иметь во время допроса, если он хочет избежать критики в связи с тем, что допрос проводится тайно с применением физических и психологических пыток. Однако эта формальность соблюдается не во всех случаях и не во всех странах. Высокопоставленные полицейские, даже если они лично критиковали действия низших должностных лиц, как правило, защищали себя или правительство от гражданской ответственности.
Ключевые Слова: Необоснованный Арест; Смерть В Условиях Содержания Под Стражей; Судебный Пересмотр; Пытки, Жертва.

A. INTRODUCTION

The actions of the police are subjected to effective judicial review and control especially when the police are called upon to carry out judicial mandates in areas in which police are left with discretion to develop their policies within broad legislative or judiciary fixed limits. It is a relief that while the criminal justice system comprising of police very often violates custodial rights, the judiciary tries to protect and promote human rights. This human rights-oriented trend of the judiciary is often criticized by the police people especially those who are inclined to commit torture. They blame the Apex Court and some of its judges as bleeding heart liberals, as impractical idealists, as arm-chair theoreticians, etc. The court, on the contrary, churns out judgments that fret and frown on the delinquencies and the derelictions of police. The result is that our system of criminal justice has a double-face; one hurts and the other tries to heal.

B. METHODS

This legal study employed a non-doctrinal approach. The legal approach was carried out by interviewing victims of police atrocities. This study aims to collect, explain, systematize, analyze, interpret, and assess the views of various facets of society. The data used in this study are primary obtained from police officers, judges, and other functionaries of the Criminal Justice Administration. The collected data, both primary and secondary, were then analyzed using descriptive qualitative methods.

C. RESULTS AND DISCUSSION

The judiciary especially, the Supreme Court of India, through successive decisions developed many valuable rights of an arrested person through human rights jurisprudence. The people, especially the intelligentsia who stand for the protection of human rights very often knock on the doors of the judiciary seeking relief and redressal to the violations of these rights. These rights are discussed below.

1. Right against Arbitrary Arrest and Detention

Article 22 was initially taken to be the only safeguard against the legislature in respect of laws relating to deprivation of life and liberty protected by Article 21(*A.K. Gopalan V. State of Madras,* A.I.R. 1950 S.C. 27). But the position of Article 21 underwent a sea change since *Maneka Gandhi v. Union of India*

(A.I.R. 1978 S.C. 597). Now Article 21 itself has become an almost inexhaustible source of restraint upon the legislature. Consequently, the relationship between Articles 21 and 22 has drastically changed, rather reversed.

Earlier 'the procedure established by law' for depriving a person of his life or liberty under Article 21 drew its minimum contents from Article 22 and Article 21 had nothing to offer to Article 22. But now the matters on which Article 22 is silent draw their contents from Article 21 This is particularly true in respect of laws relating to preventive detention which in addition to Article 22 have also to conform to the requirements of Article 21 at least to the extent to which such requirements are not inconsistent with the express provisions of Article 21. Thus Constitution has given the vital right to an individual that the Supreme Court observed:

> "It may be pointed out that our Constitution is a unique document. It is not a mere pedantic legal text but it embodies certain human values, cherished principles, and spiritual norms and recognizes and upholds the dignity of man. It accepts the individual as the focal point of all development and regards his material, moral and spiritual development as the chief concern of its various provisions. It does not treat the individual as a cog in the mighty all-powerful machine of the State but places him at the centre of the constitutional scheme and focuses on the fullest development of his personality…But all these provisions enacted to ensure the dignity of the individual and provide for his material, moral and spiritual development, would be meaningless and ineffectual unless there is rule of law to invest them with life and force." (A.I.R. 1982 S.C. 1325.)

In Joginder Kumar v. State (A.I.R. 1994 S.C.W. 1886.), the Supreme Court opined that the doctrine of personal liberty guaranteed by the Constitution would in effect except that no arrest should be made merely because it is lawful for the police to do so. The Apex Court observed:

> "No arrest can be made because it is lawful for the police officer to do so. The existence of the power of arrest is one thing. The justification for the exercise of it is quite another... No arrest should be made without a reasonable satisfaction reached after some investigation about the genuineness and bonafide of a complaint and reasonable belief as to the person's complicity and even to the need to effect his arrest... A person is not liable to be arrested merely on the suspicion of complicity in an offense… Except in heinous offenses, an arrest must be avoided..."

2. Right to be Informed of the Ground of Arrest

In *Ajaib Singh v. State of Punjab* (A.I.R. 1994 S.C.W. 1886), Supreme Court considered the arrest aspect of Article 22(1) and (2) in an arrest made

under section 50(1) and (2) of the Code of Criminal Procedure, in detail and it was concluded that Article 22(1) and (2) applied to cases of the arrest made without a warrant and it was unnecessary to apply them to arrests made under warrant. It was necessary to apply the provision of Article 22(1) of the Constitution in the case of the arrest made without a warrant because the immediate application of the judicial mind to the legal authority of the person making arrest and the regularity of the procedure adopted by him can be ensured.

The reason advanced by the Supreme Court in *Ajaib Singh* was reiterated in *Raj Bahadur (Raj Bahadur v. Legal Remembrancer,* A.I.R. 1953 Cal. 522).

Articles 22(1) and (2) were held to have been designed to give protection against the executive act or other non-judicial authority. But in *State of U.P. v. Abdul Samad* (A.I.R. 1962 S.C. 1506), Justice Subba Rao observed that arrest and detention of a foreigner for deportation were not outside the scope of Article 22(1) and (2).

Also in *State of Madhya Pradesh v. Shobharam (*A.I.R. 1966 S.C. 1910), Justice Hidayatullah observed: "Arrest is arrest whatever the reason. In so far as the first part of Article 22(1) is concerned it enacts a very simple safeguard for persons arrested. It merely says that an arrested person must be told the grounds of his arrest. In other words, a person's liberty cannot be curtailed by arrest without informing him, as soon as is possible, why he is arrested. Where the arrest is by the warrant, the warrant itself must tell him, where it is by an order, the order must tell him, and where there is no warrant or order the person making the arrest must give him that information. However, the arrest is made this must be done and that is all that the first part of Article 22(1) lays down. I find nothing in Article 22(1) to limit this requirement to arrests of any particular kind. A warrant of a court and an order of any authority must show on their face the reason for the arrest. Where there is no such warrant or order, the person making the arrest must inform the person of the reason for his arrest. In other words, Article 22(1) means what it says in its first part."

In this case, Justice Bachawat and Justice Shelat observed: "Every person is prima face entitled to his liberty. If any person is arrested, he is entitled to know forthwith why he is being deprived of his liberty, so that he may take immediate steps to regain his freedom."

To make provision for informing the person to be arrested, the ground of his arrest, Supreme Court in *Sheela Barse v. State of Maharashtra* (A.I.R. 1983

S.C. 378.), issued the following direction: "Whenever a person is arrested by the police without a warrant he must be immediately informed of the ground of his arrest and in case of every arrest it must immediately be made known to the person arrested that he is entitled to apply for bail ... As soon as a person is arrested the police must immediately obtain from him the name of any relative or friend whom he would like to be informed about his arrest and the police should get in touch with such relative or friend and inform about his arrest.".

To bring transparency and accountability in arrest and detention the Supreme Court has made a useful and effective method to structure appropriate machinery for contemporary recording and notification of all cases of arrest. The court said:

> "In addition to the statutory and constitutional requirements...it would be useful and effective to structure appropriate machinery for contemporaneous recording and notification of all cases of arrest and detention to bring in transparency and accountability. The officer arresting a person should prepare a memo of his arrest at the time of arrest in the presence of at least one witness who may be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. The date and time of arrest shall be recorded in the memo which must also be countersigned by the arrestee." (*D.K.Basu* v. *State of West Bengal*, A.I.R. 1997 S.C. 610.)

3. Right to Counsel at the Time of Police Interrogation

In re Llewelyn Evans (A.I.R. 1926 Bom. 551), the Bombay High Court held that accused should be "not only at liberty to be defended at the time of judicial proceedings but also that he should have a reasonable opportunity, if in custody, of getting into communication with his lawyer". This view was reiterated by the Lahore High Court in the case of *Sunder Singh v. Emperor* (A.I.R. *1930 Lah 945*).

In *Amolak Ram v Emperor* (A.I.R. 1932 Lah 13), the Court held that "the person who is arrested merely on suspicion" is also entitled to have legal access when in police custody. Thus the right to consult and to be defended by a legal practitioner consists of two parts viz; the right to consultation when the accused is in custody and defence at the time of trial.

In *Moti Bai v. State* (*1954 Cr.L.T. (Raj) 1591),* where the applicant was arrested and detained by the police, the Rajasthan High Court considered it as an infringement of the constitutional rights under Article 22(1) and right conferred by section 340 (1) of the Code of Criminal Procedure, 1973. It was

found that "ever since his arrest the accused has a right to be consulted by a legal advisor of his choice and to be defended by him".

It was further observed that the Indian Evidence Act, 1872 by a specific provision under section 126 prescribes that all communications are to be treated as privileged "between a client and his counsel". So it is evident that communication between client and counsel will not be confidential if the police officials are within the earshot of such consultation. Further, such consultation must be not only between the accused and his lawyers but also between his friends and relations out of the hearings of the police officer.

However, it was held by the Supreme Court that the choice of consulting and being represented by a legal practitioner of one's choice, though a right constitutionally guaranteed, is not an absolute right in terms of practice. (*Tara Singh v. State*, A.I.R. 1951 S.C. 441, p. 452) Article 22 does not guarantee any absolute right to be supplied a lawyer by the State. Nor does the clause confer any right to engage a lawyer who is disabled under the law.

The right guaranteed is only to have the 'opportunity to engage a competent legal practitioner of his choice. It has been further held that this right to counsel is not limited only to the persons arrested but can be availed of by any person who is in danger of losing his liberty.

In-*State of M.P. v. Shobharam* (A.I.R. 1966 S.C 1910), Hidayatulla, J. held that there is nothing in Article 22(1) that limits the protection to cases of the arrest made by the executive or other non-judicial authorities. The two other judges, Bachawat and Shelat, JJ. constituting the majority, left the question open.

Similarly in *State of Punjab v. Surinder Singh* (1965 Cri. L.T. 161 (P & H).), the court held that there is no hard and universal application that no questioning or interrogation can ever be made by police of an accused unless his counsel is called. The court thought that in such a case the police would be at the mercy of lawyers who may adopt dilatory tactics by taking adjournments and may not permit any questioning at all.

The opportunity to consult counsel has made by the court through *Sheela Barse* case (A.I.R. 1983 S. C. 378.) held that "whenever a person is arrested and taken to the police lock-up, intimation of the fact of such arrest must immediately be given to the nearest legal aid committee so that immediate steps can be taken to provide legal assistance to the arrested person at State cost. It is necessary to protect the accused from torture and ill-treatment or oppression and harassment at the hands of his custodian."

Even before *Sheela Barse's case*, the availability of legal aid at the preliminary stage was highlighted by the Supreme Court in *Nandini Satpathi v. Dani* (A.I.R. 1978 S.C. 1073), which was followed in *Khatri v. State of Bihar* (A.I.R. 1981 S.C. 928.), wherein it was laid down: "Constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the Magistrate."

Thus the right to counsel begins when a person is being interrogated and continues through pre-trial stages to trial and into appeal since it is an essential ingredient of the reasonable, fair, and just procedure. It would be prudent for the police officer to allow a lawyer where the accused wants to have one at the time of interrogation if he wants to escape the censure that the interrogation is carried on in secrecy by physical and psychic torture.

4. Right against Capricious and Unnecessary Handcuffing

In S*unil Batra (II) v. Delhi Administration* (A.I.R..1980 S.C.1579.), the Supreme Court observed: The routine resort to handcuffs and iron bespeaks a barbarity hostile to our goal of human dignity and social justice.

In *Kishor Singh v. State of Rajasthan* (A.I.R. 1981 S.C. 625), the Apex Court expressed its deep concern in the issue as follows:

> "(N)o police life-style which relies more on fists than on wits, on torture than on culture can control crime because means boomerang on ends and re-fuel the vice which it seeks to extinguish. Secondly, the State must re-educate the constabulary out of their sadistic arts and inculcate a respect for the human person - a process which must begin more by example than by precept if the lower rungs are really to emulate … Nothing is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts a deeper wound on our Constitutional culture than a State official running berserk regardless of human rights".

In *Prem Shankar Sukla v. Delhi Administration* (A.I.R. 1980 S.C. 1535.), the Court reacted against handcuffing that handcuffs should not be used in the routine. They are to be used only when the person is 'desperate', 'rowdy', or is involved in a non-bailable offence.

In this case, Justice Krishna Iyer also observed: "Handcuffing is *prima-facie* inhuman and, therefore, unreasonable is over-harsh and at the first flush, arbitrary. Absent fair procedure and objective monitoring, to inflict `irons' are to resort to zoological strategies repugnant to Article 21."

The high-handedness of the police authorities was brought to the light in *Delhi Judicial Service Asson, Tis Hazari Court v. the State of Gujarat* (A.I.R. 1991 S.C. 2176.) *(popularly known as Nadiad* case). The case exhibited the berserk behaviour of police undermining the dignity and independence of the judiciary. The Supreme Court took serious note of the whole incident and laid down detailed guidelines which are to be followed in case of arrest and detention of a judicial officer.

In this case, the inspector of police of Nadiad police station arrested, assaulted, and handcuffed the Chief Judicial Magistrate of Nadiad town and tied him with a thick rope-like animal with the object of humiliating him as he had been policing the police by his judicial orders. The guilty police inspector was given simple imprisonment for six months and was also directed to pay a fine of Rs.2000. The court also sent other guilty police officials to jail and imposed a fine and further directed the State Government to take disciplinary action against them.

For handcuffing and parading of undertrial prisoner, the State and not the policeman is directed to pay compensation in the *State of Maharashtra v. Ravikant S. Patil* ((1991) 2 S.C.C. 373).

In this case, an undertrial prisoner was handcuffed and taken through the streets in a procession by police during the investigation. The prisoner filed a writ petition before the High Court of Bombay. The High Court held the police officer guilty of the violation of fundamental rights under Article 21 of the Constitution of India and directed the Police officer to pay Rs.10,000/- as compensation to the respondent. Against the order, the State filed an appeal. The Supreme Court held that the police officer cannot be made personally liable and directed the State to pay Rs.10,000/- as compensation to the person illegally detained.

Despite so many eye-opening judgments police resorted to handcuffing in many cases like *Altemesh Rein* v. *Union of India* (A.I.R. 1988 S.C. 1768.), *Harbans Singh* v. *State of U.P* (A.I.R. 1991 S.C. 531.), and *Sunil Gupta* v. *State Madhya Pradesh* ((1990) 3 S.C.C. 119.), *Khedat Mazdoor Chetna Sangath* v. the *State of M.P.*((1994) 6 S.C.C. 260, A.I.R. 1995 S.C. 31.), etc.

5. Right against Torture and Custodial Death

The Supreme Court is of the view that any form of torture or degrading treatment is offensive to human dignity and violative of Article 21 of the

Constitution. (*Francis Mullin v. Union Territory of Delhi*, A.I.R. 1979 S.C. 746.) Hoping that the roots of third-degree would be plucked out, he said: "Art.21 with its profound concern for life and will become dysfunctional unless the agencies of the law in the police and prison establishments have sympathy for the humanist creed of that Article.". In *Kishor Singh v. State of Rajasthan* (A.I.R. 1981 S.C. 625.), severe strictures were passed by the Court against the police force for its gruesome act of torture. Denouncing third-degree methods of the police, Krishna Iyer, J. has observed:

> Nothing is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts a deeper wound on our constitutional culture than a State official running berserk regardless of human rights.

The Court has observed:

> "The Police, with their wide powers are apt to overstep their zeal to detect crimes and are tempted to use the strong arm against those who happen to fall under their secluded jurisdiction. That tendency and that temptation must in the larger interest of justice, be nipped in the bud".

The Supreme Court of India and various High Courts have condemned custodial violence and spoken strongly against it. They have proposed stringent punishment for custodial violence.

In *Raghubir Singh v. the State of Haryana* (A.I.R. 1980 S.C. 1087) the court hoped that "the State, at the highest administrative and political levels, will organize special strategies to prevent and punish brutality by police methodology. Otherwise, the credibility of the rule of law in our republic *vis-à-vis* the people of the country will deteriorate.".

The court suggested:

> "No police lifestyle which relies more on fists than on wife, on torture than on culture can control crime because means boom rang on ends and re-fuel the vice which it seeks to extinguish …. The state must re-educate its constabulary out of their sadistic arts and inculcate a respect for the human person."

In *D.K. Basu v. the State of W.B. (*(1997)1 S.C.C. 416.) the Supreme Court observed: "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 and whenever human dignity is wounded, civilization takes a step backwards-flag of humanity must on each such occasion fly half-mast"., p. 424. In this case, the Supreme Court has rightly condemned the use of torture by the police. The Supreme Court observed:

"Custodial violence, including torture and death in the lock-ups, strikes a blow at the rule of law…."

Gauri Shankar Sharma v. State of U.P.(A.I.R. 1990 S.C. 709.), is a typical case of a police officer trying to rescue his colleague by giving evidence favourable to the accused policeman. Restoring the conviction and sentence of 7 years by the trial court and rejecting the plea for substitution of imprisonment by fine, the Supreme Court rightly observed:

> The offence is seriously aggravated by the fact that it was committed by a person who is supposed to protect the citizens and not misuse his uniform and authority to brutally assault them while in his custody. Death in police custody must be seriously viewed for otherwise, we will help take a stride in the direction of police raj. It must be curbed with a heavy hand. The punishment should be such as would deter others from indulging in such behaviour. There can be no room for leniency.

In January 1985 the then Chief Justice of India noted that only rarely was eye-witness's testimony of torture leading to death available, other than from police officers who tend to be more concerned to conceal than to acknowledge what has occurred. The Supreme Court said that it wished to "impress upon the government the need to amend the law so that the burden of proof in cases of custodial death will be shifted to the police".

The Chief Justice made this observation after the Allahabad High Court had acquitted certain police officers of torturing to death a suspect in Uttar Pradesh because there was insufficient evidence to prove the case beyond a reasonable doubt. Prompted by the Allahabad High Court's decision, the Supreme Court proposed amending the Evidence Act to ensure that police officer who commits human rights violations against people in their custody should not evade punishment due to a "paucity of evidence".

6. Protecting the Rights of Women

In *Sheela Barse v. State of Maharashtra* (A.I.R. 1983 S.C. 378.), the Supreme Court made several directions and suggestions to the State Government to prevent the recurrence of police torture. However, these sensible directives have not been implemented by the vast majority of officials, police, and Magistrates. No wonder cases like that of *State of U.P. v. Ram Sagar Yadav* (A.I.R. 1985 S.C. 416.), continue to take place.

In this case, the Court observed: "Before we close, we would like to impress upon the Government the need to amend the law appropriately so

those policemen who commit atrocities on persons who are in their custody are not allowed to escape because of paucity or absence of evidence. Police Officers alone, and none else can give evidence as regards the circumstances in which a person in their custody comes to receive injuries while in their custody. Bound by ties of a kind of brotherhood, they often prefer to remain silent in such situations and when they choose to speak, they put their gloss upon facts and pervert the truth. The result is that persons, on whom atrocities are perpetrated by the police in the sanctum sanctorum of the police station, are left without any evidence to prove who the offenders are. The law as to burden of proof in such cases may be re-examined by the legislature so that hand-maids of law and others do not use their authority and opportunities for oppressing the innocent citizens who look to them for protection."

When the Court's attention was drawn to horrible conditions in custodial institutions for women and girls in cases like *Dr Upendra Baxi and others* v. *the State of U.P* (A.I.R. 1987 S.C. 191), and *Christain Community Welfare Council of India and another* v. *Government of Maharashtra and others* (1995 Cri. L.J. 4223 (Bom).), the Court issued detailed procedures to ensure enforcement of human rights of women and girls in police and prison custody.

To protect the rights of arrested women the Bombay High Court issued the following directions: "Not only taking away a lady forcibly in the mid-night by male police officials was a deplorable but gross and blatant abuse of power shows that such police officials have no regard for public morality and decency. It is, therefore, imperative that the State Government immediately looks into this aspect of the matter and issues directions to all the police stations in the State providing guidelines relating to the arrest of female persons in the State.

The State should ensure that no lady or female person is arrested without the presence of a lady constable and in no case, after sun-set and before sun-rise and if there are already rules or guidelines to that effect, these are to be strictly followed and complied with. We direct that the State Government should make proper provision for female detainees separately throughout the State in separate lock-ups and all other safeguards preventing police torture.

This aspect too should be examined by the Committee constituted for the aforesaid purpose and proper recommendations be made by the Committee to the State Government to curb this menace and the State Government is directed to implement the said recommendations of the Committee relating female detainees as well"

The High Court also issued certain guidelines to the State Government to improve the custodial justice system. However, it is quite unfortunate that the Apex Court disagreed with the proposition when it made the following observations:

> "While we do agree with the object behind the direction issued by the High Court in Cl. (vii) of the operative part of its judgment, we think strict compliance of the said direction, in a given circumstance, would cause practical difficulties to the investigating agency and might even give room for evading the process of law by unscrupulous accused. While it is necessary to protect the female sought to be arrested by the police from police misdeeds, it may not be always possible and practical to have the presence of a lady constable when the necessity for such arrest arises, therefore, we think this direction issued requires some modification without disturbing the object behind the same. We think the object will be served if a direction is issued to the Arresting Authority that while arresting a female person, all efforts should be made to keep a lady constable present but in circumstances where the Arresting Officers reasonably satisfied that such presence of a lady constable is not available or possible and /or the delay in arresting caused by securing the presence of a lady, the constable would impede the course of investigation such Arresting Officer for reasons to be recorded either before the arrest or immediately after the arrest be permitted to arrest a female person for lawful reasons at any time of the day or night depending on the circumstances of the case even without the presence of a lady constable."

This judgment invited protests from various corners of society. The apprehension expressed by many of the human rights activists during field study is that as at present, no substantive laws are dealing with the arrest of women, this decision may be misused by the police to arrest women without having lady constable in the arresting police party. Some directions issued by the Human Rights Commission and subsequent changes in the police manual are only leading principles in this regard.

7. Right to Compensation

Para 5 of Article 9 of the International Covenant on Civil and Political Rights 1966 provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

A somewhat similar approach is provided for under the Federal Civil Rights Act. Alvin W.Cohn & Emilio C.Viano, *Police Community Relations: Images, Roles, Realities* (1976), pp. 413 & 414. Insurance is also now available in the

U.S.A. along with other protective methods that insulate the individual officer from financial loss. Such a system can be made available in India also.

The question of granting monetary compensation to the arrested persons was considered by the Supreme Court for the first time in *Khatri v. State of Bihar* (A.I.R. 1981 S.C. 928.), wherein Justice Bhagawati observed: "Why should the court not be prepared to forge new tools and devise new remedies to vindicate the most precious Fundamental Right to Life and Personal Liberty?"

In *Rajasthan Kisan Sangathan v. State* (A.I.R. 1989 Raj. 10.), the Court held:

> "It is now well settled that a person even during lawful detention is entitled to be treated with dignity befitting any human being and the mere fact that he has been detained lawfully does not mean that he can be subjected to ill-treatment, much less any torturous beating. The right to be treated even during lawful detention in a manner commensurate with human dignity is a well recognized right under Article 21 of the Constitution, and if it is found that the police has maltreated any person in police custody which is not commensurate with human dignity, he is at least entitled to monetary compensation for the torturous act by the police."

In *Challa Ramkonda Reddy v. State* (A.I.R. 1989 A.P. 235), it was held that where a citizen has been deprived of his life or liberty, otherwise than following the procedure prescribed by law, it is no answer to say that the said deprivation was brought about while the officials of the State are acting in the discharge of the 'Sovereign function of the State'. The Court pointed out that indeed this is the only mode in which the right to life guaranteed by Article 21 can be enforced.

From the perusal of the above cases from *Rudul Shah v. Union of India* (A.I.R. 1983 S.C. 1086.) to *Bhim Singh v. the State of J&K,* (A.I.R. 1986 S.C. 494), it is clear that there was no clear basis in the approach of the judiciary towards the quantification of the number of exemplary costs and the discretion to award monetary compensation for the violation of Article 21 was left to the individual judge. For sufficient compensation, they have to again approach the civil court.

A working principle, though not a good principle, for awarding compensation evolved through *Peoples Union for Democratic Rights v. State of Bihar* (A.I.R. 1987 S.C. 355.), wherein the Supreme Court observed:

> "We may not be taken to suggest that in the case of death of liability of the wrongdoer is absolved when compensation of rupees twenty thousand is paid. But as a working principle and for convenience and to rehabilitate the dependents of the deceased such compensation is being paid... Without

> prejudice to any just claim for compensation that may be advanced by the relations of the victims who had died or by the injured persons themselves, for every case of death, compensation of rupees twenty thousand and for every injured person compensation rupees, five thousand shall be paid."

Supreme Court in *Nilabati Behra v. State of Orissa* (A.I.R. 1993 S.C. 1960), made a distinction between remedy of compensation available under the Constitution and the private law, Law of Torts, and non-applicability of the principle sovereign immunity in the Constitutional remedy. The Court observed:

> (A) ward of compensation in a proceeding under Article 32 by this court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply even though it may be available as a defence in private law in an action based on tort.

In *Saheli v. Commissioner of Police* (A.I.R. 1990 S.C. 513), compensation under the Law of Torts was allowed in the writ petition by the Supreme Court. In-*State of Rajasthan v. Vidyawati* (A.I.R. 1962 S.C. 933.), reference regarding State immunity was made and State liability was fixed. But in *Kasthuri Lal v. State of U.P.*(A.I.R. 1965 S.C. 1039.), it was held that sovereign immunity was applicable.

In *Nilabati Behra v. the State of Orissa* ((1993) 2 S.C.C. 746.), the Supreme Court directed the State to pay Rs. 1,50,000/- as compensation to the mother of the deceased. In this case, the Supreme Court relied on Article 9(5) of the International Covenant on Civil and Political Rights, 1966 and observed that the self-provision indicates that the enforceable right to compensation is not alien to the concept of the guaranteed right. Thus the doctrine of 'sovereign immunity' which was an absolute principle earlier has been modified by the Supreme Court. Such judicial activism by the Court to meet the changing situation of the society with the avowed object of rendering justice is awe-inspiring.

In a decision of the Supreme Court *in* which was a case from Manipur, a disturbed area, in which case there were a fake encounter and two persons alleged to be terrorists were seized by police, taken to a distant place, and shot at causing their death it was held that such administrative liquidation cannot be permitted and interference of the Court is called for. The Apex Court awarded a compensation of Rs. 1 lakh to families of each of the deceased.

Applying the above principle, compensation has been awarded to the family members of persons who disappeared or were found dead after being taken for interrogation by police or died in police custody due to torture. Besides, compensation has been awarded to those persons who suffered due to

patently illegal detention, rape, torture, forced labour in detention, and ill-treatment. Thus in a series of cases like *State of Punjab v. Ajaib Singh(*1973 Cri. L. J. S.C. 180.), *Charanjit Kaur v. Union of India)* (1994) 2 S.C.C. 1), *Pratul Kumar Singh v. State of Bihar ((*1994) Supp. (s) S.C.C. 100.), *Arvinder Singh Bagga v. State of U.P*. ((1994) 6 S.C.C. 565.), *Afzal v. State of Haryana*((1994) 1 S.C.C. 425.), *Inder Singh v. State of Punjab* ((1994) 6 S.C.C. 275.), and *Dhananjay Sharma v. State of Haryana* ((1995) 3 S.C.C. 757.), *People's Union for Civil Liberties v. Union of India* (A.I.R. 1997 S.C. 1203.), (*Smt) Chanchala Swain v. State of Orrisa*(1997 (1) Ori. L.R 384.), *State of Maharashtra v. Ravi Kanth S. Patil*(1991 (2) S.C.C. 373.), the Supreme Court again held that the state must be held responsible for the unlawful acts of its officers and it must repair the damage done to the citizens by its officers for violating their indefeasible fundamental right of personal liberty without any authority of law.

Thus the latest judicial trend aligns with Article 9(5) of the International Covenant on Civil and Political Rights. Though the concept of "personal liability" of the erring police official is a welcoming feature of the Indian judiciary in the area of compensatory jurisprudence, it would have been better if in *Pratul Kumar Sinha* ((1994) Supp. (s) S.C.C. 100.) and *Aravinder Sinha Bagga* ((1994) 6 S.C.C. 565.) the Apex Court had not left it open for the State government to recover the amount from the guilty officials but instead directed to recover from them.

The above decision shows that the chief object of awarding compensation by the Supreme Court was rehabilitating the victims or their dependents. Sometimes due to the police atrocities, the victim might not die but might lose his limb or eyes or the incident might make him unable to find his bread. In such cases, the amount suggested by the court would not be sufficient to rehabilitate the victim.

However, there are allegations that the Supreme Court, the sentinel of human rights, has been able to bring out only cosmetic changes since its directives to police, are more honoured in the breach than the observance. The threat of civil liability is indeed having a very great effect on police policy. But plaintiffs are not able to sustain a successful lawsuit because of the expense. Experience has proved that most of the complaints against police come not from the ghetto areas where there may be most questions about abuse of power by police, but rather from middle-income areas where an articulate citizen becomes irate over the actions of a police officer.

For indigent and illiterate victims of human rights abuses, the writ courts are too remote and too expensive to be of any avail. The rights now

granted by the courts are illusory in absence of implementation and enforcement. Justice Krishna Iyer wrote in anger and anguish:

> "Rights, however, solemnly proclaimed and entrenched in great instruments are but printed futility, unless a puissant judiciary armed with legal authority, remedial process and jurisdiction, operational and pragmatic, transforms the jurisprudence of human rights into public law of enforceable justice…Human rights regime leaves a wide gap between normative claims and implementation capabilities. The result is that large-scale breaches of civil and political rights, as well as economic, social and cultural rights, were the scenario."

D. CONCLUSIONS

The higher police officials, even though they may privately be critical of the actions of the lower officials, are tending to protect their fellowmen or the government from civil liability. Even the public prosecutors may instruct the police administration to suspend departmental disciplinary proceedings that might prejudice the litigation. Overcoming all these difficulties even if an unusual decision comes where an individual succeeds in gaining a money judgment in an action against a police officer, or government, it is apparent that, it does not cause a re-evaluation of departmental policy or practice on the part of the police. Thus civil litigation does not appear to be a perfect method of stimulating proper law enforcement policy.

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