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# Tort Law in India

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## I. INTRODUCTION: TORT LAW

The development of constitutional tort which began in the early eighties and was cemented into judicial precedent in *Nilabati Behera*<sup>1</sup> has profoundly influenced the direction tort law has taken in the past decade. It is in recognising state liability, and in denuding the defence of sovereign immunity, that constitutional tort has taken wide arcs around previously established practices in tort law. Its influence on the recognition of wrongs, and of the vicarious liability of the state, is in evidence in the cases under survey.

The toehold that culpable inaction has acquired over the years appears to be getting firmer, as a case from the Andhra Pradesh High Court bears witness.

Covering cases reported in 2000 and 2001, negligence, especially in cases of medical negligence, presents striking studies of perceptions and priorities which are most evident in the area of family planning and population control.

The test of duty of care presents itself with increased frequency than it has in years recently past.

The quantum of compensation has acquired a centrality in accident law. The connected aspect of the growing importance of the Second Schedule to the Motor Vehicles Act 1988 in determining the amount, and boundaries, of compensation is well represented.

An exploration into an area of pre-emptive action in tort law, found in a case concerning the tort of nuisance presents a potential for the legal imagination.

## II. CONSTITUTIONAL TORT

### Custody death

The incidence of custodial violence, and custody death, continues unabated. Delhi and Gauhati High Courts recur with a disturbing frequency in this section, but cases from Rajasthan, Karnataka, Maharashtra, Uttar Pradesh, West Bengal and Andhra Pradesh testify to the prevalence of custodial violence across a spectrum of states.

The experience of courts with cases of custodial violence appears to have moved them to regard complaints with reduced suspicion, and enhanced credulity. In the 18 cases that were located within this arena of custodial violence, compensation was not denied in any case. The link between custodial violence and compensation is direct<sup>2</sup> and *Nilabati Behera*,<sup>3</sup> *D.K. Basu*<sup>4</sup> and *Rudul Sah*<sup>5</sup> have evidently set at rest any questions there might have been on the payment of compensation for violation of Article 21 rights.

There is an increasing regularity in referring cases of custody death to the CBI, since it is not seen as realistic to expect that the police will carry out an unbiased investigation in a matter where the police are themselves in the dock.<sup>6</sup> The prosecution of errant officers is not unknown in law;<sup>7</sup> courts too may suggest prosecution where it is not already underway<sup>8</sup> or to leave it “open for the state authorities to proceed against the erring officers both departmentally and criminally...”<sup>9</sup>

The regularity with which cases of custodial violence and death have reached the courts has been one reason for the increasing credulity, and lessening disbelief, when complaints are made of police violence. The doctrine of *res ipsa loquitur* has been imported into this arena.<sup>10</sup> And, in *Kamla Devi v. NCT of Delhi*<sup>11</sup> the Delhi High Court has said: “When a person dies in police custody and the dead body bears telltale marks of violence or the circumstances are such that indicate foul play, the court acting under Article 226 of the Constitution will

be justified in granting monetary relief to the relatives of the victim...<sup>12</sup> While courts have generally ordered compensation to victims or their families or dependants, it has not yet become routine to direct recovery of the compensation amounts from the offending persons. In *Mst. Madina v. State of Rajasthan*,<sup>13</sup> however, the Rajasthan High Court did order that “the respondent 1 shall recover the amount of Rs. 3 lakhs proportionately from respondents 3 to 7 (the offending policemen).” In *Kamla Devi*<sup>14</sup> the court left it “open to the state to recover the abovesaid amount from the persons who are ultimately held responsible for the death of Madan Lal”.

The remedy of compensation as a “palliative”<sup>15</sup> or, as it is more frequently being characterized, as an “interim” measure<sup>16</sup> is now firmly rooted in the law. Any doubts that might have persisted about the state’s responsibility for the safety of persons in its custody has now been laid at rest by the decision of the Supreme Court in *State of A.P. v. Challa Ramkrishna Reddy*.<sup>17</sup> This affirms the decision of the Andhra Pradesh High Court in *Challa Ram Konda Reddy v. State of A.P.*,<sup>18</sup> an early decision that went beyond situations of custodial violence perpetrated by instrumentalities of the state, to the responsibility of the state when persons are held in its custody, even where injury or death is caused by third persons. The remedy of compensation has been extended to these situations and, as later cases have shown,<sup>19</sup> it has begun to be used in a range of other cases of death in custody where the state or its instrumentalities may not have been directly the cause of the harm caused.

In *Challa Ramkrishna Reddy*, a father and son accused in a criminal case were apprehended and remanded to judicial custody. About 10 days into their custody, a bomb was hurled into the cell where they were housed, and the father died in the explosion. It transpired that they had received threats to their lives, which they had communicated to the Circle Inspector who, however, did not treat the threats with any seriousness. In fact, on the night of the attack, only 2 police personnel were on duty in the sub-jail premises, although 9 members were required to stay on guard. They had also made representations to the Collector and the Home Minister, to little effect. The incident occurred in 1977. The sons of the dead man sued the state for damages. The state resisted the suit on two grounds: limitation, and sovereign immunity. The ground of limitation was overcome by locating the case within Article 113 (the residuary article) of the Limitation Act 1963 and not within Art. 72, which provides for limitation of one year from the time the act or omission takes place. The court explained this, saying: “In order to attract Article 72, it is necessary that the suit must be for compensation for doing or for omitting to do an act in pursuance of any enactment in force at the relevant time... [W]here a public officer acting bona fide under or in pursuance of an Act of the legislature commits a “tort”, the action complained of would be governed by this article which, however, would not protect a public officer acting mala fide under colour of his office.”<sup>20</sup> Finding that “the Police Sub-Inspector was also in the conspiracy and it was for this reason that in spite of their requests, adequate security guards were not provided,”<sup>21</sup> the court took away the “protection of shorter period of limitation” from the state.

In 1977, when the custodial death occurred, and in 1980, when the suit for compensation was filed, the notion of constitutional tort was still in its early stirrings. By 1989, when the Andhra Pradesh High Court decided the matter and directed that Rs.1,44,000 be paid at 6% interest, it was entrenched, and human rights discourse had entered constitutional law. In 2000, the Supreme Court had precedential backing to hold: “Thus, fundamental rights, which also include basic human rights, continue to be available to a prisoner and those rights cannot be defeated by pleading the old and archaic defence of immunity in respect of sovereign acts which has been rejected several times by this court.”<sup>22</sup> *N.Nagendra & Co. v. State of A.P.*<sup>23</sup> and *Common Cause v. Union of India*<sup>24</sup> were cited to explain the paling into insignificance of the doctrine of sovereign immunity. *Nilabati Behera*,<sup>25</sup> *In re the Death of Sawinder Singh Grover*<sup>26</sup> and *D.K.Basu*<sup>27</sup> were invoked to support the position that “so far as fundamental rights and human rights or human dignity are concerned, the law has marched ahead like a Pegasus but the government attitude continues to be conservative and it tries to defend its action or the tortious action of its officers by raising the plea of immunity for sovereign acts or acts of the state, which must fail”.<sup>28</sup>

Interestingly, the court also held that, given the stream of cases in which compensation had been awarded to persons who had suffered injury at the hands of the officers of the government, “(t)hough most of these cases were decided under public law domain, it would not make any difference as in the instant case, two vital factors, namely, police negligence as also the Sub-Inspector being in conspiracy are established as fact”.<sup>29</sup>

While compensation as a public law remedy has developed as a direct response to custodial violence, the

determination of the quantum is still uncertain ground. In *Amitadyuti Kumar v. State of West Bengal*,<sup>30</sup> the Supreme Court enhanced the Calcutta High Court's award of Rs. 20,000 to an "appropriate" sum of Rs. 70,000. In *Smt. Suguna v. State of Karnataka*,<sup>31</sup> the Karnataka High Court was confronted with the death of an auto driver, whose dependants were his wife, mother and a minor daughter. In "public law", the court held the state "obliged to pay compensation to the petitioners which is quantified at Rs. 3 lakhs."<sup>32</sup> In *Mst. Madina*,<sup>33</sup> the Rajasthan High Court held the petitioner "entitled to at least Rs. 3 lakhs by way of interim relief." These cases do not indicate the basis for determining the quantum. Where a court has ventured to explain it has, at best, been a sketchy exercise. So, in *Govt. of NCT of Delhi v. Nasiruddin*,<sup>34</sup> the court held: "Taking into account the decisions of the apex court in the matter of Motor Vehicles statute, and the cases noted above, and also the fact that loss of dependencies, if any, is that of parents and their age...." But *Iqubal Begum*,<sup>35</sup> also decided in the Delhi High Court adopts a contrary approach: "The reason for my drawing attention to the judgments and various pronouncements of the Supreme Court is to show that it is not necessary that the criteria laid down in fatal accident cases and allied matters for awarding compensation should be followed by courts in awarding *ex gratia* compensation in custodial death cases. Such an interpretation would lead to treating citizens differently based on their economic strength when rights are violated by the state."

In an earlier survey, the problem of applying principles of motor vehicle compensation to cases of custodial death was noticed.<sup>36</sup> That was a case of a convict undergoing life imprisonment where, since the income replacement principle could not be applied, the court worked on a factor of dependency, unrelated to the convict's contribution to his dependants at the time of his death.<sup>37</sup>

Generally, income replacement, where it has been invoked, has been referred to in passing, and an "appropriate" lump sum awarded in cases of custodial violence. That compensation in this jurisdiction has been viewed as an "interim" measure could be seen to have influenced this development, as also the immediate liability to pay resting with the state. The protection of the right to pursue other remedies<sup>38</sup> even while *Challa Ramkrishna Reddy* stands testimony to the dilatory nature of the civil remedy. There is also evidence that the compensation recommended by the NHRC is usually much lower than that awarded by courts.<sup>39</sup>

A feature of these cases is the petty nature of the crime of which those killed in custody were often accused. In *Mst. Madina*,<sup>40</sup> the victim had allegations of "theft of a guar gum bag" levelled against him. In *Narayani Sharma v. State of Tripura*,<sup>41</sup> a schoolboy of 16 years was a victim of custodial violence after he was picked up in connection with a case of theft.<sup>42</sup> In *Gopal Ch. Sarmah v. State of Assam*,<sup>43</sup> there is no indication that the victim was in police lock up in connection with any offence; only he was a member of a political party.<sup>44</sup> This disproportionate use of force, even to the causing of death, seen in conjunction with the abuse of power that custodial violence represents, indisputably points to a deep malaise harming the system of criminal justice.<sup>45</sup> The four aspects of compensation to the victim, recovering the compensation amount from the erring officers, disciplinary proceedings and criminal action against the accused will each have to be developed to produce a deterrent effect. The firming up of the links between liability and compensation could in this context, be viewed as an imperative.

## Police Atrocity

Excessive, or unwarranted, use of force by the police constitutes a ground for seeking relief – both compensatory and asking for investigation and prosecution – from the court. In the two cases reported in the period under survey, the Andhra Pradesh High Court and the Bombay High Court at Aurangabad have deflected the issue from that of deterring culpability and compensation to recognizing the imperative of investigation.<sup>46</sup> In the Maharashtra case, the court declined to act since a commission of inquiry had been appointed into the alleged incidents of police violence, and it considered any intervention at that stage premature.

Where it was established that a constable had assaulted a person in the course of his duty, and that resulted in amputation of a limb, the state was held vicariously liable, and the doctrine of sovereign immunity was expressly rejected.<sup>47</sup> Interestingly, the court was called upon to address a reversal of the contention that where an alternative remedy exists in civil law, public law remedy, in writ, should not be allowed -- a position that has been negated many times over. And it held: "The fact that a public law remedy lies under Articles 32 and

226 of the Constitution before the superior courts in respect of torts committed by police.... would not take away the power of civil court to grant relief of damages for violation of fundamental rights by the state agency committing such tort.”<sup>48</sup>

The death of a woman who was assaulted by a constable during a prohibition raid while she pleaded that her nephew was on his way to buy medicines for her child and should not therefore be apprehended, is another instance of excessive use of force that has been brought to court. That enquiry into the incident was deliberately allowed to drag acted in aggravation. The court therefore directed initiation of “criminal proceedings against the police constable concerned for his rude behaviour in his pushing her to the ground which subsequently ended in her death apart from expediting the departmental enquiry pending against him.” The state was directed to pay Rs.2 lakhs to her family with the “right to be indemnified by and take such action as may be available to them against the wrongdoer....”<sup>49</sup>

## Encounter killing

The labelling of a person as a member of an extremist organization has provided a shield to the police and armed forces in cases of encounter killings or in fake encounters. The obstacles to enabling investigation in cases of alleged encounters were set out in an earlier survey.<sup>50</sup> An attempt to cover up a death in custody as an encounter killing of a member of ULFA has since been reported in *Gopal Ch. Sarmah v. State of Assam*.<sup>51</sup> A single judge of the Gauhati High Court, basing his judgment on a judicial enquiry instituted by the court, gave a lie to the assertion of death in an encounter, and directed that Rs. 2,50,000 be paid in compensation.

A reaction to extremist violence, where a heightened tolerance of state violence is seen, is found in the decision of a Division Bench of the Gauhati High Court in *Siba Nath Gogoi v. Union of India*.<sup>52</sup> Dealing with a challenge to the identity of a person who was killed, allegedly in an encounter, Sarma, J. in his separate but concurring judgment added, as in a postscript: “... the question is whether one who distances from the societies, departs from the society and adopts gun culture, should receive equal treatment at the hand of the instrumentalities of the society... The society cannot be asked to cough up compensation for the death of a terrorist in encounter, because that will mean putting a premium on wrongdoings.”<sup>53</sup> The court did make an exception when it said: “Fake encounter, cold blooded killings apart, for the death of a terrorist no compensation can be/should be granted by the court.”<sup>54</sup>

The judicial dictum adds an imperative to the registering, and investigation of alleged encounter deaths, to determine the veracity or otherwise of charges that the encounter was staged, or fake.

## Illegal detention

The casual treatment meted out in matters of liberty has led courts to direct that compensation be paid to these detained beyond the prescription of the law. *Free Legal Aid Committee, Jamshedpur v. State of Bihar*<sup>55</sup> is a glaring instance of the short shift accorded to both the law, and liberty. In an agitation by villagers in April 1991 against Icha Kharakai Bandh Yojna, a large number of agitators were detained under S.107 CrPC. Among them was a girl of about 13 years. It was over a month later that she was released. In explanation to the High Court, the Executive Magistrate who had acted on behalf of the SDM said that there had been a power failure and he had had to work by candlelight. In that meagre light he had not been able to see the faces and features of the arrested persons and, with the police report not mentioning the ages, he had remanded all those produced before him. A fortnight later, when the SDM held court, the girl was remanded without being physically produced, he said. The Juvenile Justice Act 1986, in S.23, expressly forbade proceedings under Chapter VIII being taken against a juvenile; and S.107 lies within the territory of that chapter. Asserting that the remand, being contrary to the express provisions of the law, was illegal and that it had been in violation of her fundamental right, the court directed that Rs.10,000 be paid to the girl while holding her “entitled to compensation under the public law in addition to the remedy available under the private law for the damages for tortious action of the government servant.”<sup>56</sup>

The poignant case of Ajay Ghosh who, declared unfit to stand trial, was in a state of incarceration from 1962 to 1996 with scant care and no discernible treatment within the Presidency Jail, Calcutta speaks both of constitutional neglect and of the irrelevance of compensation.<sup>57</sup> “We could have directed some interim compensation to be paid to Ajay Gosh,” the court said, “but considering his present state of mental and physical health, that would not be of any avail. He has no known relatives either. We are conscious of the fact that money award can be calculated only to make good financial loss. It is not an award for the sufferings already undergone which are incapable of calculation in terms of money... All that the courts can do in such cases is to award such sums of money, which may appear to be giving of some reasonable compensation, assessed with moderation, to express the court’s condemnation of the tortious act committed by the state.”<sup>58</sup> As an interim measure, therefore, the court directed that Rs.2 lakhs be paid by the State of West Bengal to the Missionaries of Charity (Brothers), Howrah, “by way of donation”, not by way of expenses for taking care of Ajay Ghosh but to assist them in their work. The saga of callous detention first highlighted by *Rudul Sah*<sup>59</sup> seems not yet to be at a close.

In *Virendra v. State of U.P.*,<sup>60</sup> a single judge recommended that the government pay an amount not below Rs. 40,000 as compensation to “a young man... subjected to incarceration for a long period of five years” where the investigating agency “deliberately, by design” kept a dying declaration secret and prosecuted the accused on a “wholly false version”. The court so ordered while recording his acquittal. However, where a person was arrested and detained on suspicion of having committed murder, and was later discharged when the real culprits were apprehended, the court held that the only restriction on the power of the arresting authority was that “this power should not be exercised in bad faith or in an arbitrary manner or for collateral purpose”. And these will have to be proved.<sup>61</sup> The court held that, in the instant case, it was at most only an error of judgment, and relief was denied. The court, however, went further to record the plaintive cry of the police officers that “if a person is charged with a crime and subsequently discharged or acquitted (and) is enabled to file a writ petition of this nature, no police officer or law enforcement agency can function effectively in this country.”<sup>62</sup> The court advocated that “such tendency deserves not merely to be condemned but also curbed by passing appropriate orders by imposing exemplary costs for filing petitions with the main objective of harassing the officers of investigating agency.”<sup>63</sup> This discouragement to those who see themselves as victims in an unequal power equation, where those affected by the operation of the law, and often by its excessive or arbitrary use, approach the court is, it may be said, not quite fair on those accused who may carry a sense of having been wronged even where a court may not agree with them. The compensation jurisdiction of the court has been developed to provide a sense of justice, as also some redress, to persons affected by the abuse, or negligent use, or non-use of law. Deterring access to this jurisdiction may run counter to this purpose. And, as *C.D. Manjunath*’s case witnesses, court are equipped to ensure that the police is not penalised unfairly or unjustly.

The “sheer negligence in implementing the court orders” resulted in continued, illegal incarceration of an acquittee for 42 days. The court, in *Trimbak Waluba Sonwane v. State of Maharashtra*,<sup>64</sup> directed the state to pay Rs.10,000 as compensation for ‘false imprisonment’ which, as the court observed, “is a type of trespass to the person and ... is actionable without proof of special damage”.<sup>65</sup>

In *Hussain v. State of Kerala*<sup>66</sup> a person was accused of an offence under the NDPS Act 1985 and, due to the ineptitude of his counsel, he was wrongfully convicted and sentenced to 10 years in prison and a fine of Rs.1 lakh. By the time the Supreme Court heard his appeal, aided by an *amicus curiae*, he had served five years in jail. Acquitting the appellant, the court however, said: “In this case, we are not considering the question of awarding compensation to the appellant but he is free to resort to his remedies under law for that purpose.”<sup>67</sup>

The directions issued by a single judge of the Punjab and Haryana High Court to Sessions Judges to prevent violations of Article 22 of the Constitution and S.57 CrPC followed “several petitions... alleging detention of the arrested person in the police lock-up beyond 24 hours, in some cases for days and months together in police lock-ups”.<sup>68</sup>

This cavalier attitude to the law’s prescriptions have fostered a climate of unconstitutional conduct which the law that has developed around constitutional tort seeks to allay. In the cases under survey, courts have commonly acknowledged a link between the delinquent and the recovery of compensation. In *Durgalal Vijay v. Govt. of MP*,<sup>69</sup> the state and the SDM were held jointly and severally liable to pay damages quantified at Rs. 25,000 where illegal detention resulted from manipulation of records. In *Trimbak Waluba Sonwane v. State of Maharashtra*,<sup>70</sup> the court directed the state to pay, recover the amount from the officials concerned and institute

departmental proceedings against them.<sup>71</sup> Constitutional tort is, however, essentially viewed as a matter of state liability for infringement of fundamental rights, and it is not an unvarying direction to pass the liability on to the delinquent, even where such officer has been identified.<sup>72</sup>

## Disappearances

Cases of disappearances continue to crop up in the courtroom, coming from the strife torn years in the Punjab, and from the north eastern states. The disappearance of persons picked up by the armed forces has raised presumptions of the disappeared being dead, unless the armed forces produce the person. It has also led to presumptions of the armed forces having disappeared the person. Yet, in constitutional tort, the remedy has been limited to directing the payment of compensation as an interim measure.<sup>73</sup> The Supreme Court, in *State of Punjab v. Vinod Kumar*<sup>74</sup> merely paused to explain that no trial court would take a cue about liability of delinquent officers from the interim compensation award passed, thus emphasising the distance between liability in the realm of civil remedy of compensation and criminal trial, and the influence the former may have on the latter.

## III. CULPABLE INACTION

The disturbances and destruction of properties following the assassination of Rajiv Gandhi on May 20, 1991 has brought culpable inaction into focus in *J.K. Traders of Ramakrishna 70MM Theatre v. State of A.P.*<sup>75</sup> The proprietor of a theatre in Hyderabad city petitioned the court seeking a declaration that the state, and its police, had failed to protect their property, and for consequent compensatory monetary relief. It was alleged that the NTR estate, where the damage was done belonged to the TDP leader NTRama Rao, the government in power was the Congress and it was an act of political vengeance; the state, it was alleged, had been complicitous (“the police was only a mere spectator”) when the violence erupted.

This case has many of the ‘classical’ features of culpable inaction: the petitioners had apprehended attack and asked for police protection; the police did not react immediately, and, when they did turn up at the scene of destruction, they allegedly watched while the vandals wreaked havoc. Further, an enquiry by an Additional Commissioner of Police found police officers guilty of dereliction of duty, but no action was taken on the report.

The Government of Andhra Pradesh appointed a Commission of Inquiry to inquire into the incidents of violence and destruction. The Commissioner reported that there had been large scale damage to private properties, especially those belonging to TDP leaders. He faulted the police with inaction, and dereliction of duty.

Recognised surveyors assessed the loss sustained by the petitioner at Rs.1,51,50,000 and the Insurance Loss Assessor assessed it at Rs.1.35 crores. The Collector, it appears, certified the estimated loss.

In response to the petition, the state contended, *inter alia*, that:<sup>76</sup>

- Every citizen is responsible for the protection of their lives and property. “The state cannot give guaranteed protection to every citizen in respect of these in all circumstances as such a guarantee is not feasible practically.” In this case, the state averred, all steps had been taken to prevent, and later control, the violence.
- “In an economy like ours where risk can be covered under insurance, the very fact that insurance is available would indicate that the state would not be responsible for hundred per cent protection for individual life and property ... In view of the vast size of the country and the different fissiparous forces, it is not a practical proposition to expect the state to maintain a man to man cover to watch the life and property of every citizen.”<sup>77</sup>
- If the state is rendered liable for loss suffered by an individual, the burden on the rest of the com-



munity would be enormous, and this would be iniquitous.

- *Ex gratia* is paid “‘out of grace’ on a humanitarian consideration to tide over the immediate crisis” and is not in the nature of compensation.<sup>78</sup>

It was argued that “there must be established positive inaction on the part of the government resulting in direct violation of the right to life”, and that the evidence did not lead to this conclusion. The single judge considered the catena of decisions dealing with state liability for compensation and set out the principles deduced, which included:<sup>79</sup>

- “Constitutional mandate enjoins upon the state to protect the person and property of every citizen and if it fails to discharge its duty, the state is liable to pay the damages to the victims”.
- “The failures or inactions on the part of the state which led to the violation of the fundamental right more especially under Articles 14, 19 and 21 ..... should have direct nexus to the damage caused/suffered.”
- The defence of sovereign immunity stands severely restricted in its discharge of sovereign functions, and while undertaking commercial activity.
- The High Courts and the Supreme Court may award monetary compensation for injury – mental, physical, fiscal – suffered where it is conclusively established that the state failed to take any positive action in protecting the fundamental rights of citizens.<sup>80</sup>
- Both public law and private law remedies are available while claiming damages for violation of fundamental rights.
- Quantum may vary from case to case “depending upon nature of loss suffered by the victim.”

The state relied on *M/s Sri Lakshmi Agencies v. Govt. of A.P.*<sup>81</sup> where a single judge of the High Court had not accepted the claim for damages on an argument of foreseeability. The Judge in *J.K. Traders* found that the *Sri Lakshmi* court had, “in principle accepted the theory of compensatory justice”<sup>82</sup> only that “in each and every case of action or inaction on the part of its state or officers, it must be conclusively established that there is positive action on the part of the officer or state... in discharging their sovereign duties”.<sup>83</sup>

Relying on the report of the Commission of Inquiry, and the report of the Addl. DCP, the court found that “it can be conclusively said that there was *positive inaction* on the part of the police in preventing the mob from gaining access into the estate... [N]o preventive action whatsoever was pressed into service, much less, no post event precautions were also taken.... The recommendations (in the two reports) are very categorical that the police people are mere spectators to the incident and they are responsible for not arresting the damage”.<sup>84</sup> “Thus, it is,” it was held, “conclusively established in the instant case that there is any amount of *inaction on the part of the police in protecting the person and property of the citizens*. In the instant case, ..... the property belonging to a political rival (was) made target by workers of the party in power. Therefore, I hold that the state failed to discharge its sovereign functions in protecting the property of the petitioner and the essential functions viz., the police exhibited complete inaction and slackness in dealing with the situation.”<sup>85</sup>

The court proceeded to issue a series of directions on compensation and rehabilitation measures. The question also arose whether compensation can be claimed on “actuals”, and it was held that “since this is a case where the petitioner had admittedly suffered huge loss on account of the positive inaction on the part of the state machinery, which resulted in gross violation of fundamental rights under Articles 19 and 21 of the constitution of India, he is entitled for reasonable and appropriate compensation”.<sup>86</sup> The court awarded Rs.1 crore as damages with the postscript that “the petitioner shall refund the claim amount to the government as and when received from the insurance company”.<sup>87</sup>

The relationship between “positive inaction”, foreseeability (including where the agencies of state have been forewarned) and culpability of the state has been categorically stated in *J.K.Traders*. The complicity of state agencies has also been recognised as an aspect that may constitute the context of culpable inaction.

The anti-Sikh riots following the assassination of Mrs. Gandhi in 1984 have also been laden with inferences, and evidence, of state complicity. The compensation worked out to be paid to the families of the victims of the riots has been re-asserted and, following the decision of the Delhi High Court in *Bhajan Kaur v. Delhi Administration*,<sup>88</sup> a single judge of the Punjab and Haryana High Court directed the payment of Rs.3.5 crores, minus the Rs.20,000 which was all that had been paid *ex gratia* to the family of a victim of the anti-Sikh riots

in 1984. <sup>89</sup> Explaining, the court said: “Article 21 of the Constitution of India mandates an obligation upon the state to enforce law and order to maintain public order and public peace so that all sections of the society, irrespective of their religion, caste, creed, colour and language, can live peacefully within the state. In the riots following the assassination of Smt. Indira Gandhi, the state failed in its duty to protect the lives of its citizens resulting in the barbaric killings of numerous persons belonging to one community. The state cannot escape its liability to pay adequate compensation to the family of the person killing during 1984 riots.”<sup>90</sup>

Culpable inaction, it appears, continues to develop around instances where foreseeability, complicity and positive inaction are discernible.

## Endnotes

- 1 *Nilabati Behera v. State of Orissa* (1993) 2 SCC 373.
- 2 See, for e.g., *Tarulata Devi v. State of Assam* (2000) 1 Gau LJ 419, para 9.
- 3 *Supra* n.1.
- 4 *D.K.Basu v. State of West Bengal* (1997) 1 SCC 416.
- 5 (1983) 4 SCC 141.
- 6 *Moheela Moran v. State of Assam* (2000) 2 Gau LT 504; *Phoolwati v. NCT of Delhi* 2000 Cri LJ 1613; (2000) 84 DLT 177; *Ajab Singh v. State of U.P.* (2000) 3 SCC 521; *Tarulata Devi supra* n.2; *Laxman v. State of Rajasthan* (2000) 3 Raj LW 1469.
- 7 *Mst. Madina v. State of Rajasthan* (2000) 1 Raj LW 266; *Iqbal Begum v. State of Delhi* 2001 ACJ 2033 : (2001) 89 DLT 504. See also *State of U.P. v. Mundrikar* (2001) 9 SCC 346, case under S.302 and S.302/34.
- 8 *Notle v. Union of India* 2000 ACJ 786.
- 9 *Gopal Ch. Sarmah v. State of Assam* (2000) 1 Gau LT 643 at 657. See also *Kamla Devi v. Govt. of NCT of Delhi* 2000 Cri. LJ 4867: (2000) 84 DLT 348.
- 10 *Government of NCT of Delhi v. Nasiruddin* (2001) 89 DLT 91 at 105.
- 11 *Supra* n. 9 at 4873. The judgment, condemning the use of third degree methods to extract information as a violation of Art. 21, also says: “A comparison between a criminal and a policeman committing brutality will end where the latter violates the law of the land and tramples upon the human rights of a citizen... By using third degree methods the police gets the information or statement from the person who suffers its brutality according to its liking. By adopting such methods an investigation cannot arrive at the truth...”.
- 12 See also, *Mst. Madina v. State of Rajasthan* (2001) 1 Raj LW 266 at 268.
- 13 *Id.* at 270.
- 14 *Supra* n.9 at 4874.
- 15 *Rudul Sah v. State of Bihar supra* n.5.
- 16 See *Mst. Madina v. State of Rajasthan supra* n.12; *Laxman v. State of Rajasthan supra* n.6; *Shiv Dev Singh v. Senior Supdt. of Police, Batala* (2000) 9 SCC 426, where the Supreme Court termed it a “provisional amount”. See also, *Tarulata Devi v. State of Assam supra* n. 2; *Smt. Kamla Devi v. Govt. of NCT of Delhi supra* n.9.
- 17 (2000) 5 SCC 712.
- 18 AIR 1989 AP 235.
- 19 E.g., *Murti Devi v. State of Delhi* (1998) 9 SCC 604, where an undertrial prisoner died after alleged assault by convicts in the jail; *Muktaram Sitaram Shinde v. State of Maharashtra* 1997 Cri LJ 3458, compensation for death in prison due to lack of medical facilities.
- 20 *Supra* n.17 at 719.
- 21 *Id.* at 722.
- 22 *Id.* at 726.
- 23 (1994) 6 SCC 205.
- 24 (1999) 6 SCC 667.
- 25 *Supra* n.1.
- 26 1995 Supp 4 SCC 450.
- 27 *Supra* n.4.
- 28 *Supra* n. 17 at 727.
- 29 *Ibid*, emphasis added.
- 30 (2000) 9 SCC 404.
- 31 (2000) Cri LJ 4408.
- 32 *Id.* at 4414. The court directed that Rs. 2,50,000 be deposited in the daughter’s name, and the money used “only for the purpose of her education and marriage”.
- 33 *Supra* n.7 at 270.
- 34 *Supra* n.10
- 35 *Supra* n.7 at 2035.
- 36 Usha Ramanathan, “Law of Torts” 1995 *ASIL* 447 at 451.
- 37 *Suramalla Ranulu v. State of AP* (1995) 2 Andh LJ 399.

38 *Mst. Madina, supra* n.7 at 270; *Ajab Singh v. State of U.P. supra* n.6 at 525; *Phoolwati v. NCT of Delhi supra* n.6 at 1617; *Smt. Kamla Devi supra* n.9 at 4874.

39 *Amitadyuti Kumar v. State of West Bengal, supra* n.30 : Calcutta High Court in lieu of amount suggested by NHRC – Rs. 20,000; SC – Rs. 70, 000; *Iqubal Begum supra* n.7 : NHRC – Rs. 50,000, SC Rs. 3,50,000; *Smt. Kamla Devi supra* n.9 at 4874 : High Court – Rs. 2 lakhs, “aforesaid amount shall be over and above the one which has been awarded by the NHRC.”

40 *Supra* n.7

41 2000 ACJ 869.

42 The court records that his complaint to a magistrate of torture while in police custody went unheeded : *id* at 870.

43 (2000)1 Gau LJ 643.

44 See also, *Tarulata Devi, supra* n.2.

45 See also, *Surendra v. State of Maharashtra* (2001) 4 Mah LJ 601 at 612, torture of journalist through misuse of chapter VIII powers “so that he should learn a lesson not to expose police officers of the region within whose jurisdiction he was residing.”

46 *APCLC v. SHO, Saifabad Police Station, Hyderabad* (2000) 1 Andh LT 201, police firing during agitation against enhancement in electricity tariff; *Council for Protection of Human Rights v. State of Maharashtra* (2000) 2 Mah LJ 242.

47 *State of Gujarat v. Govindbhai Jakhubhai* 2000 ACJ 1305.

48 *Id* at 1314.

49 *Mariyappan v. State of Tamil Nadu* 2000 Cri LJ 4459, the incident was of November 1990.

50 Usha Ramanathan, “Tort Law”, 1997-98 *ASIL* 595 at 600-602, esp. *K.G.Kannabiran v. Chief Secy., Government of AP* (1997) 4 Andh LT 541.

51 (2000) 1 Gau LT 643.

52 (2001) 2 Gau LJ 280.

53 *Id.* at 283.

54 *Ibid.*

55 (2000)1 Bih LJR 20.

56 *Id.* at 23. The court negated a challenge to the locus of the public interest petitioner. The time taken to arrive at this finding was nearly 8 years.

57 *R.D. Upadhyay v. State of A.P.* (2001) 1 SCC 437.

58 *Id* at 439.

59 *Supra* n. 5.

60 2000 All LJ 1914 : 2000 Cri LJ 3917.

61 *Dr. C.T.Manjunath v. State of Karnataka* (2001) 3 Kar LJ 58 at 68.

62 *Id* at 74.

63 *Ibid.*

64 (2000) 2 Mah LJ 498 at 502.

65 *Id.* at 501. The court adopted a Minimum Wages formula.

66 (2000) 8 SCC 139.

67 *Id.* at 142.

68 *Amrik Singh v. State of Punjab* 2000 Cri LJ 4305. The court followed the dictum of the Supreme Court in *Sheela Barse v. State of Maharashtra* AIR 1983 SC 378.

69 (2001) 2 Jab LJ 114.

70 (2000) 2 Mah LJ 498.

71 See also, *Virendra v. State of UP supra* n.60 at 1917.

72 See, *Free Legal Aid Society v. State of Bihar, supra* n.55.

73 See *Smt. T.Joicy v. UOI* 2000 Cr.LJ 764: (2000) 1 Gau LT 120, compensation of Rs.2,50,000; *Smt. Kiron Devi v. UOI* (2000)1 Gau LT 446, Rs. 2 lakhs for the disappearance of a 19 year old boy.

74 (2000) 9 SCC 742 at 744.

75 (2000) 5 Andh LT 726.

76 *Id.* at 731-32.

77 *Id.* at 732.

78 For other cases re *ex gratia*, see, *Dipali Mandal v. State of Orissa* (2000) 90 Cutt LT 570,

- Rs.75,000 for death of husband in Orissa supercyclone on October 29/30 1999; *Raj Bala v. State of Haryana* (2001) 1 Punj LR 521, Rs.10 lakhs for martyr's family at the time of Operation Vijay in 1999; *Dr. Sharanjit Kaur v. State of Punjab* (2001) 3 Punj LR 109, Rs.2 lakhs as *ex gratia* by extension of a scheme covering the armed forces; *Maya Devi v. State of Bihar* (2000) 2 BLJR 1245, Rs. 1 lakh based on government resolution, to family of presiding officer in polling booth shot while on duty.
- 79 *Id.* at 746.
- 80 In *Chairman, Railway Board v. Chandrima Das* (2000) 2 SCC 465, as the single judge noticed earlier, the Supreme Court held that a Bangladeshi national was entitled to compensation where it was an Article 21 violation, which article extends to 'every person'.
- 81 (1994) 1 Andh LT 341. See also, Usha Ramanathan, "Law of Torts", 1994 *ASIL* 485 at 491.
- 82 *Supra* n. 75 at 745.
- 83 *Id.* at 745-46.
- 84 *Id.* at 750, emphasis added.
- 85 *Id.* at 750-51.
- 86 *Id.* at 753.
- 87 *Id.* at 754. At 753, the court recorded the government's strange protest that "the certificate issued by the Collector cannot be made basis for assessing the damages, it is only with a view to enable the petitioner to claim the insurance amount from the insurance such a certificate was issued and, therefore, it cannot be treated as actual damage suffered...".
- 88 1996 AIHC 5644. See also, Usha Ramanathan, "Tort Law" 1996 *ASIL* 423 at 426.
- 89 *Mohinder Kaur v. State of Haryana* (2000) 1 Punj LR 87. The FIR filed in 1984, and the *ex gratia* given by the State of MP, were recognized by the court as contradicting the plea of the state that the victim had not died at the hands of a mob.
- 90 *Id.* at 88-89.

