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Wrongful Prosecution, Incarceration, Conviction - The Requirement for Statutory Framework to Compensate

SHAILESH MADIYAL¹ AND NEHA JAIN²

ABSTRACT

The present paper examines the issue of compensating individuals for wrongful prosecution, incarceration or even conviction. This aspect has been examined across the world and has given rise to a plethora of views and opinions. The issue itself is a highly complex one and any view is bound to have its pros and cons. However, progressive democracies have overwhelmingly evolved statutory frameworks to provide for some sort of compensation for certain types of instances of wrongful prosecution, incarceration or conviction. India does not, at present, have any such specific statutory framework although the Constitutional Courts have, under certain circumstances, awarded compensation to individuals who have been wrongly arrested. These instances of the Constitutional Courts' intervention are clearly more the exception than the rule and would not substitute the requirement of a specific law in this regard. The Law Commission of India has also, in its 277th Report, also made recommendations to this effect.

I. INTRODUCTION

Through history, there has perhaps been nothing more cherished than liberty and freedom – words which, over the course of generations, have acquired wide and expansive connotations but which, at a very basic level, refer to physical liberty and physical freedom. It is, therefore, no surprise that democratic and progressive countries have, through their constitutional documents, manifested these rights recognising them as being the extremely fundamental to human existence. Civilised society does, however, also require checks and conflicts on these rights. The very authority of a nation-state is dependent upon the ability to incarcerate an individual – both for the purposes of preventing him from injuring the rights of others as also for the punitive purpose of punishing him for having injured the rights of others.

The right of the nation-state to incarcerate fundamentally stems from the right to prosecute, try

¹ Author is an Advocate-on-Record at Supreme Court of India, India.

² Author is an Advocate, India.

or/and convict the individual posing a threat or having committed an act which is a threat to another individual or to the society at large. The legal system, across countries, provide for temporary phases of incarceration even before a person is held guilty, i.e., during investigation, prosecution and trial. Incarceration can take on a more permanent nature once it is the consequence of the individual being held guilty of an offence. The problem, however, that has confounded and continues to trouble the legal system in most countries is the question of what ought to be the consequence if an individual is prosecuted, incarcerated or even convicted wrongly. It can hardly be gainsaid that a person who is wrongly prosecuted, detained or convicted suffers serious consequences in various spheres – societal, emotional, financial and, of course, physical.

It is this aspect of the criminal justice system that raises the issues dealt with in the present paper – The right to be compensated for wrongful prosecution, arrest or conviction. To clarify, while each of these three situations have different implications, this paper attempts to examine them as a whole on the basis of the accepted premise that while incarceration has serious consequences upon liberty, even prosecution without incarceration has extremely detrimental consequences upon the individual prosecuted. An effective compensatory mechanism would not only help rehabilitate and reintegrate such individuals, but also help in curbing instances of false complaints being registered or individuals being wrongly prosecuted or incarcerated.

II. ISSUE IN THE INDIAN SCENARIO

Law enforcement agencies, across the world, face the extremely challenging obligation to protect individual liberties while balancing this obligation with the requirement to restrain such liberties under certain circumstances. Nothing exemplifies this conflict more than the necessity at times to make arrests even prior to the carrying out investigation. Similarly, even the most well-meaning prosecuting and judicial agencies are, more often than not, at the crosshairs of having to cause incarceration on prima facie notions of guilt.

In the Indian context, it is not unknown that there are several instances where complaints are filed, and FIRs are registered only to intimidate people against whom the Complainant has an axe to grind. It is also not uncommon that persons, who are convicted, spend considerable amount of time in detention before the conviction is set-aside. The only one losing in these scenarios is the person who has been implicated falsely or wrongly, who loses his reputation, money and more importantly, precious years of his or her life. During the course of the last few years, courts and in particular the Hon'ble Supreme Court of India, has recognised the problem

of misuse of the power to arrest and has sought to place checks and balances on it.³ The detrimental effect of false prosecution (with or without incarceration) was recognised in **Lalita Kumari's** case⁴ where the Hon'ble Court observed as follows:

*“If an innocent person is falsely implicated, he not only suffers from loss of reputation but also mental tension and his personal liberty is seriously impaired.”*⁵

More recently, in the case of **Babloo Chauhan @ Dabloo v. State of Delhi**⁶ it was observed that:

*“The instances of those being acquitted by the High Court or the Supreme Court after many years of imprisonment are not infrequent. They are left to their devices without any hope of reintegration into society or rehabilitation since the best years of their life have been spent behind bars, invisible behind the high prison walls.”*⁷

In spite of such laudable statements of law, the ground reality remains that individuals are often made to face lengthy prosecutions, trials and/or detentions – sometimes for mala fide reasons and often on account of the incapacity of the criminal justice system. The problem is, in no small measure, a result of an overburdened law enforcement system devoid of a mechanism for fast and scientific investigation.

III. LEGAL FRAMEWORK – INTERNATIONAL PRACTICE

The International Covenant on Civil & Political Rights [hereinafter referred to as 'ICCPR'], 1968 recognizes the inherent dignity of each individual and aims to protect the civil and political rights of all individuals. Article 9(5) of the ICCPR reads as:

*“Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”*⁸

Further, Article 14(6), ICCPR also provides as

“When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been

³ Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273, ¶ 6; Lalita Kumari v. State of Uttar Pradesh, (2012) 4 SCC 1.

⁴ *Ibid.*

⁵ ¶ 58, *ibid.*

⁶ Babloo Chauhan @ Dabloo v. State of Delhi, 2017 SCC OnLine Del 12045.

⁷ *supranote* 6, ¶ 13.

⁸ Article 9(5), International Covenant on Civil and Political Rights, 1968.

pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.”⁹

It is evident from a bare perusal of the aforementioned provisions that these are the very basic requirements as contained in the treaty and the parties to the treaty have an obligation to provide for the same. In other words, the right to compensation has been recognised by the ICCPR, but how this compensation is to be given and implemented is left upto the respective countries. Following this, several different countries have developed their legal frameworks for remedying such miscarriage of justice by compensating the victims of wrongful convictions /wrongful arrest or detention and providing them pecuniary and/or non-pecuniary assistance.

(A) United Kingdom

The Criminal Justice Act, 1988, of the United Kingdom, more specifically Part XI subtitled “*Miscarriages of Justice*”, incorporates the obligations as delineated in the ICCPR. Sections 133 – 133B provide that

“when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice....”¹⁰ [Emphasis supplied]

The power of determining whether there is a right to compensation under these provisions is given to the Secretary of State and if found in the affirmative, the assessor is to determine the amount of compensation that has to be given¹¹. In doing so, the assessor is required to consider the following factors:

- i. the seriousness of the offence of which the person was convicted, and the severity of the punishment suffered as a result of the conviction, and
- ii. the conduct of the investigation and prosecution of the offence.¹²

It is also noteworthy that the legislature has provided for an increased limit for overall

⁹ Article 14(6), *ibid.*

¹⁰ Section 133(1), Criminal Justice Act, 1988 C 33.

¹¹ Section 133, *Ibid.*

¹² Section 133A(2), *Ibid.*

compensation, extending upto £1 million in case the individual has undergone a detention exceeding 10 years¹³. Additionally, the United Kingdom Supreme Court also widened the scope of “miscarriage of justice and notion of innocence” while dealing with compensation. It held that the person should be entitled to compensation for having been punished if it can conclusively be shown that the State was not entitled to punish the person and the person will be guilty only if the State can prove his guilt beyond reasonable doubt¹⁴.

(B) Germany

Germany has, infact, gone one step further and shifted the burden of proof on the State to show as to why a person, who has been acquitted, should not be granted compensation. Article 34 of the Constitution of Germany, 1949, lays down the foundation of the same by assigning the liability to the State in case of breach of official duty by a public servant towards a third party¹⁵. Further, Germany essentially has 2 main laws that discuss and provide the right to compensation which are:

- i. *Law on Compensation for Criminal Prosecution Proceedings, 1971*, which deals specifically with wrongful conviction and provides that whoever has suffered damage due to a criminal conviction which is later quashed or lessened shall be compensated by the State.¹⁶ In contrast to United Kingdom where conviction is the pre-requisite for claiming compensation, the standard in Germany for such claim is relatively lower and even a remand order or abandonment of the prosecution is sufficient to make the person entitled to compensation¹⁷.
- ii. *Law on Compensation for Law Enforcement Measures, 1971* [*Strafverfolgungsschädigungsgesetz*] which deals with claims for compensation arising out of mitigation or elimination of final conviction, unlawful pre-trial detention and other unlawful detention, unlawful search and seizure.

(C) United States of America

Most States in the United States of America provide for non-monetary compensation for assisting individuals in rehabilitation and reintegration into society, which includes transitional services including housing assistance, job training, assistance in terms of job search and placement services, referral to employers with job openings, and physical and mental health

¹³ Section 133B r/w section 133A(5), *Ibid*.

¹⁴ *R (on the application of Adams) v. Secretary of State for Justice*, (2011) UKSC 18.

¹⁵ Article 34, Grundgesetz, 1949. [Germany]

¹⁶ Article 1, *Law on Compensation for Criminal Prosecution Proceedings, 1971* [Germany].

¹⁷ Article 2, *Ibid*.

services, counselling services; and expunging of the record of conviction - helpful in allowing the claimants reintegrate into society. This is in addition to the laws providing for monetary compensation which differs from State to State in terms of the procedure and amount of compensation to be given.

IV. LEGAL FRAMEWORK – INDIAN CONTEXT

India, having been a signatory to the ICCPR, is obligated to give effect to the obligations contained in the international convention¹⁸. However, unlike the other countries as discussed above, India is yet to implement a specific law dealing with compensation to the victims of wrongful arrest, prosecution or conviction. In fact, it is interesting to note that, even when the Indian government was ratifying the ICCPR, it made a statement that there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State.¹⁹ In the absence of a specific law, there are certain statutory provisions that may help provide some relief to the implicated individuals.

Section 250 of the Code of Criminal Procedure, 1972 [hereinafter referred to as ‘CrPC’] is titled *compensation for accusation without reasonable cause*. This provision provides that in case of a complaint or information given to the police, if the accused are tried by the Magistrate who acquits or discharges him/her/them and is of the opinion that there was no reasonable ground for making the accusation against them or any of them, the Magistrate may call upon the complainant or informant to show cause as to why he should not pay compensation to such accused.²⁰

Further, Section 358 of the CrPC is titled *compensation to persons groundlessly arrested*. This provision provides that whenever a person causes a police officer to arrest another person and it appears to the Magistrate by whom the case is heard that there was no sufficient ground for causing such arrest, the Magistrate may award such compensation, not exceeding one hundred rupees, to be paid by the person so causing the arrest to the person so arrested.²¹

Even a cursory glance at these provisions brings to light the lacunae involved in the same. *Firstly*, the duty of paying the compensation is vested in the Complainant/informant and there is no obligation on the State to pay the same. Without any liability on the State, such provisions are unlikely to prevent instances of wrongful arrest/prosecution as the State and its agencies do not have any accountability in the present system. *Secondly*, the amount of fine that is to be

¹⁸ INDIA CONST. art. 253.

¹⁹ Justice G. Yethirajulu, “ARTICLE 32 AND THE REMEDY OF COMPENSATION”, The Practical Lawyer, (2004).

²⁰ Section 250 (1), CODE OF CRIMINAL PROCEDURE, 1973, Act No. 2 of 1974, Acts of Parliament, 1974 [India].

²¹ Section 358, *Ibid*.

paid as compensation is meagre. For instance, in section 358, the maximum amount of compensation that is payable is Rs. 100, which is hardly a deterrent.

Therefore, then the only recourse available to the individuals is filing a suit on the basis of tort law which, again, is hardly efficacious. In addition to a civil suit being time consuming, the process is usually expensive. Further, the fact that tort law is not codified is another bump in the road.

It is important to state here that it is not as though the country or legislation makers are not conscious of the loopholes in the law with respect to grant of compensation. This is evident from the 277th Report of the Law Commission of India wherein it was recommended, inter alia, that:

- i. Compensation must be given to any person who has been wrongfully or maliciously prosecuted irrespective of whether it leads to his conviction or detention.
- ii. The CrPC should include the guiding principles to be followed by the Court while deciding the amount of compensation. Factors such as seriousness of the offence, severity of the punishment, length of detention, damage to health, harm to reputation and loss of opportunity, etc. should be taken into consideration while determining the
- iii. The Compensation must, in addition to pecuniary liability, also include assistance of a non-pecuniary nature [such as counseling, skill-development etc.].
- iv. The claims in this regard must be speedily decided.²²

V. JUDICIAL PRONOUNCEMENTS

The need to compensate those who have been wrongly prosecuted or incarcerated has also been felt by the Judicial system of the country. This is not a new thought but one which has been existing since 1980s when, in the case of *Khatri & Ors. [II] v. State of Bihar and Ors.*²³, the Hon'ble Supreme Court observed that:

“4. The other question raised by Mrs. Hingorani on behalf of the blinded prisoners was whether the State was liable to pay compensation to the blinded prisoners for violation of their Fundamental Right under Article 21 of the Constitution. She contended that the blinded prisoners were deprived of their

²² 277th Report, LAW COMMISSION OF INDIA, 2018

²³ *Khatri & Ors. [II] v. State of Bihar and Ors.*, (1981) 1 SCC 627.

eye sight by the Police Officers who were Government servant acting on behalf of the State and since this constituted a violation of the constitutional right under Article 21, the State was liable to pay compensation to the blinded prisoners. The liability to compensate a person deprived of his life or personal liberty otherwise than in accordance with procedure established by law was, according to Mrs. Hingorani, implicit in Article 21.”

“These rival arguments raised a question of great constitutional importance as to what relief can a court give for violation of the constitutional right guaranteed in Article 21. The court can certainly injunct the State from depriving a person of his life or personal liberty except in accordance with procedure established by law, but if life or personal liberty is violated otherwise than in accordance with such procedure, is the court helpless to grant relief to the person who has suffered such deprivation? Why should the court not be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious Fundamental Right to life and personal liberty. These were the issues raised before us on the contention of Mrs. Hingorani, and to our mind, they are issues of the gravest constitutional importance involving as they do, the exploration of a new dimension of the right to life and personal liberty.” [Emphasis Supplied]

Another landmark case was that of ***Rudal Shah v. State of Bihar and Anr.***²⁴ in which the Petitioner continued to be in jail for over 14 years after his acquittal. While upholding the importance of the Petitioner’s fundamental right to liberty and dignity, the Hon’ble Supreme Court observed

“In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders to release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violaters in the payment of monetary compensation.”

²⁴ Rudal Shah v. State of Bihar and Anr., (1983) 4 SCC 141.

Stressing on the principles of liberty and dignity of an individual, the Hon'ble Supreme Court awarded a compensation of Rs. 50 Lakhs to Mr. Narayanan, a former scientist of ISRO who was kept under custody which caused tremendous harassment and immeasurable anguish. The Hon'ble Court held as follows:

“34... The liberty and dignity of the appellant which are basic to his human rights were jeopardised as he was taken into custody and, eventually, despite all the glory of the past, he was compelled to face cynical abhorrence. This situation invites the public law remedy for grant of compensation for violation of the fundamental right envisaged under Article 21 of the Constitution. In such a situation, it springs to life with immediacy. It is because life commands self-respect and dignity.”²⁵

In the aforementioned case, the Hon'ble Apex Court, despite acknowledging that a civil suit for compensation had already been filed, granted the compensation:

“The lackadaisical attitude of the State Police to arrest anyone and put him in police custody has made the appellant to suffer the ignominy. The dignity of a person gets shocked when psycho-pathological treatment is meted out to him. A human being cries for justice when he feels that the insensible act has crucified his self-respect. That warrants grant of compensation under the public law remedy. We are absolutely conscious that a civil suit has been filed for grant of compensation. That will not debar the constitutional court to grant compensation taking recourse to public law. The Court cannot lose sight of the wrongful imprisonment, malicious prosecution, the humiliation and the defamation faced by the appellant.”²⁶ [Emphasis Supplied]

Further, in order to help curb the wrongful arrests being made, some Courts have also directed that in all cases, where an arrest is made, the authorities shall identify the persons so arrested on the basis of Bio-metric as well as other documents in order to ensure their identity, in order to ensure that no innocent person has to go to jail again²⁷.

While there are several judgements that have granted compensation to those wrongly incarcerated, it is also important to look at the judgements in which compensation has not been granted. For instance, the Hon'ble Supreme Court refrained from granting compensation in the

²⁵ S. Nambi Narayanan v. Siby Mathews, (2018) 10 SCC 804.

²⁶ *Ibid.*

²⁷ Kamlesh v. State of Madhya Pradesh, 2020 SCC OnLine MP 271.

famous case of *Adambhai Sulemenbhai Ajmeri & Ors. v. State of Gujarat*²⁸ (the *Akshardham Temple case*). In this case, the accused persons had spent more than a decade in prison; the Supreme Court although acquitted the accused persons with a specific noting as to the perversity in the conduct of the case from investigation to conviction to sentencing but did not award any compensation to those wrongfully convicted; despite also noting that the police instead of booking the real culprits caught innocent people and subjected them to grievous charges. However, when a separate petition praying for compensation came up before another bench of the Supreme Court, the plea for compensation was rejected on the grounds that acquittal by a court did not automatically entitle those acquitted to compensation and if compensation is to be awarded for acquittal, it will set a “dangerous precedent”, post which the petition was withdrawn.

An examination of the above judgements clearly reveals that the directions to compensate are more discretionary in nature. These judgements further accentuate the requirement for a statutory framework to provide such compensation instead of individuals depending on the discretion of constitutional courts for this purpose.

VI. DRAWING THE BALANCE – THE WAY FORWARD

As is evident, the present paper makes a pitch for compensating persons wrongly prosecuted, incarcerated or convicted. We hasten to add that the compensation ought not to be based only on the fault of the investigating or prosecuting agency or the Court which may have convicted the individual before he is subsequently acquitted. Such fault does, of course, make compensation all the more imperative. However, there could well be instances where the prosecution, incarceration or conviction is made for good reason as was evident at the time when the prosecution, incarceration or conviction was being made but which subsequently reveals itself to be erroneous. In our view even under such circumstances, the individual concerned has suffered nevertheless for no fault of his and a statutory mechanism to compensate him must be evolved.

It is, however, required to state that while the principle to compensate might not be one which most people would oppose, the nuances do raise several questions which may not be capable of definite answers. These issues are nevertheless briefly pointed out for the purposes of a balanced consideration of the question of compensation:

²⁸ *Adambhai Sulemenbhai Ajmeri & Ors. v. State of Gujarat*, (2014) 7 SCC 716.

1. The law enforcement mechanism in India is acknowledged to be highly over-burdened and lacking in latest scientific tools of investigation. Under such circumstances, the threat of being made to compensate in case of wrongful arrest could have the effect of law enforcement agencies showing reluctance to prosecute/arrest even in deserving cases. Similarly, the axe of having to compensate could well deter complainants from agitating their grievances.
2. Trials in India are normally time consuming and the burden of proof on the prosecution is high, i.e., the guilt of the accused is required to be proven beyond reasonable doubt. Thus, acquittals are often not on the basis of a finding that the accused person is not guilty but is on the other hand a result of faulty investigation. To ignore this problem would be to turn a blind eye to what is apparent. Under such circumstances, it needs serious examination as to whether an individual who is acquitted must, in all circumstances, be compensated or whether it must be in exceptional cases.
3. In spite of several judgements to the contrary, it is apparent that jail is in fact the rule and not bail. While this could be a reflection of the reality that the trial itself is extremely time-consuming, what cannot be lost sight of is that, with India's density and size of population, it is not very difficult for an accused person to abscond if he/she is not detained. The reluctance to detain could result in a huge burden on the law enforcement agencies – both in terms of money and time.
4. Lastly, the financial implication on the State is itself something that requires serious consideration especially in light of the fact that the conviction rate in India is extremely low.

The legal system is designed and set in place to dispense justice; dispense justice to not only the victim but also to the individual on the other side of the bars, i.e., the accused. While it is said that the Indian criminal justice system aims at rehabilitation of the offenders, we have failed to put our words to action. A rational and effective compensatory mechanism for wrongful prosecution, arrest, incarceration or conviction would be an extremely important step in this direction. While the authors acknowledge that setting up such a mechanism is one full of inherent complications and perhaps must first be preceded by a reform of the criminal justice and law enforcement system in its entirety, the same is imperative in order to provide the necessary balance in the law enforcement and criminal justice framework.
