



LEGAL ACCOUNTABILITY OF THE POLICE IN INDIA¹

I: INTRODUCTION

Given the reported failure of the state and central government to fully implement the directions of the Supreme Court in *Prakash Singh v. Union of India*², in this paper we explore the option of whether a judicial remedy in the form of a cause of action against police officers in their individual capacity for violations of constitutional rights might enhance oversight conducted by the Police Complaint Authorities.

In approaching this question, we discuss three broad mechanisms of external police accountability- *First*, the establishment of independent police oversight boards in accordance with *Prakash Singh v. Union of India*³ judgment of Supreme Court of India. *Second*, it will deal with a judicial remedy in the form of cause of action against police officers for violation of constitutional rights as a means of enhancing police accountability. It will explore the judicially enforceable forms of accountability that flow from existing criminal laws, public laws and private laws. *Third*, the National and State Human Rights Commission (NHRC/SHRC) as a remedy for police misconduct are also briefly discussed in the document. The memorandum will assess whether a shift towards a mechanism of independent police oversight boards is to be preferred to the court based remedy under criminal, private or public law. Before we begin with this discussion, it may be useful to make a brief note of the quasi-federal nature of the Indian police organisation and some of the developments on police reforms initiated in the recent years.

Under Article 246 of the Indian Constitution, 'Police' falls in the State List of the 7th Schedule, therefore it is within the scope of the respective State Governments to make laws to regulate the police in their State. Although there is a strong federal character to police laws, India

¹ This is an edited version of a Memorandum that CLPR prepared for Centre for Human Rights, American Bar Association in 2013-14

² (2006) 8 SCC 1

³ *Id*

is largely a quasi-federal nation and so the Central Government is also involved in the regulation of police forces. For example, the recruitment of senior police officers of the Indian Police Service (IPS) is a centralized process regulated by the All-India Services; there are also several paramilitary forces such as Central Reserve Police Force or the Border Security Force that fall under the Central Government; the Ministry of Home Affairs oversees the police as well. The Indian Police Act, 1861 is the central statute governing the police in India; most States either adopt this central law or have statutes that are modelled on it.

In the past three decades, several measures have been initiated to make serious police reforms. The National Police Commission submitted eight reports between 1978 and 1981 making various recommendations, but little action was taken to implement them. In the case of *Vineet Narian v. Union of India*⁴ the Supreme Court noted the urgent need for implementation of these reforms, following which the Ribeiro Committee submitted two reports, in 1998 and 1999, the Central Government appointed Padmanabhaiah Committee Report in 2000 and Malimath Committee Report in 2002. All of these reports culminated in the *Prakash Singh v. Union of India*⁵ judgment of the Supreme Court. The judgment broadly deals with three aspects of police organisation- autonomy, accountability and efficiency.⁶ The Supreme Court gave detailed directions which are to be followed by the Centre and State Governments until legislations in this regard are enacted.⁷ The directions include :- (1) each State Government must constitute a State Security Commission to ensure that police are protected from illegitimate political interference. (2) fixing the selection and minimum tenure of Chief of Police (DGP); (3) minimum tenure of other police officers including Inspector General of Police (IGP), Deputy IGP, Superintendents of Police in-charge of districts and Station Officers; (4) separation of investigation function from 'law and order' functions; (5) setting up a Police Complaints Authority; (6) setting up a National Security Commission; (7) setting up a Police Establishment Board which will decide issues concerning transfers, postings, promotions and other service related matters of officers below rank of Deputy Superintendent of Police. Given the scope of this memorandum, we shall limit our discussion to the Police Complaints Authority.

⁴(1998) 1 SCC 226

⁵(2006) 8 SCC 1

⁶Mihir Desai "Red Herring in Police Reforms" in *EPW* (Vo. XLIV, No. 10; 2009) 9

⁷Report: *Seven Steps to Police Reform* (Commonwealth Human Rights Initiative, 2010) Available at:-

http://www.humanrightsinitiative.org/programs/aj/police/india/initiatives/seven_steps_to_police_reform.pdf

We have reviewed the applicable laws and rules, as well as the reported case laws on this issue from various legal forums and have traced the evolution of principles in these precedents. We have also reviewed the recent reports and studies on the police in India which provide a rich source of empirical and statistical data, several articles on the subjects and relevant books,⁸ although there are few that focus entirely on the legal aspects of the police organisation in India. We now turn to the first section of the memorandum which shall focus on the court-based judicial remedies. This will be followed by a discussion on Police Complaints Authority post-*Prakash Singh* and in the final section, the National Human Rights Commission (‘NHRC’) as a mechanism of police accountability.

II

One of the forms of external mechanism for holding the police accountable for misconduct is through the courts, where complainants can directly sue police officers for alleged abuse of powers. The police can be held liable under criminal law, public law or through private tortious liability. Criminal law liability can be traced from *inter alia* the Criminal Procedure Code, 1973 and the Indian Penal Code, 1860. Public law liability against police misconduct is largely derived out of the Indian Constitution and administrative law, while liability in private law against the police through torts has hardly taken hold in India as yet.

A. PUBLIC LAW LIABILITY

Public law liability with respect to police forces finds its source in the Constitution of India and administrative law. For violation of fundamental rights stated in Part III of the Constitution, such as right to life and liberty, protection against arbitrary arrests and illegal detention, protection from discrimination and unequal treatment etc, the courts have repeatedly held the police liable under public law and have imposed pecuniary liability on the State as compensation for the harm caused. A series of Supreme Court judgments beginning from the early 1980’s laid the foundational principles for holding the State liable for police misconduct

⁸ See for example; Sankar Sen “*Enforcing Police Accountability through Civilian Oversight*” (Sage, 2010); Kirpal Dhillon “*Police and Politics in India: Colonial Concepts, Democratic Compulsions*” (Manohar, 2002); K.S. Dhillon “*Adoption of Accountability and Oversight Mechanisms: The Case of the Indian Police*” in “Global Environment of Policing” ed by: Darren Palmer, Michael M. Berlin and Dilip K. Das (CRC Press, 2012)

and abuse of power, making pecuniary compensation a significant remedy for such violation of fundamental rights.

The precedent can be traced to the crucial 1983 case of *Rudul Sah vs. State of Bihar*⁹, a three judge bench of the Supreme Court under writ jurisdiction, passed an order of compensation for the violation of Article 21 and Article 22 of the Indian Constitution. In this case, the petitioner was unlawfully detained in prison for 14 years even after his acquittal. On finding that his detention was wholly unjustified, he demanded compensation for the illegal detention. Although an ordinary remedy through a civil suit was available to the petitioner for claiming compensation, the Supreme Court held that it wouldn't be doing justice merely by passing an order of release from illegal detention and in fact had the power to direct the State Government to pay compensation. It ordered a sum of Rs 30,000 to be paid by the State within two weeks of the order. In the two cases that immediately followed, in 1984, of *Sebastian Hongray vs. Union of India*¹⁰, the Supreme Court awarded compensation for torture, agony and harassment of two ladies whose husbands had been missing after they were taken to an army camp by army officials in Manipur, and for the failure of the detaining authority to produce the missing persons. Exemplary costs were awarded for the same and the single judge bench did so following *Rudul Shah* but without indicating any further reasons. Similarly, in *Bhim Singh vs. State of Jammu and Kashmir*¹¹, the single bench Supreme Court awarded compensation to the petitioner for his illegal arrest by the police. Bhim Singh was a member of the State Legislative Assembly of Jammu and Kashmir. He had been illegally detained with the object of preventing him from attending the session of the Legislative Assembly which was scheduled to be held on 11 September, 1985. When efforts to trace him proved futile, his wife acting on his behalf filed a writ of habeas to direct the respondents to produce him before the court and to declare his detention illegal. The court concluded that "there was a clear violation Article 21 and 22(2) by the police officers, who were in turn executing the orders they had received from higher echelons". But once again by merely relying on the precedents of *Rudul Shah case*¹² and *Sebastian Hongray case*¹³, the court ordered the State of Jammu & Kashmir to pay Bhim Singh

⁹AIR 1983 SC 1086

¹⁰AIR 1984 SC 571 and AIR 1984 SC 1026

¹¹AIR 1986 SC 494

¹²AIR 1983 SC 1086

¹³AIR 1984 SC 1026

a compensation of Rs. 50,000. Nor was any reasoning given on how the amount of compensation was fixed.

In *Saheli vs. Commissioner of Police, Delhi*¹⁴, a nine year old child was severely beaten up by the police and later died. It was a clear case of misuse of sovereign power. But this division bench judgment is a slight exception because unlike the previous cases, it relies upon the decisions of *Joginder Kaur vs. State of Punjab*¹⁵ and *State of Rajasthan vs. Vidhyawati*¹⁶, to hold that the Delhi Administration is liable to pay compensation of Rs. 75,000 to the mother of the deceased child. Here, *State of Rajasthan v. Vidhyawati* was relied upon in order to argue that the State is responsible for the tortious acts of its employees. Again, no reasoning was given as to why the compensation was fixed at Rs 75,000 other than stating that *PUDR v. Delhi Police Headquarters and Anr*¹⁷ where a labourer doing some work in the police station was severely beaten to death, and the court in that case had directed the Delhi administration to pay Rs 50,000 as compensation.

In *State of Maharashtra vs. Ravi Kant Patil*¹⁸, an under-trial prisoner was handcuffed, arms tied with a rope and paraded through the streets, being subjected to humiliation and indignity. The Supreme Court relying on *Rudul Shah* agreed with the decision of the High Court that a compensation of Rs 10,000 be paid by the State Government. The court however deliberated over the question of who is to pay the compensation- whether the individual police officer is to be held liable or the State. Making an argument of vicarious liability, the court stated that “He has acted only as an official and even assuming that he has exceeded his limits and thus erred in taking the under-trial prisoners handcuffed, still we do not think that he can be made personally liable.”

*Nilabati Behara vs. State of Orissa*¹⁹ is a case of custodial death where the mother reported the death of her son as a result of multiple injuries inflicted on him while he was in police custody. A three judge bench of the Supreme Court in 1993 concluded that the cause of death was police brutality which was a violation of fundamental rights and hence awarded

¹⁴AIR 1990 SC 513

¹⁵[1969] ACJ 28 at 32

¹⁶[1962] Supp 2 SCR 989 at 1007

¹⁷(1989) 4 SCC 730 (Division Bench)

¹⁸AIR 1991 SC 871 (Single Bench)

¹⁹AIR 1993 SC 1960

compensation under Article 32 of the Constitution. This is a crucial judgment for crystallizing the principle by which erstwhile precedents ordered compensation for violation of fundamental rights due to police misconduct. Clarifying the principle behind this order as well as the precedents such as in *Rudul Shah* and *Bhim Singh*, the court observed that award of compensation is a remedy available in public law based on strict liability for contravention of fundamental rights. It went on to state that the principle of sovereign immunity is inapplicable in cases that are in contravention to fundamental rights, even though doctrine may be applicable as a defence in private law in an action based on torts. It therefore directed the State of Orissa to pay a compensation of Rs 1,50,000/- to the petitioner and a sum of Rs 10,000 as costs paid to the Supreme Court Legal Aid Committee, an amount much higher than what the Supreme Court previously ordered.

In *PUCL vs. Union of India*²⁰ the issue before the Supreme Court was whether it is open to the State to deprive a citizen of his life and liberty otherwise than in accordance with the procedure prescribed by law and yet claim an immunity on the ground that the said deprivation of life occurred while the officers of the State were exercising the sovereign power of the State. The Court concluded in the negative. Relying on the *Nilabati Behara case*²¹, the court ruled that monetary compensation is an appropriate and indeed an effective remedy in case of infringement of the fundamental right of life of a citizen by a public servant of the State who is vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State. In *A.V. Janaki Amma And Ors. vs Union Of India*²² the court has observed that “it has been well established that for violation of fundamental rights guaranteed under Article 21 of the Constitution of India, public authorities, officials and the State are liable to pay compensation. Public law courts in India exercising powers under Articles 32, 136 and 226 of the Constitution of India can award compensation in public law. Such remedy is in addition to the remedy in tort in private law.”

²⁰AIR 1997 SC 1203

²¹AIR 1993 SC 1960

²²2004 (1) ALD 19

Exercising its epistolary jurisdiction, in *Sube Singh v. State of Haryana*²³, a writ under Article 32 was instituted in the Supreme Court, based on a letter it received from the petitioner alleging illegal detention, custodial torture and harassment to family members of the petitioner. The three judge bench of the Supreme Court furthered the principle in *Nilabati Behra*²⁴ by asserting that compensation as a remedy will be available only if the violation of Article 21 involving custody death or torture is “established or is incontrovertible” as opposed to cases where the violation is “doubtful or not established”. It suggested that courts must although zealously protect fundamental rights of those illegally detained or subject to custodial violence, but should also stand guard against false, motivated and frivolous claims and to enable the police to discharge their duties fearlessly and effectively (para 45).

In effect, the *Sube Singh* judgment placed a limit to compensations to cases where (1) the violation of fundamental rights is patent and incontrovertible; (2) the violation is gross and of a magnitude to shock the conscience of the court. The court did not award any remedy in this case on grounds of lack of clear and incontrovertible evidence or any medical report of injury or disability caused thereby.

The following points are clear from a perusal of the aforementioned precedents. *Firstly*, It is clear that a violation of fundamental rights due to police misconduct, can give rise to a liability under public law, apart from criminal and tort law. *Secondly*, that pecuniary compensation can be awarded for such a violation of fundamental rights. *Thirdly*, it is the State that is held liable and therefore the compensation is borne by the State and not the individual police officers found guilty of misconduct. *Fourthly*, the Supreme Court has held that the standard of proof required for proving police misconduct such as brutality, torture and custodial violence and for holding the State accountable for the same, is high. It is only for patent and incontrovertible violation of fundamental rights that such remedy can be made available. *Fifthly*, the doctrine of sovereign immunity does not apply to cases of fundamental rights violation and hence cannot be used as a defence in public law. Largely, the nature of cases where the Supreme Court has interfered have been of extreme police misconduct, such as custodial deaths, police brutality, torture and forced disappearances. It is in cases of clear and “gross violence that shocks the conscience of the

²³(2006) 3 SCC 178

²⁴AIR 1993 SC 1960

court”²⁵, that the Courts have repeatedly ordered the State to compensate the victim and the victim’s family. No set principle has evolved on how the quantum of compensation is to be calculated.

Unlike the vicarious liability in public law, criminal liability of police officers is personal in nature.

B. Criminal Liability

For criminal liability, the Code of Criminal Procedure, 1973 (CrPC) gives procedural safeguards to government servants in order to be able to prevent vexatious litigation against an official who is performing a public function.²⁶ Police officers have been held to have the protection of Section 197 of CrPC and more narrowly, under Section 132 of the CrPC. The requirement of the aforementioned section is that sanction be received from the Central or the State Government before any criminal proceeding is instituted against a police officer alleged to have committed a criminal offence “while acting or purporting to act within the discharge of his official duty”. Similarly, Section 132 mandates sanction of the government against prosecution of police officers for any act purporting to be done under section 129 to 131 CrPC, which deals with controlling an unlawful assembly that is alleged to have caused a breach of peace. Under Section 132, if the accused police officer is able to show that he/she attempted to disperse the unlawful assembly and on the failure of which, used force, then he/she gets the protection under Section 132.²⁷

*P.P. Unnikrishnan v. Puttiyottil Alikutty*²⁸ is a case where two police officers were accused of having kept a complainant illegally in lock-up for several days and torturing him. The division bench of the Supreme Court had to deal with a defence raised by the police officers under Section 64 of the Kerala Police Act wherein there are procedural safeguards against initiation of legal proceedings against police officers acting in good faith in pursuance of any duty imposed or authority conferred by the State. The Supreme Court considered this provision to be based on the rationale of Section 197 of the CrPC. Therefore, the Supreme Court discussing

²⁵(2006) 3 SCC 178

²⁶*Jaysingh Wadhu Singh v. State of Maharashtra*, 2001 CrLJ 456 at 473

²⁷*Nagraj v. State of Mysore* AIR 1964 SC 269

²⁸AIR 2000 SC 2952

the scope of Section 197(1) held that “There must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty.” The court goes on to give an example where, if a police officer wrongly confines a person in lock-up for more than twenty-four hours without sanction of the court or assaults a prisoner, such police officer is not only abusing his duty but is acting outside the contours of the duty and therefore would not get the protection under Section 197 CrPC. A single bench of the Gujarat High Court applied this interpretation of Section 197 in a case of torture in police custody that lasted for three days. The accused police officers dragged the legal proceedings for years, *inter alia* on the plea of protection of Section 197 CrPC.²⁹ Relying on the *Unnikrishnan* judgment and the inherent powers recognised in Section 482, CrPC³⁰ to make such orders as may be necessary to prevent abuse of the process or to secure the ends of justice, it held that the accused police officers would not get the protection under Section 197 because their acts of torture were clearly outside the scope of their official duty.

Another case in point is *Uttarakhand Sangharsh Samiti v. State of U.P.*³¹ where a division bench of the High Court of Allahabad was faced with a case of mass human rights violations including firing by the police and paramilitary forces on an assembly of protestors, resulting in the loss of twenty four lives, mass scale molestation and rape, illegal detentions and incarceration of large number of persons. In this case, when the question of a sanction of the State Government under Section 197 of CrPC came up, the division bench held that “it is not every act done by a public servant while on duty which falls within the purview of S. 197 but only those acts which have direct nexus to the discharge of official duty.” Relying on Privy Council as well as Apex Court judgments³² it was stated that acts of wrongful restraint and detention, planting weapons to show fake recoveries, deliberate shooting of unarmed agitators, tampering with or framing incorrect records, commission of rape and molestation etc are neither acts done, nor purported to be done in the discharge of official duties. No sanction of the Government is required in ordering prosecution of such public officials. It granted exemplary

²⁹*S.S. Khandwala (I.P.S.) Addl. D.G.P. and Ors v. State of Gujarat* (2003) 1 GLR 802

³⁰*See; Mary Angel v. State of Tamil Nadu* AIR 1999 SC 2245 on the extraordinary power which is to be exercised only in extraordinary circumstances.

³¹(1996) 1 UPLBEC 461

³²*H.H.B Gill v. The King* AIR 1948 PC 128; *Amrik Singh v. State of PEPSU* AIR 1955 SC 309; *MatajogDubey v. H.C Bhari* AIR 1956 SC 44; *Balbir Singh v. D.N. Kadian* AIR 1986 SC 345

damages of Rs 10 lakhs to the 24 persons killed, Rs 10 lakhs to each of the women raped and Rs 5 lakhs to each of the women molested.

Given the precedents, the following conclusions can be made. *Firstly*, the procedural safeguard under Section 197 CrPC is available only if the accused police officer is able to show that the alleged criminal act was in the course of performing an official duty. Hence, in order to understand whether prosecuting a police officer requires sanction or not, hinges on the question of whether the conduct of the offending officer was in the course of his/her duties. *Secondly*, the test for whether the action of the police was in the course of performance of duty is if the action has direct nexus to that duty or not. *Thirdly*, acts in violation of fundamental rights have never been considered as being in course of official duties by the Apex Courts.

However, it has to be noted that the procedural safeguards under Section 197 CrPC is often misused by the police by not allowing the complaints or First Information Report (FIRs) to be filed in the first place, thus being a major hurdle as an effective remedy for misconduct.³³

C. Liability in Private Law

There is no doubt that the State can be held accountable under private law through a civil suit for compensation, for violation of fundamental rights caused by police misconduct. But precedents suggest that it is writ petitions under public law that has been used as a remedy, to the exclusion of private law. The courts have repeatedly clarified right from the *Rudul Shah*³⁴ judgment, and later restated in *Nilabati Behera v. State of Orissa*³⁵ that in cases of violation of fundamental rights, the remedy of compensation available under the writ jurisdiction, Art. 32 and 226 of the Indian Constitution, is distinct and in addition to the available ordinary processes under a private law remedy.

A crucial question however arises in case of private law remedies- whether the doctrine of sovereign immunity can be used as a defence in civil suits claiming compensation for violation of fundamental rights. In *Nilabati Behera v. State of Orissa*³⁶ a three judge bench of the

³³Report: *Accountability For The Indian Police: Creating An External Complaints Agency* (HRLN, 2009)10-11; also see; Report: *Torture in India 2011* (Asian Centre for Human Rights, 2011)

³⁴AIR 1983 SC 1086

³⁵1993 AIR SC 1960

³⁶1993 AIR SC 1960

Supreme Court clarified that the concept of sovereign immunity is inapplicable and alien to the concept of guarantee of fundamental rights. It distinguished cases of police excesses from the earlier Supreme Court judgment in *Kasturilal Ralia Ram Jain v. State of Uttar Pradesh*³⁷ where the plea of sovereign immunity was upheld for tortious acts of its servants. It went on to state that “the principle of sovereign immunity is inapplicable in cases that are in contravention to fundamental rights, even though the doctrine may be applicable as a defence in private law in an action based on tort.” Hence the question arises:- will the doctrine of sovereign liability be a valid defence in civil suits claiming compensation for police misconduct?

The question came up first in *State of Rajasthan v. Vidyawati*³⁸ where a claim for damages was made by the dependents of a person who died in an accident caused by the negligence of a driver who worked for the government. A defence was raised stating that the driver was acting in the course of his duty and hence sovereign immunity applies in this case. The five-judge bench of the Supreme Court held that there is no justification in the principle of sovereign immunity, and that such a principle was based on old feudalistic notions of justice that assumes that the king can do no wrong. The Supreme Court went on to hold that the State was vicariously liable for the negligence of the driver and that the defence of sovereign immunity would not hold good. The question of sovereign immunity came up again in front of a five judge bench of the Supreme Court in *Kasturilal Ram Jain v. State of UP*³⁹ where a suit was filed against the State of U.P. asking compensation for the missing gold ornaments that the police had lost due to their negligence. In this case however, the Supreme Court applied the principle of sovereign immunity and held that because it was in the course of employment of a government servant, the police officers have sovereign immunity in such cases. Distinguishing itself from *State of Rajasthan v. Vidyawati*⁴⁰, it held that the duty of a government driver was not a sovereign function, but the duty of a policeman was an exercise of sovereign power and therefore has immunity from tortious liability. Although the *Kasturilal* judgment is yet to be overruled, it has been largely criticised by authorities, and subsequent decisions of the Supreme Court have greatly undermined its authority. The entire gamut of precedents discussed in this memorandum, from

³⁷AIR 1965 SC 1039

³⁸AIR 1962 SC 933

³⁹AIR 1964 SC 1039

⁴⁰AIR 1962 SC 933

the *Rudul Shah* judgment, and more directly, *Saheli vs. Commissioner of Police, Delhi*⁴¹ and *Nilabati Behara vs. State of Orissa*⁴² which rely on *State of Rajasthan v. Vidyawati* and distinguish themselves from *Kasturilal Ram Jain v. State of U.P.*, do not consider the defence of sovereign immunity in such cases of police misconduct.

Quantum of Punishment in Appeals From Disciplinary Proceedings

The police can be held liable for violating laws and rules through internal mechanisms of remedial action such as those established under the Police Act, 1871 or any of the other laws regulating them. The Police Act, 1871 for example lays down offences and processes such as Section 7 of the Act which deals with the “Appointment, dismissal, etc of inferior officers” or Section 29 that deals with “Penalties for neglect of duty etc”. Such proceedings usually take place through internal disciplinary authorities that collect evidence and pass binding orders. These orders can be appealed to the High Court and the Supreme Court. The limited question that is relevant to this memorandum is the extent to which the courts can interfere with the punishment imposed by such disciplinary proceedings.

In the case of a departmental inquiry under Prevention of Corruption Act, 1947 on illegal accumulation of assets, it was held by a three judge bench of the Supreme Court in *B.C. Chaturvedi v. Union of India*⁴³ that “disciplinary authorities are fact-finding authorities and have exclusive power to consider the evidence with a view to maintain discipline...The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty.” Relying upon this case, in 2009 a division bench of the Supreme Court in *Ramanuj Pandey v. the State of M.P. and Ors.*⁴⁴, did interfere with the punishment granted by the disciplinary authority on the principle of proportionality. In this case, the appellant police officer while discharging his duties, apprehended one Laxmi Narain and registered him under Lunacy Act without any sufficient reason, causing harassment to him. Accordingly, the punishment of dismissal of the appellant imposed by the disciplinary authority was substituted with one of compulsory retirement from the date of dismissal from services. Therefore it is the disciplinary authority which will decide

⁴¹AIR 1990 SC 513, 1989 SCR 488

⁴²AIR 1993 SC1960, 1993 SCR (2) 581

⁴³AIR 1996 SC 484

⁴⁴(2009) 7 SCC 248

the quantum of punishment for the misconduct and the higher courts can interfere only in rare cases where the quantum of punishment is disproportionate to the offence committed.

Concluding this section, the following points maybe noted: *Firstly*, based on a reading of the precedents, it is clear that for violation of fundamental rights, a writ under public law has been the most used remedy as opposed to a civil remedy under torts. *Second*, in cases of violation of fundamental rights, sovereign immunity is not available as a defence; *Third*, a civil remedy under torts is more suitable when the claim to compensation is based on controversial facts. On the other hand, public law remedies require a clear and gross violation of fundamental rights. *Fourthly*, the punishment ordered in internal disciplinary proceedings can be appealed to the higher courts but the power of these courts to interfere with the order is limited to testing the punishment on grounds of proportionality.

III

The Police Complaints Authority

The Police Complaints Authority (“PCA”) is a mechanism that was introduced in the *Prakash Singh v. Union of India*⁴⁵ judgment of the Supreme Court in 2006. As per the Model Act, which incorporates the recommendations of the Supreme Court, the PCA is essentially a body that can receive and hear complaints against officers of all ranks. It is to be established at the State and the District level. The State level authority is suppose to look into allegations of “serious misconduct” against officers of the rank of Superintendent of Police and above, while the District level is to look into all complaints against police officers of and up to the rank of Deputy Superintendent. Interestingly, there is a distinction between the types of complaints that can be heard against officers; while for the higher level officers, only complaints of serious misconduct can be entertained, against the lower level officers, complaints of any nature can be heard. As per the Supreme Court judgment, the PCA can take cognizance of complaints made either by the victim or the victim’s representative. Some State laws allow the PCA to initiate inquiry *suo moto*. The authority is to have the powers of the civil court under the Code of Civil Procedure, 1908 including power to summon witness, compel appearance, inquiries, compel registration of First Information Report (FIR) against errant officers or initiate departmental inquiries.

⁴⁵(2006) 8 SCC 1

Following the Soli Sorabjee report which drafted the Model Police Act, it recommends that the Commission should have five members – a retired High Court judge, a retired police officer, a person with minimum 10 years of experience (judicial officer, public prosecutor, practicing advocate, or a professor of law), a person of standing from the civil society member and a retired officer with public administration experience.⁴⁶ It also recommends that at least one member should be a woman and the not more than one member should be a retired police officer in the rank of the DGP.

As the Commonwealth Human Rights report notes, much of the recommendations and significant provisions of the model law have not been adopted. Till date, only eighteen states have passed legislations in partial conformity with the Model Act and the *Prakash Singh* judgment.⁴⁷ Only six states- Assam, Goa, Haryana, Kerala, Tripura and Uttarakhand, and four Union Territories- have PCA's which are actually operational at the ground level, while Kerala is the only state which has the PCA functioning at state as well as district levels.⁴⁸ As per the Supreme Court orders, the members of the PCA have to be chosen by the government from a panel prepared by the Chief Justice and the State Human Rights Commissions, the Lokayukta and State Public Service Commission. In practice however, all present members of the functional PCAs have been appointed directly by the State Governments, without exception.⁴⁹ A fair and transparent process of appointing the authorities needs to be the first step towards an independent and institutional entity such as the PCA but this is not the case. Several states have appointed serving police officers to the PCA, which defeats the purpose of the authority.⁵⁰ Most states have not framed even minimum rules governing the functioning of the PCA, it lacks investigatory powers, witness protection for complainants and witnesses, the funding in most States is still part of the police budget and not independent of it. As it currently stands, the PCA has failed to

⁴⁶See Section 160, The Model Police Act, 2006

⁴⁷Assam, Arunachal Pradesh, Jharkhand, Meghalaya, Bihar, Chhattisgarh, Goa, Gujarat, Haryana, Himachal Pradesh, Kerala, Maharashtra, Rajasthan, Sikkim, Tripura, Orissa, Punjab and Uttarakhand. Report: *Accountability For The Indian Police: Creating an External Complaints Agency* (HRLN, 2009)

⁴⁸Police Reforms: Complaints Authorities in States a non-starter, *The Hindu* (April 11, 2013)

⁴⁹Report: *Police Complaints Authorities: Reform Resisted* (Commonwealth Human Rights Initiative, 2011) 28

⁵⁰ID at 68

deliver. Like other institutions of justice, the PCA also continues to be insensitive, with complex procedures and intimidating to the people.⁵¹

IV

NHRC AS AN EXTERNAL MECHANISM OF POLICE ACCOUNTABILITY:

The National Human Rights Commission (“NHRC”) was established on October 12, 1993 under the Protection of Human Rights Act, 1993 (“Act”). Under the Act, the NHRC/SHRC’s have the power to enquire *suo motu* or upon petitions filed on matters pertaining to human rights violations. It may intervene in any judicial proceedings on human rights, summon or seek attendance of witnesses, procure documents and evidence, visit prisons and detention centres, make recommendations to the Government. Every death in police and judicial custody is to be reported to the NHRC for its scrutiny irrespective of such death being natural or otherwise.⁵² The Commission is constituted largely of retired Supreme Court and High Court judges and two members are chosen from among people with knowledge of or experience with matters involving human rights. The Commission, along with the various State Commissions, has the power under Section 18(c) of the Act to grant compensation in case of human rights violations by the police after an inquiry.⁵³ As a norm, the NHRC grants compensation as a form of relief in all cases of police misconduct. But the biggest limitation of the Act is that, under Section 18, if the NHRC through inquiries has proven certain human rights violations, the Commission is limited to advising the government to prosecute the concerned persons or grant relief to the victim. This mere recommendatory power has made NHRC a weak mechanism for accountability.

The NHRC for public information purposes, has categorised its cases into custodial deaths, police excesses, fake encounters, cases relating to women/children, atrocities on Dalits and minorities, bonded labour, armed/paramilitary forces and other cases.⁵⁴ The only available public information about NHRC is through its Annual Reports, and these Reports provide only selective, limited and cursory information⁵⁵. Further, none of the Annual Reports from 2010 onwards are accessible. In 2002-2003, 68,779 cases were registered out of which 67,354 were

⁵¹Report: *Police Complaints Authorities: Reform Resisted* (Commonwealth Human Rights Initiative, 2011) 54

⁵²NHRC Guidelines on Procedure to be followed in case of Death during Police Action (12 May, 2010); NHRC Booklet/Instructions of Custodial Deaths/Rapes (14 December, 1993)

⁵³Section 18(c), Protection of Human Rights Act, 1993

⁵⁴ See, www.nhrc.nic.in

⁵⁵ Section 20 Protection of Human Rights Act, 1993 mandates the submitting of Annual Reports

human rights violations, 1,340 were custodial deaths, 2 were custodial rapes and 83 related to police encounters.⁵⁶ By the end of 2003, 43,010 cases remained pending while the NHRC ordered compensation amounting to Rs 31,40,000/- to be paid in 39 cases.⁵⁷ Through 2004-05, 75,000 complaints were filed with the NHRC, and as on 31st March, 2005, 50,000 were pending.⁵⁸ 90,946 cases were registered in NHRC in 2008-09 while 82,021 cases were registered during 2009-2010. Of the cases that were registered during the year 2009-10, 80,260 cases were complaints of alleged human rights violations, 1,599 cases were about intimations of custodial deaths and 111 pertained to encounters (104 encounters by Police and 7 encounters by Defence Forces).⁵⁹ Further, the NHRC does not seem to follow any set principle for the calculation of the compensation payable in the various cases. In a case of police torture in Rajasthan in 1994, the NHRC awarded compensation of Rs 50,000 to the dependents of the deceased, even though no external injuries had been noticed in the inquest and the post-mortem report.⁶⁰ In another case in 1999-2000, a complainant asked for compensation of Rs 6 lakh for the dependants of a labourer who was beaten brutally by the police during a raid on a gambling place. Ultimately, the NHRC granted compensation of Rs 2 lakh to be paid by the State government.⁶¹ Compensation ranging from Rs 10,000 to 1 lakh is granted in most cases of custodial violence and torture⁶² while in cases of false implication, the amount of compensation awarded has tended to be on the higher side, ranging between Rs 10,000 rupees to Rs 10 lakhs.⁶³ Compensation has also been awarded for causing mental agony, harassment and humiliation to the complainant and members of her family.⁶⁴

⁵⁶ National Human Rights Commission Report (2002-2003) (New Delhi, 2003) 168, 169

⁵⁷ ID at 170

⁵⁸ Josh Gammon, "A Meek, Weak NHRC" in *Combat Law* (Vol. 6, Issue 4, 2007) 72

⁵⁹ National Human Rights Commission Annual Report 2009-2010 at 15.

⁶⁰ Police torture and death: Rajasthan (Case No. 144/93-94/NHRC)

⁶¹ Torture by Kerala Police which led to Death of Hussain (Case No.64/11/1999-2000)

⁶² Torture by Tiruchi Police resulting in Death of Shri Mohan, Case No. 4444/95-96/NHRC; Bihar Case No. 2054/4/1999-2000; Sheshrao Rayasing Rathod case (Maharashtra Case No: 1299/13/98-99); Dayashankar case (Uttar Pradesh Case No.791/24/2000-2001); Tripura Case No. 5/23/2003-2004-WC; Vinod Kumar Rajput Case [Case No.1412/12/98-99(FC)]; Rama Rao Case (Andhra Pradesh Case No.5828/95-96/NHRC); Anil Kumar Case (Maharashtra Case No.517/13/98-99); D.M. Rege Case (Maharashtra Case No.1427/13/98-99); Uttar Pradesh Case No.13161/24/98-99; Uttar Pradesh Case No.23239/24/1999-2000; Tamil Nadu Case No.213/22/2001-2002; Uttar Pradesh Case No.17171/24/1999-2000; Delhi Case No. 3454/30/2000-2001; Case No. 2193/12/2006-2007; Bhagat Ram case (Rajasthan Case No. 376/20/2006-2007-CD).

⁶³ Rajiv Rattan (Case No. 9302/95-96); Madhya Pradesh Case No.667/12/98-99-FC; Uttar Pradesh Case No. 13501/24/2000-2001; Case No. 144/93-94/NHRC

⁶⁴ Sarita Sahu Case (Jharkhand Case No. 974/34/2001-2002)

The Commission has also held that the grant of interim relief did not depend upon the outcome of any trial proceedings, whether criminal or departmental, and that it has power to grant immediate interim relief in those cases where a *prima facie* case was made out for violation of the victim's human rights.⁶⁵ In this respect, the NHRC, in the case of custodial torture of Zamir Ahmed Khan,⁶⁶ observed as follows: *"It is well-settled and hardly requires any elaboration that the pendency of a case either in this criminal or civil court for any other relief is no ground to keep in abeyance the disciplinary proceedings. Even otherwise, the standard of proof required for taking action in any disciplinary proceeding is of 'greater probabilities', as against 'proof beyond reasonable doubt' in a criminal proceeding. In the present case, the mere fact that the magisterial inquiry has already recorded a finding as above, is sufficient for the disciplinary proceedings to continue as well as for this Commission to award "immediate interim relief" under section 18(3) of the Protection of Human Rights Act, 1993, which jurisdiction is attracted the moment a strong prima facie case of violation of human rights is made out."*

It awarded compensation of twenty thousand rupees to the victim, but the Uttar Pradesh Government protested that the victim had not sustained any grievous injuries. The NHRC condemned the attitude of the government: *"The custodial torture is the clear finding reached in the magisterial inquiry itself. The insensitivity depicted in the letter of the Government of Uttar Pradesh where it says that payment of the amount does not appear to be proper because there was no serious injury caused to the victim, is disturbing. Custodial torture even without inflicting any visible injury would justify award of some compensation and disciplinary action against the delinquent police personnel. It is not necessary to say anything further in this connection except to reiterate the recommendation for payment of the above amount to the victim which is done hereby."*

Thus, the attitude of the NHRC with respect to awarding interim monetary relief in cases of police abuse seems to be the norm rather than an exercise of discretion. However, the amount of compensation awarded seems to be arbitrary, given the wide range of the amounts awarded in particular species of cases, such as false implication and illegal detention. The NHRC also stipulates in its orders that the State may recover the amount from the errant officer, but the compensation to the victim/dependants must be paid by the State. Further, there is little evidence

⁶⁵Jagdish Kawale Case (Maharashtra Case No.1585/13/2001-2002); Jagannath Shaw Case (West Bengal Case No.:118/25/2002-2003)

⁶⁶Uttar Pradesh Case No. 14071/24/2001-2002

to show whether the recommended compensation was actually administered or not⁶⁷. Independent reports that analyze the performance of NHRC, all suggest the necessity of broad reforms.⁶⁸ They indicate under-staffing, overwhelmingly large caseload and inefficient management as some of the major causes for its lack of effectiveness.⁶⁹

Conclusion:

In this memorandum, we looked at three broad mechanisms of external police accountability- 1) Judiciary-based accountability 2) Police Complaints Authority and 3) National and State Human Rights Commissions. Under Judiciary-based accountability, victims of police misconduct have remedies either under public law, private law or criminal law. Compensation is awarded to the victims or their representatives in all these three forums. However, the public law remedy is the most commonly used platform almost to the exclusion of private law remedies under tort. In private law, although the doctrine of sovereign immunity is not considered a defence, but if it is argued that the action of the police is in direct nexus and in the course of the duty, it is still considered a defence under tort law. Private law remedies therefore are more suitable in cases where the cause of action and evidence is more controversial and doubtful. Protection of fundamental rights of citizens from police excesses has largely been restricted to the High Court or the Supreme Court although even lower courts have jurisdiction to try these matters and pass orders of compensation. The burden of proof is much higher in public law, limited to cases of clear and gross violation of fundamental rights. Further, in all cases of police misconduct, it is the State which has been made vicariously liable to pay compensation and not the individual police officers. Criminal law is also used as a remedy, and compensation is often granted under such cases of police excesses. The procedural safeguard available to police officers is a hurdle while instituting criminal complaints against them. Although courts have held that sanction of the government under Section 197 and 132 of the CrPC is not required, it is often a misused provision, preventing lay-persons from registering FIRs against them. Police excesses often cause harassment and injuries but may not necessarily amount to a violation of fundamental

⁶⁷ Report: *National Human Rights Commission of India: Time to Stand Up and Speak Out* (Asia Pacific Human Rights Network, 2004)

⁶⁸ See for example; Report: “*Preparing for a Fresh Start*” (McKinsey & Company, 1997); Staff Inspection Unit Report (1999)

⁶⁹ Josh Gammon, “A Meek, Weak NHRC” in *Combat Law* (Vol. 6, Issue 4, 2007) 73

rights. In such cases, criminal law and private law based remedies are more suitable and hence have to be strengthened at the level of the lower courts, avoiding an excessive reliance on the writ jurisdiction of the High Court and the Supreme Court. The second mechanism of accountability we discussed is the PCA as suggested by *Prakash Singh* judgment of the Supreme Court and incorporated into the model law. But only a limited number of States have implemented these recommendations and hence, this mechanism has not yet really taken flight yet. Although it provides the necessary institutional design for being a potentially effective mechanism for police accountability, there are little signs of political will to implement this on the ground level. Lastly, we discussed the NHRC and the SHRC's which have been functioning since 1993. In all their orders where police misconduct has been proved, as a norm, compensation has been granted as a remedy. Yet they are also beset with institutional problems such as a massive number of pending cases and a lack of funding and capacity to handle the quantum of cases, understaffing, inefficient functioning and lack of political will for reforms.