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Wrongful Prosecution (Miscarriage of Justice): Legal Remedies

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भारत का विधि आयोग
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Shri Ravi Shankar Prasad Ji,

The Delhi High Court, in the case of *Babloo Chauhan @ Dabloo v. State Government of NCT of Delhi*, 247 (2018) DLT 31, expressed grave concern about wrongful prosecution and incarceration of innocent persons, highlighting the need for a legislative framework for providing relief to such persons.

An effective response from the State to the victims of miscarriage of justice resulting in wrongful prosecutions is lacking in the criminal justice system in the country, as it stands today. Also, there is no statutory or legal scheme articulating State's response on the issue. Therefore, the Court directed the Law Commission to undertake a comprehensive examination of the issue and make its recommendations to the Government of India.

Article 21 of the Constitution provides for protection of life and personal liberty of the citizens. The infringement of a fundamental right due to police and prosecutorial misconduct invokes State liability. The Constitution, which secures the fundamental rights, is silent about grant of compensation by the State for infringement of such fundamental rights. Even under other remedies available under the existing system, the mechanism of compensation for miscarriage of justice resulting in wrongful prosecution remains complex and uncertain. The Commission has set out certain standards to be applied to the said 'miscarriage of justice' and has explained as to what amounts to wrongful prosecution. In order to give clarity to the whole procedure, the Commission has suggested amendments to Code of Criminal Procedure, 1973 and has prepared a Draft Bill titled "The Code of Criminal Procedure (Amendment) Bill, 2018".

I take the privilege to forward herewith the Commission's **Report No.277** titled "**Wrongful Prosecution (Miscarriage of Justice): Legal Remedies**" for consideration by the Government. I would like to place on record the laudable assistance provided by Ms. Nidhi Arora, Consultant, in preparation of the Report.

With warmest regards.

Yours sincerely,

B S Chauhan

[Dr. Justice B S Chauhan]

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Report No. 277
Wrongful Prosecution (Miscarriage of Justice): Legal Remedies

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Acknowledgements

The subject matter of this Report required a focused study for framing of new provision for providing legal remedies to the wrongfully prosecuted, as no such legislative framework exists today. The Commission gratefully acknowledges the valuable assistance and advise provided to it in this endeavour by Mr. Justice A P Sahi, Sr. Judge, Allahabad High Court; Justice (Retd.) Mr. Pratyush Kumar; Shri Sidharth Luthra, Sr. Advocate, Supreme Court; Shri Abhay, Director General, Narcotics Control Bureau; and Dr. Aparna Chandara, Assistant Professor, National Law University, Delhi.

Chapter - 1 INTRODUCTION

A. Reference from the Delhi High Court

1.1 In *Babloo Chauhan @ Dabloo v. State Government of NCT of Delhi*,¹ the High Court of Delhi, while dealing with an appeal on the issues of fine and awarding of default sentences without reasoning, and suspension of sentence during pendency of appeal, expressed its concerns about wrongful implication of innocent persons who are acquitted but after long years of incarceration, and the lack of a legislative framework to provide relief to those who are wrongfully prosecuted. The Court, vide its order dated 30 November 2017, specifically called for the Law Commission of India (‘the Commission’) to undertake a comprehensive examination of issue of ‘relief and rehabilitation to victims of wrongful prosecution, and incarceration’ (‘the Reference’), noting that:

There is at present in our country no statutory or legal scheme for compensating those who are wrongfully incarcerated. 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. **The possibility of invoking civil remedies can by no stretch of imagination be considered efficacious, affordable or timely...**

...The decisions in *Khatri v. State of Bihar* (1981) 1 SCC 627; *Veena Sethi v. State of Bihar* AIR 1983 SC 339; *Rudul Sah v. State of Bihar* AIR 1983 SC 1086; *Bhim Singh v. State of Jammu and Kashmir* (1985) 4 SCC 677

¹ 247 (2018) DLT 31.

and *Sant Bir v. State of Bihar* AIR 1982 SC 1470, are instances where the Supreme Court has held that compensation can be awarded by constitutional courts for violation of fundamental right under Article 21 of the Constitution of India. **These have included instances of compensation being awarded to those wrongly incarcerated as well. But these are episodic and are not easily available to all similarly situated persons.**

There is an urgent need, therefore, for a legal (preferably legislative) framework for providing relief and rehabilitation to victims of wrongful prosecution and incarceration... Specific to the question of compensating those wrongfully incarcerated, the questions as regards the situations and conditions upon which such relief would be available, in what form and at what stage are also matters requiring deliberation...

The Court, accordingly, requests the Law Commission of India to undertake a comprehensive examination of the issue highlighted in paras 11 to 16 of this order and make its recommendation thereon to the Government of India.” (Emphasis Supplied)

B. Issue Under Consideration

1.2 The expression ‘miscarriage of justice’ is of wide amplitude. It has been defined as an error of justice meaning “errors in the interpretation, procedure, or execution of the law – typically, errors that violate due process, often resulting in the conviction of innocent people.”² Wharton’s Law Lexicon (9th Edition) defines ‘Miscarriage of Justice’ as the failure of justice.

1.3 The Privy Council in *Bibhabati Devi v. Ramendra Narayan Roy*,³ defined the contours of the term ‘miscarriage of justice’ as a

² Brian Frost, *Errors of Justice, Nature, Sources and Remedies* (Cambridge: Cambridge University Press, 2004) 3.

³AIR 1947 PC 19.

departure from the rules that permeates all judicial procedure so as to make the resulting proceedings not in the proper sense of the word 'judicial procedure' at all. The Court highlighted two scenarios: one, where violation of law or procedure must be of such erroneous proposition of law that if that proposition were to be corrected, the finding could not stand; and the other, where the neglect is of such principle of law or procedure, whose application will have the same effect.⁴

1.4 Over the years, the expression 'miscarriage of justice' has been looked into in a plethora of judicial pronouncements, including within its purview a multitude of violations and desecrations. Miscarriage of justice is what arises from misconception of law, irregularity of procedure, neglect of proper precaution leading to apparent harshness of treatment or some underserved hardship to individuals.⁵

1.5 In *Ayodhya Dube & Ors. v. Ram Sumar Singh*⁶, the Supreme Court held that lack of judicial approach, non-application of mind, non-consideration or improper consideration of material evidence inconsistencies with faulty reasoning such that amounts to perversity amounts to grave miscarriage of justice.

1.6 A glaring defect in the procedure or a manifest error on a point of law is consequently a flagrant miscarriage of justice.⁷ If a

⁴ See also: *Srinivas Ram Kumar v. Mahabir Prasad & Ors.*, AIR 1951 SC 177; and *Union of India v. Ibrahim Uddin & Anr.*, (2012) 8 SCC 148.

⁵ *Janata Dal v. H. S. Chowdhary & Ors.* AIR 1993 SC 892; see also: *T. N. Dhakkal v. James Basnett & Anr.* (2001) 10 SCC 419.

⁶ AIR 1981 SC 1415.

⁷ *K. Chinnaswamy Reddy v. State of Andhra Pradesh*, AIR 1962 SC 1788.

judgment is unreasonable, based on an erroneous understanding of the law and of the facts of the case, it occasions miscarriage of justice. If a court's approach in dealing with the evidence is found to be patently illegal, with findings recorded to be perverse, and the conclusions arrived thereto contrary to the evidence on record, it leads to miscarriage of justice.⁸

1.7 Non-compliance of the principles of natural justice, may deprive the accused to explain a particular circumstance. Unjust failure to produce requisite evidence may cause prejudice to the accused, which may result in failure of justice. Prejudice is incapable of being interpreted in its generic sense. The expression failure of justice is an extremely pliable or facile expression, which can be made to fit into any situation of a case.⁹

1.8 Miscarriage of justice arises from a faulty and erroneous appreciation of evidence.¹⁰ In *Ramesh Harijan v. State of Uttar Pradesh*¹¹, the Court overturning an acquittal order, noted that undue importance to 'insignificant discrepancies and inconsistencies' by the trial court observing that such a course

⁸ *State Of Punjab v. Madan Mohan Lal Verma*, AIR 2013 SC 3368; see also: *Abrar v. State of Uttar Pradesh*, AIR 2011 SC 354; *Rukia Begum v. State of Karnataka*, AIR 2011 SC 1585; and *State of Madhya Pradesh v. Dal Singh & Ors.*, AIR 2013 SC 2059.

⁹ *Nageshwar Sh. Krishna Ghobe v. State of Maharashtra*, AIR 1973 SC 165; *Shamnsaheb M. Multtani v. State of Karnataka*, AIR 2001 SC 921; *State v. T. Venkatesh Murthy*, AIR 2004 SC 5117; *Prakash Singh Badal v. State of Punjab*, AIR 2007 SC 1274; *Rattiram v. State of Madhya Pradesh*, AIR 2012 SC 1485; *Bhimanna v. State of Karnataka*, AIR 2012 SC 3026; and *Darbara Singh v. State of Punjab*, AIR 2013 SC 840).

¹⁰ *State of Uttar Pradesh v. Nawab Singh*, AIR 2004 SC 1511; *State of Uttar Pradesh v. Premi*, AIR 2003 SC 1750; and *Bangalore City Cooperative Housing Society Ltd. v. State of Karnataka & Ors.*, AIR 2012 SC 1395.

¹¹ AIR 2012 SC 979

tantamount to miscarriage of justice – and preventing the same is of paramount importance.¹²

1.9 These judicial pronouncements discuss a broader view of the expression ‘miscarriage of justice’, but in the context of issue under discussion in this report, ‘miscarriage of justice’ refers to wrongful or malicious prosecution, whether or not it leads to a conviction by any court of law, and whether or not it leads to any incarceration. These are the cases where the accused was not guilty of the offence, and the police and/or the prosecution engaged in some form of misconduct in investigating and/or prosecuting the person.

C. Previous Reports of the Law Commission

(i) The 1st Report on ‘Liability of State in Tort’ (1956)

1.10 The Commission looked into the question of a specific law with respect to citizen claims based on tort against the Union and the States, and if so, what should be the extent of State liability. It recommended the enactment of a suitable law to define the position on Government’s tortious liability, stating that it “is necessary that the law should, as far as possible, be made certain and definite.” On the extent to which such law should make the state liable for tortious acts, the Commission recommended that this issue requires “undoubtedly, a nice balancing consideration so

¹² *Allarakh K Mansuri v. State of Gujarat*, AIR 2002 SC 1051, the Supreme Court held that in a case where the trial court has taken a view based upon conjectures and hypothesis and not on the legal evidence, a duty is cast upon the appellate court to re-appreciate the evidence in appeal for the purposes of ascertaining as to whether the accused has committed any offence or not. See Also: *State of Rajasthan v. Shera Ram*, AIR 2012 SC 1.

as not to unduly restrict the sphere of activities of the State and at the same time to afford sufficient protection to the citizen.”

1.11 The Commission also considered the scope of the immunity of the State for the tortious acts of its officials and recommended the relaxation of the rule of state immunity, and that “the old distinction between sovereign and non-sovereign functions should no longer be invoked to determine the liability of the State.”

(ii) The 78th Report on ‘Congestion of Under-trial Prisoners in Jails’ (1979)

1.12 The Commission in this report dealt with the issue of substantial number of undertrial prisoners in jails and the need for legal reforms required to deal with the same. The Commission noting that the jails should primarily be meant for lodging convicts and not for persons under trial, recommended that the two categories of inmates be housed separately, that there should be a separate institution for the detention of undertrial prisoners. The report also contained other recommendations on disposal of cases (delay and arrears in trial courts); amount of bond; release on bond without surety etc.

(iii) The 113th Report on ‘Injuries in Police Custody’ (1985)

1.13 The Commission in this report dealt with the issue of burden of proof in prosecution of a police officer for an alleged offence of having caused bodily injury to a person in custody. It recommended insertion of a Section 114B in the Indian Evidence Act, 1872 to provide that in the aforesaid cases of prosecution of a police officer, if there was evidence that the injury was caused

during the period when the person was in the custody of the police, the Court may presume that the injury was caused by the police officer having custody of that person during that period.

1.14 The Commission further recommended that the Court, while considering the question of presumption in the said cases, should have regard to all relevant circumstances including the period of custody, statement made by the victim, medical evidence and the evidence which the Magistrate may have recorded. The report also recommended shifting of burden of proof in offences relating to custodial violence and tortures.

(iv) The 152nd Report on 'Custodial Crimes' (1994)

1.15 The Commission in this report dealt with the issue of arrest and abuse of authority by the police officials. Referring to the concerned Constitutional and statutory provisions, the report recommended many amendments on the subject matter. One of the amendments recommended was with respect to the Indian Evidence Act, 1872 - reiterating insertion of section 114B (as was recommended in the 113th report). The recommendations made hereunder also suggested amendments to the Criminal Procedure Code, 1973, adding of a section 41(1A) for recording the reasons for arrest, and a section 50A to inform the nominated person about the arrest, among others.

(v) The 154th Report on 'The Code of Criminal Procedure, 1973' (1996)

1.16 The Commission undertook a detailed examination of the Code 1973 "so as to remove the germane problems leading to

consequential delay in disposal of criminal cases”. It made comprehensive recommendations including amendments in the Code, 1973, the Police Acts, amongst others. One of these recommendations was to separate the investigating police force from the law and order enforcement police force: to *inter alia* increase the expertise of the investigating police; make investigations efficient which will reduce the possibility of unjustified and unwarranted prosecutions. The investigating police force was recommended to be placed under the supervision of higher authorities.

(vi) The 185th Report on the ‘Review of the Indian Evidence Act, 1872’ (2003)

1.17 The Commission while reviewing the Act 1872, once again looked into section 114B (as recommended in the 113th report and reiterated in the 152nd report). Along with recommending amendments to other sections of the Act 1872, the Commission reiterated the aforesaid recommendation of section 114B, but with a modification to provide the meaning of the expression ‘police officer’ for the purpose of the section. The said expression was recommended to include “officers of the para-military forces and other officers of the revenue, who conduct investigation in connection with economic offences”.

(vi) The 273rd Report on ‘Implementation of ‘United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment’ through Legislation’ (2017)

1.18 The Commission in this report, looking into the issue under consideration, made several recommendations. One of these was endorsing the views expressed in the 113th, 152nd and 185th

reports with respect to insertion of section 114B in the Indian Evidence Act, 1872. The Commission noted that this provision will ensure that in a case where a person in police custody sustains injuries, it is presumed by the Court that those injuries have been inflicted by the police, and the burden of proof shall lie on the concerned police officer to explain such injury.

D. The Present Report

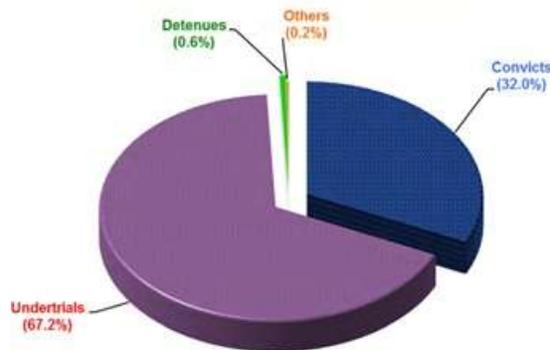
1.19 Pursuant to the Reference, the Commission conducted broad-based research and consulted stakeholders from various spheres – police, advocates, judicial officers, among others, on the issue of miscarriage of justice resulting in wrongful prosecution, incarceration and/or conviction. Taking into consideration the inputs and suggestions received, and upon extensive deliberations, discussions and in-depth study, the Commission has given shape to the present Report.

1.20 The Report discusses the international perspective on addressing the aforementioned miscarriage of justice; delving into the current scenario - remedies as available under the existing laws - identifying the standard of miscarriage of justice in the Indian context; and concludes with the recommendations of the Commission in terms of a legal framework to address the issue.

Chapter - 2

DATA AND ANALYSIS

2.1 The National Crime Records Bureau's (NCRB) annual statistical report called the 'Prison Statistics India' (PSI) contains information with respect to prisons, prisoners, and prison infrastructure. According to PSI 2015¹³, there were 4,19,623 prisoners across the country¹⁴; out of which, 67.2% i.e. 2,82,076 were undertrials (i.e. people who have been committed to judicial custody pending investigation or trial by a competent authority)¹⁵; substantially higher than the convict population i.e. 1,34,168 (32.0%):



Source: National Crime Relations Bureau

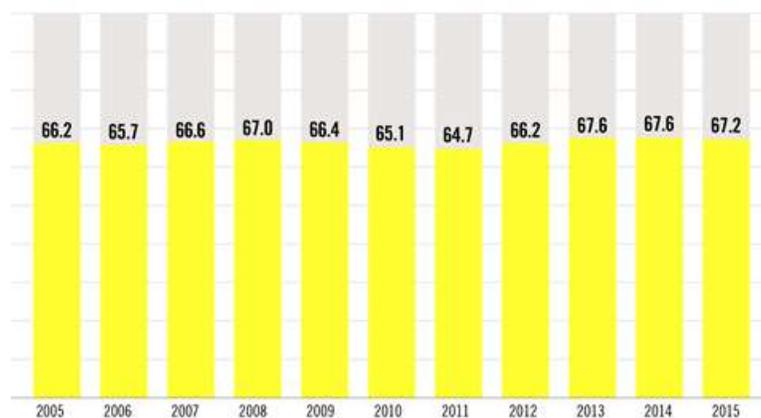
2.2 A review of the data in PSI shows that across the country as well as in States, undertrial prisoners continue to be higher in numbers than the convict population. The States with the highest percentage of undertrials were Meghalaya - 91.4%, Bihar - 82.4%,

¹³ Ministry of Home Affairs. Available. *National Crime Records Bureau, Prison Statistics India – 2015* (September 2016). Available at <http://ncrb.gov.in/statpublications/psi/Prison2015/Full/PSI-2015-%2018-11-2016.pdf>. (Last Accessed: 10 August 2018)

¹⁴ Central Jails; District Jails; Sub Jails; Women Jails; Open Jails; Borstal Schools; Special Jails; and Other Jails, Ibid.

¹⁵ National Crime Records Bureau, *Prison Statistics India – 2015*, supra.

Manipur -81.9%, Jammu & Kashmir -81.5%, Nagaland - 79.6%, Odisha - 78.8%, Jharkhand 77.1%, and Delhi - 76.7%.¹⁶ This percentage of undertrials (of the total number of prisoners) has remained consistently high over the preceding decade of 2005-2015:



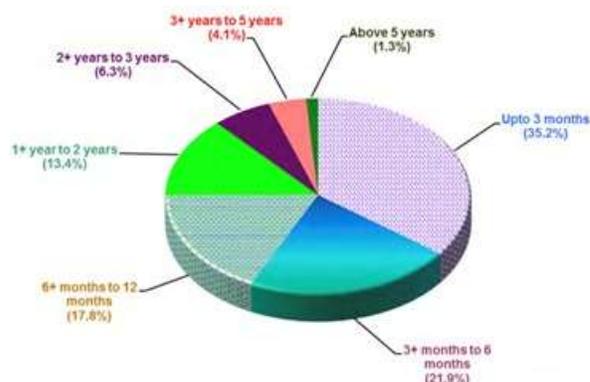
Source: National Crime Records Bureau

2.3 In terms of the State-wise statistics, the maximum number of undertrial prisoners in various jails across the country at the end of the year 2015 were reported from Uttar Pradesh - 62,669, followed by Bihar - 23,424, then Maharashtra - 21,667, Madhya Pradesh - 21,300, West Bengal - 15,342, Rajasthan - 14,225, Jharkhand - 13,588, Punjab - 13,046, Odisha - 12,584, Delhi - 10,879 and Haryana -10,489.

2.4 With respect to the issue of miscarriage of justice under consideration here, the period of incarceration of the undertrials also needs to be taken into consideration. The data shows that 25.1% (70,616) of the total undertrials spent more than a year in prison; 17.8% (50,176) spend up to 1 year in prison as undertrials,

¹⁶ Ibid.

21.9% (61,886) of the undertrials were in prison for 3 to 6 months, and 35.2% (99,398) undertrials spent up to 3 months in prison. The complete percentage breakup of 'period of detention' of the undertrials is as follows:



Source: National Crime Relations Bureau

2.5 Also to be noted is the data of release, which shows that during the year 2015, 82,585 prisoners were released by acquittal, and 23,442 prisoners were released in appeal.¹⁷

2.6 Further, according to the information compiled by NCRB (cited in the answer by Minister of State in the Ministry of Home Affairs, Shri Hansraj Gangaram Ahir in the Rajya Sabha to the Unstarred Question No. 550), during the year 2016, the number of undertrials increased by more than 10,000 (from 2015), recorded at 2,93,058; while the number of convicts increased by a little over 1000, recorded at 1,35,683.¹⁸

2.7 An international study has noted that India, with the aforementioned 67.2%, has one of the highest undertrial

¹⁷ National Crime Records Bureau, Prison Statistics India – 2015, supra.

¹⁸ Available at <https://mha.gov.in/MHA1/Par2017/pdfs/par2018-pdfs/rs-07022018-ENG/550.pdf>. (Last Accessed 12 August 2018) .

populations in the world.¹⁹ It is noted to be the 16th highest in the world (out of a total of 217 countries);²⁰ and the fifth highest in Asia – after Pakistan, Cambodia, Philippines and Bangladesh.²¹

2.8 Such large number of undertrials (more than the number of convicts) year after year and their long detention periods show that undertrials spent a substantial period of time awaiting trials/ judicial determination of their case. This delay and waiting becomes a graver miscarriage of justice when the person is wrongfully accused and incarcerated pending trial/proceedings, which he should not have been subjected to in the first place.

2.9 While the data does not specifically highlight the number of undertrials wrongfully incarcerated or acquitted pursuant to a wrongful prosecution or conviction; these numbers, nonetheless, press upon the importance of the issue and the urgency for a statutory remedial framework to provide relief to these victims of the system.

2.10 The Apex Court, taking note of this dreadful state of affairs, expressed anguish over the plight of accused persons languishing

¹⁹“Highest to lowest - pre-trial detainees /remand prisoners”. World Prison Brief, Institute for Criminal Policy Research. Available at: http://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=All. (Last Accessed: 12 August 2018). See also: Amnesty International India, *Justice Under Trial: A Study of Pre-trial Detention in India*

²⁰ World Prison Brief, Institute for Criminal Policy Research, ‘Highest to lowest - pre-trial detainees / remand prisoners’. Available at: http://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=All

²¹In a total of 28 entries. “Institute for Criminal Policy Research, ‘Highest to lowest - pre-trial detainees / remand prisoners”. World Prison Brief. Available at: http://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=16. (Last Accessed: 12 August 2018).

in prisons for unjustifiable extended periods of time, in *Thana Singh v. Central Bureau of Narcotics*²², observing:

The laxity with which we throw citizens into prison reflects our lack of appreciation for the tribulations of incarceration; the callousness with which we leave them there reflects our lack of deference for humanity. It also reflects our imprudence when our prisons are bursting at their seams. For the prisoner himself, imprisonment for the purposes of trial is as ignoble as imprisonment on conviction for an offence since the damning finger and opprobrious eyes of society draw no difference between the two....

²²(2013) 2 SCC 590. See also: *Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar, Patna*, AIR 1979 SC 1369; *Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India and Ors.* (1994) 6 SCC 731.

Chapter - 3

INTERNATIONAL PERSPECTIVE

A. The International Covenant on Civil and Political Rights

3.1 The International Covenant on Civil and Political Rights 1966 ('ICCPR') is one of the key international documents on miscarriage of justice. ICCPR discusses the obligation of State in cases of miscarriage of justice resulting in wrongful conviction. It requires the State to compensate the person who has suffered punishment on account of a wrongful conviction provided that the conviction was final, and was later reversed or pardoned on the ground of miscarriage of justice i.e. a new fact proving that the accused was factually innocent. Article 14(6) of ICCPR states:

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 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. (Emphasis Supplied)

Article 9(5) states:

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

3.2 The United Nations Human Rights Committee²³ discussed Article 14 of the ICCPR in detail in its General Comment No. 32 (2007). In explaining the obligations of the State in ‘Cases of Miscarriage of Justice’, it required:

52. **It is necessary that States parties enact legislation ensuring that compensation as required by this provision can in fact be paid and that the payment is made within a reasonable period of time.**

53. This guarantee does not apply if it is proved that the non-disclosure of such a material fact in good time is wholly or partly attributable to the accused; in such cases, the burden of proof rests on the State. Furthermore, no compensation is due if the conviction is set aside upon appeal, i.e. before the judgment becomes final,²⁴

or by a pardon that is humanitarian or discretionary in nature, or motivated by considerations of equity, not implying that there has been a miscarriage of justice.²⁵
(Emphasis Supplied)

3.3 ICCPR and the above-referred General Comment together emphasise the need for a legislative framework for payment of compensation to the victims of wrongful conviction, and the same to be done within a “reasonable period of time”.

3.4 A total of 168 State parties, including India, have ratified the ICCPR. However, not all countries have converted their commitment into law. State parties have met their obligations under article 14(6) in one or more of the following ways: incorporation of the article (or a rewording of the article) directly

²³ United Nations Human Rights Committee is the UN body whose interpretations of the ICCPR are considered authoritative.

²⁴ Communications No. 880/1999; *Irving v. Australia*, para. 8.4; No. 868/1999, *Wilson v. Philippines*, para. 6.6., as cited in the General Comments 32, UN Human Rights Committee

²⁵ Communication No. 89/1981; *Muhonen v. Finland*, para. 11.2. *ibid*

into domestic legislation to create a statutory right to compensation; conferring a dedicated discretion on an administrative or judicial body to determine whether awards of compensation should be paid; or utilising the general power of domestic governments to make *ex gratia* payments.

3.5 These States have developed legal frameworks for remedying such miscarriage of justice by compensating the victims of wrongful convictions, providing them pecuniary and/or non-pecuniary assistance. These frameworks establish the State's responsibility of compensating the said victims and also lay down other substantive and procedural aspects of giving effect to this responsibility – quantum of compensation - with minimum and maximum limits in some cases - factors to be considered while deciding the right to compensation as well as while assessing the amount, claim procedure, the institution set up etc. The following section of this Chapter delves into few of these legal frameworks discussing their key features.

B. United Kingdom

(i) Criminal Justice Act 1988

3.6 In conformity with its international obligation under ICCPR, the United Kingdom has incorporated the aforesaid provision of Article 14(6) into its domestic legislation, the Criminal Justice Act 1988, under Part XI subtitled “Miscarriages of Justice”, sections 133, 133A, 133B.

3.7 The said section lay down the legislative framework under which the Secretary of State, subject to specified conditions, and upon receipt of applications, shall pay compensation to a person

who has suffered punishment as a result of a wrongful conviction, that was subsequently reversed or pardoned on the ground that there has been a miscarriage of justice - where a new fact came to light proving beyond reasonable doubt that the person did not commit the offence. It also provides the factors to be considered while assessing the amount of compensation i.e. harm to reputation or similar damage, the seriousness of the offence, severity of the punishment, the conduct of the investigation and prosecution of the offence. In terms of the amount of compensation, the said sections provide an overall compensation limit (distinguishing on the basis of period of incarceration i.e. less than ten (10) years or ten (10) years or more).²⁶

3.8 Prior to 2011, the eligibility for compensation under this law requires that the claimant be exonerated and not acquitted on grounds of legal technicalities or evidence falling short of “beyond reasonable doubt.” However, in 2011 vide the case of *R (on the application of Adams) v. Secretary of State for Justice*²⁷, the UK Supreme Court widened the definition of ‘miscarriage of justice and the notion of innocence’. A majority judgment ruled that the requirement of conclusive innocence was too narrow and held that even those who cannot prove their innocence beyond reasonable doubt were entitled to compensation; further noting that:

Innocence as such is not a concept known to our criminal justice system. We distinguish between the guilty and the not guilty. A person is only guilty if the state can prove his guilt beyond reasonable doubt... if it can be conclusively shown that the state was not entitled to punish a person, it seems to me that he should be entitled to compensation

²⁶ Under the Act there is also a time limit for filing of the claim i.e. before the end of the period of 2 years from the date on which the conviction of the person concerned is reversed or he is pardoned (Section 133).

²⁷ [2011] UKSC 18.

for having been punished. He does not have to prove his innocence at his trial and it seems wrong in principle that he should be required to prove his innocence now.

(ii) Criminal Cases Review Commission (CCRC)

3.9 The UK also has a Review Commission dedicated to the task of ascertaining whether an accused has suffered miscarriage of justice. The Criminal Cases Review Commission (CCRC), which was established in March 1997, reviews cases with possibility of miscarriages of justice in the criminal courts of England, Wales, and Northern Ireland, and refers appropriate cases to the appeal courts for review.

3.10 CCRC is the forum where those who believe they have either been wrongfully convicted or sentenced can apply to have their case reviewed. It can gather information related to a case and carry out its own investigation. Once completed, CCRC decides whether to refer the case to the appropriate appellate court for further review.

(iii) UK Police Act, 1996

3.11 Also noteworthy is the section 88 of the UK Police Act 1996, that deals with the 'Liability for wrongful acts of constables'. This section lays down the remedy and procedure in the aforesaid cases. It makes the chief officer of police liable in respect of any unlawful conduct of constables under his direction and control in the performance of their functions, in like manner as a master is liable in respect of torts committed by his servants in the course of their employment; and, accordingly shall as in the case of a tort, be treated for all purposes as a joint tortfeasor. It further provides for payment of any damages or settlement amount, for such cases, out of the police fund.

3.12 In *Hill v. Chief Constable of West Yorkshire*²⁸, the House of Lords held that police officers did not owe a duty to individual members of the public who might suffer injury through their careless failure to apprehend a dangerous criminal. The conduct of a police investigation involves a variety of decisions on matters of policy and discretion, including decisions as to priorities in the deployment of resources. To subject those decisions to a common law duty of care, and to the kind of judicial scrutiny involved in an action in tort, was held to be inappropriate.

3.13 In *Brooks v. Commissioner of Police for the Metropolis & Ors.*,²⁹ the House of Lords approving the decision in *Hill v Chief Constable of West Yorkshire* (supra), reformulated the principle in terms of an absence of a duty of care rather than a blanket immunity, noting that “*it is, of course, desirable that police officers should treat victims and witnesses properly ... But to convert that ethical value into general legal duties of care ... would be going too far. The prime function of the police is the preservation of the Queen’s peace ... A retreat from the principle in Hill would have detrimental effects for law enforcement.*”

3.14 In *Robinson v. Chief Constable of the West Yorkshire Police*,³⁰ the UK Supreme Court explained the scope of the common law duty of care owed by police when their activities lead to injuries being sustained by members of the public. It has long been the case that a claim cannot be brought in negligence against the police, where the danger is created by someone else, except in certain unusual circumstances such as where there has been an

²⁸ [1987] UKHL 12.

²⁹ [2005] UKHL 24.

³⁰ [2018] UK SC 4.

assumption of responsibility. This case, however, was focused on the question of injuries resulting from activities of the police, where the danger was created by their own conduct. The Court held that the police did owe a duty of care to avoid causing an injury to a member of the public in those circumstances. The Court while taking note of public law duties of the police further noted as follows in relation to their private law duties:

It follows that there is no general rule that the police are not under any duty of care when discharging their function of preventing and investigating crime. They generally owe a duty of care when such a duty arises under ordinary principles of the law of negligence unless statute or the common law provides otherwise. Applying those principles, they may be under a duty of care to protect an individual from a danger of injury which they have themselves created, including a danger of injury resulting from human agency, as in *Dorset Yacht and Attorney General of the British Virgin Islands v. Hartwell*. Applying the same principles, however, the police are not normally under a duty of care to protect individuals from a danger of injury which they have not themselves created, including injury caused by the conduct of third parties, in the absence of special circumstances such as an assumption of responsibility.

C. Germany

3.15 In Germany, the issue of miscarriage of justice resulting in wrongful convictions et.al. is primarily dealt with by assigning the liability to the State ('official liability'), and by providing compensation to those wrongfully convicted.

(i) Grundgesetz – The Constitution

3.16 The Constitution of Germany [Grundgesetz (GG)], 1949, also referred to as the Basic Law, in its Article 34 lays down the

primary law in this respect. The Article titled 'Liability for violation of official duty' reads:

If any person, in the exercise of a public office entrusted to him, violates his official duty to a third party, liability shall rest principally with the state or public body that employs him. In the event of intentional wrongdoing or gross negligence, the right of recourse against the individual officer shall be preserved. The ordinary courts shall not be closed to claims for compensation or indemnity.

(ii) Law on Compensation for Criminal Prosecution Proceedings 1971

3.17 In addition to the above, specifically dealing with wrongful conviction, there is also An Act of Parliament - the Law on Compensation for Criminal Prosecution Proceedings 1971, which specifies that whoever has suffered damage as a result of a criminal conviction which is later quashed or lessened (the "applicant") shall be compensated by the State (Article 1). The State also compensates a person who has suffered damage as a result of a remand order or certain other types of detention, provided he or she is acquitted, or the prosecution is suspended or abandoned (Article 2).

(iii) Law on Compensation for Law Enforcement Measures

3.18 There is also the 'Strafverfolgungsentschädigungsgesetz' (StrEG), translated as 'Law on Compensation for Law Enforcement Measures' in force since 1971, dealing with claims for compensation mainly arising out of mitigation or elimination of final conviction, unlawful pre-trial detention and other unlawful detention, unlawful search and seizure.

3.19 § 7 Abs. 3 StrEG provides for a fixed sum per day for the non-pecuniary damage as compensation i.e. €25 per day (wrongfully spent in custody) in addition to any compensation for financial loss. Factors comprising financial loss include loss of earnings often due to a loss of the place of employment, losses in the pension insurance policy (usually due or in direct consequence to loss of earnings), cost of the lawyer, cost arising from the search of a place to live and from damage to health.

3.20 Claim for compensation under this law is made before the state justice administration, which decides on the claim. The burden of proof in the aforesaid claims lie on the claimant, which has been noted to make it difficult in reality for the claimant to obtain any compensations for financial loss.

3.21 § 5 StrEG bars claims of compensation in certain cases, such as causation of the prosecution by the injured party – deliberately or gross negligently (the expression ‘gross negligently’ includes an act where the wrongfully convicted person neglected their duty of care, for example, accused confessing to his guilt despite being innocent); the concealment of relieving circumstances by the claimant.

(iv) The German Criminal Code

3.22 In terms of other specific statutes, the German Criminal Code called the ‘Strafgesetzbuch’ (in effect since 1872) in its sections 97a and 97b deals with the cases of suffering caused due to excessive length of the proceedings before the Federal Constitutional Court, providing for “adequate compensation” to

victims of such delays; where the reasonableness of the length of the proceedings shall be established on a case-by-case basis, taking into account the Federal Constitutional Court's tasks and position. A decision on compensation and reparation hereunder requires a formal complaint against judicial delay (Verzögerungsbeschwerde).³¹ The provision also talks in terms of a non-pecuniary disadvantage, which shall be assumed to exist if a case has taken excessively long. Compensation for such a disadvantage may only be claimed if the circumstances of the individual case do not permit a different kind of redress, in particular a declaration that the length of the proceedings was excessive.³²

(v) The German Civil Code

3.23 With respect to official breach of duty pertaining to administrative acts, the 'official liability' is the central standard of the German state liability law. The legal basis for the same resides in the German Civil Code (in effect since 1900) called Bürgerliches Gesetzbuch (BGB). § 839, read with Art. 34 GG. § 839 BGB laying down the provision regarding 'Liability in case of official breach of duty', states as follows:

(1) If an official, intentionally or negligently, violates his official duty towards a third party, he shall reimburse the third party for the resulting damage. If the official is only liable for negligence, he may only be charged if the injured person cannot obtain compensation in any other way.

³¹ Section 97b(1), The German Criminal Code.

³² Compensation provided for in such a case is fixed at EUR 1,200 for each year of delay with the discretion for vested with the Federal Constitutional Court to set a higher or lower amount. Section 97a(1), The German Criminal Code.

(2) If an official breaches his official duties in a judgment in a case, he is only responsible for the resulting damage if the breach of duty results in a criminal offense. In a wrongful refusal or delay in the exercise of their office, this provision does not apply.

(3) The duty of compensation shall not arise if the injured party intentionally or negligently failed to avert the damage by using an appeal.

3.24 § 839 BGB in conjunction with Art. 34 GG forms the basis of the liability of the public authorities by its transfer to the state and deals the external relationship with the citizen. Under these provisions, 'official liability' arises if public official breaches an official duty towards a third party, thereby causing harm to such third party be it a citizen or other legal entity. In terms of the examination scheme, the following 6 prerequisites must be fulfilled:

- (i) Exercise of a public office by a public official;
- (ii) Violation of a third-party duty;
- (iii) Violation / breach of duty;
- (iv) Imputability of the damage;
- (v) No disclaimer and no limitation of liability; and
- (vi) No statute of limitations

3.25 The aforesaid provisions lay down the consequences of unlawful and culpable administrative acts and justifies a claim for damages. The official liability initially includes the personal liability of the person acting for the State and for this purpose appointed by the State. This liability is then transferred to the State in accordance with Art. 34 GG. The official is thus liable himself and is subsequently relieved by the State. The misconduct of the official is therefore not considered a State wrongdoing. The State only assumes the guilt of the official. The State takes the place of

the actually liable as a protective shield and compensates the affected citizen. The official liability is therefore not an immediate, but only an indirect State liability.

D. United States of America

3.26 In the United States of America (US), matters of miscarriage of justice resulting in wrongful conviction are primarily addressed by compensating those who have been wrongfully convicted in accordance with the federal or the respective state law, as may be applicable.

(i) Federal Law

3.27 The federal law on the issue is the United States Code Title 28 § 1495 & §2513. It deals with federal claims from persons unjustly convicted of an offence against the United States and imprisoned. A claimant is eligible for relief under this law on the grounds of pardon for innocence, reversal of conviction or of not being found guilty at a new trial or rehearing. These claims lie in the U.S. Court of Federal Claims. The Code provides for a fixed compensation amount depending on the length of incarceration.³³

(ii) State Laws

3.28 All the States in the US have their own respective laws providing for compensation - monetary and/or non-monetary assistance - to the victims of wrongful conviction, incarceration. In terms of monetary compensation, while some States have laid down fixed amount to be paid depending on the period of incarceration (Alabama, California, Colorado, District of Columbia, Florida, Illinois, Hawai, Iowa, Kansas, Louisiana, Michigan,

³³ The compensation amount is fixed at \$50,000 for each year of incarceration, and \$100,000 per year for each year on death row.

Minnesota, Mississippi, Missouri, New Jersey, New York, North Carolina, Texas, Virginia, Vermont, Washington), others have given the discretion to the appropriate forum to decide the amount of compensation on case-to-case basis (with a statutory guidelines/prescribed maximum amount)(Connecticut, Massachusetts, Maine, Maryland, Nebraska, New Hampshire, West Virginia)

3.29 The compensation framework of Illinois needs a specific mention, where the statute (Ill Rev Stat Ch. 705 § 505/1) provides a tabular compensation formula, laying down maximum amount payable depending on the period of incarceration:

- 5 years or less - \$85,350 maximum
- 14 year or less - \$170,000 maximum
- More than 14 years - \$199,150 maximum

3.30 District of Columbia is also worth mentioning, where DC ST § 2-421 provides for interim relief, stating that within 21 days of approval of a petition for compensation, the claimant will receive \$10,000 to assist in immediately securing services such as housing, transportation, subsistence, re-integrative services, and mental and physical health care.

3.31 In addition to the above, most of the States in the US also provide for non-monetary compensation for assisting these victims in rehabilitation, and reintegration into society; it 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 services, counselling services; and expunging of the record of

conviction - helpful in allowing the claimants to reintegrate into society.

E. Canada

3.32 Canada ratified the ICCPR in 1976; though no legislation has been enacted to give effect to the Covenant, the principles expressed in it appear to have informed a joint set of guidelines relating to compensation for the wrongfully convicted, formulated by the Federal and Provincial Ministers of Justice in 1988.

3.33 Titled as the 'Federal/Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons', these Guidelines contain the criteria which is to be met before a person can be considered eligible for compensation. Notably, the Guidelines expressly limit the payment of compensation only to the actual person who was wrongfully convicted and imprisoned.

3.34 As per the said Guidelines, the prerequisites for eligibility for compensation are as follows:

- (i) the wrongful conviction must have resulted in imprisonment, all or part of which has been served;
- (ii) compensation should only be available to an individual who has been wrongfully convicted and imprisoned as a result of a Criminal Code or other federal penal offence;
- (iii) the conviction has been reversed, outside the normal appeal process, on the basis of a new or newly discovered fact;
- (iv) the new fact shows that the applicant is factually innocent i.e. the applicant did not commit the crime, and that there has been a miscarriage of justice; and

(v) when all available appeal remedies have been exhausted.

3.35 The considerations for determining the quantum of compensation under the Guidelines include both non-pecuniary and pecuniary losses:

(i) Non-pecuniary losses

- a) Loss of liberty and the physical and mental harshness and indignities of incarceration;
- b) loss of reputation which would take into account a consideration of any previous criminal record;
- c) loss or interruption of family or other personal relationships.

(ii) Pecuniary Losses

- a) Loss of livelihood, including of earnings, with adjustments for income tax and for benefits received while incarcerated;
- b) loss of future earning abilities;
- c) loss of property or other consequential financial losses resulting from incarceration.

3.36 In assessing the aforementioned amounts, the inquiring body is required to consider the following factors:

- (i) Blameworthy conduct or other acts on the part of the applicant which contributed to the wrongful conviction;
- (ii) due diligence on the part of the claimant in pursuing his remedies.

3.37 Additionally, reasonable costs incurred by the applicant in obtaining a pardon or verdict of acquittal should be included in the award for compensation. Compensation for non-pecuniary losses

should not exceed \$100,000. It is to be noted that these Guidelines are not regarded as binding legislation; and just as they do not create any legal right to compensation, they also do not create any legal bar to compensation, payment of compensation remains at the discretion of the Crown. In this manner, reportedly, many of the awards of compensation that have been made in the last 20 years departed in some manner or the other from the criteria proposed by the Guidelines.³⁴

3.38 In addition to the above, a wrongfully convicted person, in Canada, also has the option to pursue a civil cause of action, such as a claim in tort for malicious prosecution, negligent investigation, prosecutorial misconduct, or false imprisonment, or a claim for breach of rights protected under the Canadian Charter of Rights and Freedoms. ‘Negligent investigation’, as a cause of action was recognized the Supreme Court of Canada in the case of *Hill v. Hamilton-Wentworth Regional Police Services Board*,³⁵ where the Court noted that the appropriate standard of care, like for other professionals, is that of “a reasonable police officer in similar circumstances.”

F. New Zealand

3.39 In New Zealand, wrongful conviction and imprisonment is addressed via compensation granted *ex-gratia* by the State. These *ex gratia* payments are in accordance with the Ministry of Justice’s ‘Compensation for Wrongful Conviction and Imprisonment (May 2015)’ (“Guidelines”). These Guidelines are based on the ‘Cabinet

³⁴ ‘Entitlement to Compensation - The Legal Framework’. Available at: <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/truscott/section5.php>

³⁵ [2007] SCC 41.

Criteria for Compensation and Ex Gratia Payments for Persons Wrongly Convicted and Imprisoned in Criminal Cases' (Ministry of Justice, 1998). The said Guidelines cover both the issue of whether or not someone receives the compensation, and how much compensation they receive.

3.40 Under the Guidelines, a person is eligible for compensation if he is imprisoned following a wrongful conviction that is subsequently set aside; and is, at a minimum, innocent on the balance of probabilities. In addition to the foregoing, claimant must (i) be alive at the time of application; (ii) have served all or part of a sentence of imprisonment; (iii) have received a free pardon or have had their convictions quashed on appeal without order of retrial.

3.41 The Guidelines provide for three categories of compensation for successful claimants:

- (i) payments for non-pecuniary losses following conviction – based on a starting figure of \$100,000 for each year in custody.
- (ii) payments for pecuniary losses following conviction.
- (iii) a public apology or statement of innocence.

3.42 Where factors taken into consideration with respect to non-pecuniary losses include: loss of liberty, loss of reputation (taking into account the effect of any apology to the person by the Crown), loss or interruption of family or other personal relationships, and mental or emotional harm. And, for pecuniary losses include: loss of livelihood, including loss of earnings, with adjustments for income tax and for benefits received while incarcerated; loss of future earning abilities; loss of property or other consequential financial losses resulting from detention or imprisonment; and

costs incurred by or on behalf of the person in obtaining a pardon or acquittal. The Guidelines also lay down the procedure for making a claim thereunder.

3.43 Compensation for wrongful conviction though not germinating from a statutory right in New Zealand, and only given by the Government *ex-gratia*, is frequently invoked and resorted to. In this respect, the 2016 case of Teina Anthony Pora is worth a mention, where the claimant was wrongfully convicted of rape and murder, and spent 21 years in prison. Pursuant to the Guidelines, the claimant was paid a compensation of about \$2.52m (towards non-pecuniary and pecuniary losses) by the Government of New Zealand for wrongful conviction and incarceration.³⁶

G. Australia

3.44 In Australia, individuals wrongfully convicted and imprisoned do not have a common law or statutory right to compensation except for in the Australian Capital Territory (ACT). However, a State or territory government may choose to make an *ex gratia* payment either on its own accord or as a result of a request by a party for such a payment.³⁷

3.45 With respect to the ACT, Human Rights Act 2004 (ACT) lays down the law regarding compensation for wrongful conviction for

³⁶“*Second Report for Minister of Justice on Compensation Claim by Teina Antihony Pora*”. Hon Rodney Hansen Czm Qc. Available at: <https://www.justice.govt.nz/assets/Documents/Publications/pora-teina-compensation-claim-quantum-report.pdf>. (Last Accessed: 29 July 2018)

³⁷ In Australian jurisdictions, where *ex gratia* compensation payments are made, they include both pecuniary and non-pecuniary loss to the person i.e. loss that is easily quantifiable (such as loss of income), and loss that is not readily calculable (such as pain and suffering or the loss of the expectations of life).

ACT. Under section 23 of the Act, an individual who is wrongfully convicted of a criminal offence may apply for compensation if such individual: (i) has been convicted of a criminal offence by a final decision of a court; (ii) they have suffered punishment because of the conviction; and (iii) that conviction was reversed or the individual was pardoned as a result of a new fact showing conclusively that there has been a miscarriage of justice (Section 23(1)). Foregoing criteria being met, the section provides for a right to be compensated 'according to law' (Section 23(2)). The section marks a specific exception for cases where it is proved that the non-disclosure of unknown fact in time is completely or partly the person's own doing (Section 23(3)).

3.46 Section 23, though pursuant to Article 14(6) of ICCPR, via its sub-section 1(b) adds an additional element of the person having suffered punishment because of the conviction to qualify for compensation thereunder. It is notable that the term 'punishment' as used in section 23(1)(b) has been interpreted to include not just imprisonment but even lesser sanctions, such as a fine or the recording of a conviction alone.³⁸

3.47 It is noteworthy that in the absence of a legal framework or even guidelines for the award of compensation, these *ex gratia* compensation payments have been noted to be 'arbitrary' and generally 'very modest', marred by lack of transparency, making it

³⁸ Adrian Hole. *Compensation for Wrongful Compensation*. Trends & Issues in Crime and Criminal Justice: No. 356, May 2008, Australian Government, Australian Institute of Criminology. Available at <https://aic.gov.au/publications/tandi/tandi356> (Last Accessed: 29 July 2018)

difficult to establish any formal or informal tariff of compensation payable³⁹.

3.48 A study of the international perspective shows that the international law and the law in Western countries (including the above-discussed) understands miscarriage of justice to take place after the claimant has been convicted by a final court, and a new fact comes to light that proved conclusively that the claimant did not commit the offence. And, they primarily address this miscarriage of justice by providing relief to the victim of wrongful conviction via monetary compensation and non-monetary assistance.

³⁹ Tom Percy QC. *Despised Outsiders: Compensation for Wrongful Convictions*. Precedent Issue 81 July/August 2007. Available at <http://www.austlii.edu.au/au/journals/PrecedentAULA/2007/66.pdf>. (Last Accessed 29 July 2018).

Chapter - 4
CURRENT SCENARIO – OVERVIEW AND INADEQUACIES

4.1 A review of the existing laws and the case law brings forward three categories of court-based remedies with respect to miscarriage of justice resulting in wrongful prosecution, incarceration or conviction etc.: (i) Public Law Remedy; (ii) Private Law Remedy; and (iii) Criminal Law Remedy. This Chapter also takes note of the relevant provisions of the Police Act, 1861, and of the role of the Human Rights Commissions in this context.

4.2 The first two of the aforementioned remedies are victim-centric providing for pecuniary relief from the State to persons who have suffered on account of wrongful prosecution, conviction and/or incarceration. The third remedy, available under criminal law, is on the lines of holding the wrongdoer accountable, i.e. proceeding with criminal action against the concerned officers of the state for their misconduct.

A. Public Law Remedy

4.3 Public law remedy for miscarriage of justice on account of wrongful prosecution, incarceration or conviction finds its roots in the Constitution of India. In such cases, it is the violation of fundamental rights under Article 21 (the right to life and liberty), and Article 22 (protection against arbitrary arrests and illegal detention etc.) that invokes the writ jurisdiction of the Supreme Court and the High Courts under Articles 32 and 226 of the Constitution respectively; which includes the grant of compensation to the victim, who may have unduly suffered

detention or bodily harm at the hands of the employees of the State.

4.4 The function of maintaining law and order has been held to be a sovereign function.⁴⁰ According to the traditional classification, arrest and detention were classified as 'sovereign' functions, whereby any person who suffered undue detention or imprisonment at the hands of the State was not entitled to any monetary compensation and, the courts could only quash an arrest or detention if it was not according to law. This, however, changed with the *Maneka Gandhi* judgment,⁴¹ where the Supreme Court gave a dynamic interpretation to Article 21, a new orientation to the concept of personal liberty. One of the important offshoots of the foregoing was that the courts started to consider awarding compensation in cases of undue detention and bodily harm.

4.5 In this respect, the case of *Khatri & Ors. v. State of Bihar & Ors.*,⁴² (the *Bhagalpur Blinding* case), was one of the earlier cases where the question was raised as to whether a person who has been deprived of his life or personal liberty in violation of Article 21 can be granted relief by the Court, and what could such relief be. In this case, it was alleged that the police had blinded certain prisoners and that the State was liable to pay compensation to them. The Court though not giving a definitive answer to the

⁴⁰ See: *The 'Ad Hoc' Committee, the Indian Insurance Company Association Pool v. Smt. Radhabai*, AIR 1976 MP 164, the Court observed that "*These cases show that traditional sovereign functions are the making of laws, the administration of Justice, the maintenance of order, the repression of crime, carrying on of war, the making of treaties of peace and other consequential functions. Whether this list be exhaustive or not, it is at least clear that the socio-economic and welfare activities undertaken by a modern State are not included in the traditional sovereign functions.*".

⁴¹ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

⁴² AIR 1981 SC 928.

question of the State's pecuniary liability to pay compensation, did order the State to meet the expenses of housing the blinded victims in a blind home in Delhi.

4.6 Subsequent to the above, there was a series of Supreme Court judgments which expounded on the State's vicarious liability, which developed the foundational principle for holding the State liable for abuse of power by its employees - one of them being misconduct on the part of police and investigating agencies. These judgments established pecuniary compensation as a prominent public law remedy for the aforesaid violations of fundamental rights.

4.7 One of the first precedent-setting cases is from the year 1983, *Rudal Sah v. State of Bihar*⁴³, where the Supreme Court, exercising its writ jurisdiction, passed an order of compensation for the violation of Articles 21 and 22 of the Constitution. In this case the petitioner was unlawfully detained in prison for 14 years after the order of acquittal. The court observed thus:

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 violators in the payment of monetary compensation.** Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. (Emphasis Supplied)

4.8 The Court further observed that this remedy is independent of the rights available under the private law in an action based on tort, or that under criminal law i.e. via criminal proceedings

⁴³ AIR 1983 SC 1086:

against the wrongdoer.⁴⁴ On the heels of *Rudal Sah* (supra) came the *Boma Chara Oraon*⁴⁵ case, where the Supreme Court declared that anyone deprived illegally of his life or personal liberty can approach the Supreme Court and seek compensation for violation of his fundamental right under Article 21. Subsequently, there has been a string of cases, where the Supreme Court awarded compensation to persons whose fundamental rights under Articles 21 and 22 had been violated on account of illegal detention, wrongful incarceration etc.⁴⁶

4.9 Emphasising the need to compensate the victims of wrongful arrests, incarceration etc. by awarding “suitable monetary compensation”, the Supreme Court in the case of *Bhim Singh, MLA v. State of J & K & Ors.*⁴⁷ opined that the mischief, malice or invasion of an illegal arrest and imprisonment cannot just be “washed away or wished away” by setting free the person so arrested or imprisoned. The Court awarded a sum of Rs. 50,000/- as compensation for illegal detention but, it is noteworthy that it did not delve into the reasoning or mechanism of how this “suitable monetary compensation” was determined or should be determined in similar cases.

4.10 Delving into question of ‘who is responsible to pay the compensation in cases of State officials’ misconduct - individual police officers or the State’, the Supreme Court in the case of *SAHELI, A Women's Resources center & Ors. v. Commissioner of*

⁴⁴ Ibid.

⁴⁵ *B. C. Oraon v. State of Bihar*, cited in M. P. Jain, *Indian Constitutional Law Volume 1* (LexisNexis, Gurgaon, India Updated 6th Edition, 2013) 1618; see also: *Devki Nandan v. State of Bihar*, AIR 1983 SC 1134;

⁴⁶ See: *Sebastian M. Hongray v. Union of India*, AIR 1984 SC 1026.

⁴⁷ (1985) 4 SCC 677.

*Police Delhi & Ors.*⁴⁸, upheld the principle of the vicarious liability of the State i.e. the State to responsible for the tortious acts of its employees; and, ordered the Delhi Administration to pay the compensation for police atrocities which lead to the death of a 9 year-old child; further noting that the Delhi Administration has the option to recover the amount paid from the officers found responsible.⁴⁹

4.11 The Supreme Court upholding the principle of vicarious liability of the State in the case of *State of Maharashtra v. Ravi Kant Patil*,⁵⁰ further observed that the individual officers cannot be held personally liable because even if it is assumed that such officers exceeded the limits of their power, they were still acting as officials. These cases recognised State's liability and responsibility to pay compensation for the wrongful acts of its employees but did not go into the compensation jurisprudence – factors taken into consideration for arriving at the amount of compensation etc.

4.12 A crucial judgment often credited with crystallising the principle of vicarious liability of the State underlining the above-discussed cases and that of principle of sovereign immunity *vis-à-vis* violation of fundamental rights by the State officials was delivered in the case of *Nilabati Behera v. State of Orissa*⁵¹. The Supreme Court in this case observed that award of compensation in writ proceedings is a remedy under public law, based on strict liability for contravention of fundamental rights, and that the

⁴⁸ AIR 1990 SC 513.

⁴⁹ See also *Peoples' Union for Democratic Rights through its Secretary & Anr. v. Delhi Police Headquarters & Anr.*, (1989) 4 SCC 730; *Joginder Kaur v. State of Punjab*, (1969) 71 PLR 85.

⁵⁰ AIR 1991 SC 871.

⁵¹ AIR 1993 SC 1960; see also: *State of Andhra Pradesh v. Challa Ramkrishna Reddy*, (2000) 5 SCC 712.

principle of sovereign immunity is inapplicable in the cases involving violation of fundamental rights, though available as a defence under private law in an action based on tort⁵². The Court further observed that the State in such cases in turn has the right to be indemnified by, and/or take action against the concerned officers in accordance with law through appropriate proceedings. The principle of strict liability of the state was also upheld in the landmark decision on the issue of 'police atrocities and awarding of compensation' in the case of *D. K. Basu v. State of West Bengal*⁵³.

4.13 The defence of sovereign immunity is not applicable to cases of violations of the fundamental rights guaranteed under the Constitution. Claim for compensation is a constitutional remedy under Article 32 or 226, and the said defence is not available against a constitutional remedy. This was reiterated by the Supreme Court in the case of *Consumer Education and Research Center & Ors. v. Union of India*⁵⁴. The Court further observed:

... It is a practicable and inexpensive mode of redress available for the contravention made by the State, its servants, its instrumentalities, a company or a person in the purported exercise of their powers and enforcement of the rights claimed either under the statutes or licence issued under the statute or for the enforcement of any right or duty under the Constitution or the law.

4.14 The right of personal liberty of citizens is precious, and no one can be permitted to interfere with it except in accordance with

⁵² The Court in this case distinguished the state's liability in cases involving violation of fundamental rights from a claim for damages for the tort of conversion under the ordinary process, stating that the decision of "*the Court in Kasturilal (Kasturi Lal Ralia Ram Jain v. State of U.P., AIR 1966 SC 1039) upholding the State's plea of sovereign immunity for tortious acts of its servants is confined to the sphere of liability in tort.*"

⁵³ AIR 1997 SC 610.

⁵⁴ AIR 1995 SC 922; *Mrs. Sudha Rasheed v. Union of India*, 1995 (1) SCALE 77.

the procedure established by law. For any damage thereto, the State must be held responsible for the unlawful acts of its officers and it must repair the damage done to the citizens by its officers.⁵⁵

4.15 With respect to protection of fundamental rights from excesses and abuse of power, the Courts have taken a very restrictive view of the 'sovereign functions' of the State, thereby expanding the scope of State's liability. In the case of *People's Union for Civil Liberties v. Union of India & Ors.*,⁵⁶ the Supreme Court held that the State cannot deprive a citizen of his life and liberty except according to the procedure established by law, and cannot claim 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 claim for compensation is based on the principle of strict liability to which the defence of sovereign immunity is not available.

4.16 The right to life under Article 21 is available not only to 'citizens', but also to 'persons' which would include 'non-citizens'.⁵⁷ A foreigner too can claim protection under Article 21 along with the Indian citizens.⁵⁸ A natural corollary to this is entitlement to compensation in the event of a violation of the said right. In line with the foregoing, the Supreme Court in the case of *Chairman, Railway Board & Ors. v. Chandrima Das*⁵⁹ ruled that a citizen of Bangladesh i.e. a foreign national when in India was entitled to the

⁵⁵ *Dhaman Joy Sharma v. State of Haryana*, AIR 1995 SC 1795; *Dalbir Singh v. State of U.P.*, AIR 2009 SC 1674.

⁵⁶ AIR 1997 SC 1203; see also: *Nasiruddin v. State*, 2001 CriLJ 4925; *Tasleema v. State (NCT of Delhi)*, 161 (2009) DLT 660.

⁵⁷ *Anwar v. State of J & K*, (1977) 3 SCC 367.

⁵⁸ See: *Common Cause, A Regd. Society v. Union of India*, AIR 1999 SC 2979; *National Human Rights Commission v. State of Arunachal Pradesh*, AIR 1996 SC 1234.

⁵⁹ AIR 2000 SC 988.

protection of her person under Article 21, which when violated also entitled her to relief of compensation by the State under Article 226 as the State was under constitutional liability to pay compensation to her.

4.17 As the principle of granting compensation for violation of Article 21 was gaining ground, the scope of cases covered under this remedy once again came under review in the case of *Sube Singh v. State of Haryana*,⁶⁰ which laid down the proposition that compensation is not to be awarded in all cases. This case limited the award of compensation to cases where: (i) the violation of Article 21 is patent and incontrovertible; (ii) the violation is gross and of a magnitude to shock the conscience of the court; or (iii) the custodial torture alleged has resulted in death, or the custodial torture is supported by medical report or visible marks or scars or disability. In this case, the petitioner alleged illegal detention, custodial torture and harassment to the family members of the petitioner. Applying the foregoing criteria, the Court did not award any compensation in this case on the ground of lack of clear and incontrovertible evidence.

4.18 In cases of wrongful incarceration, prosecution involving infringement or deprivation of a fundamental right, abuse of process of law, harassment etc., though it has evolved as a judicial principle that the Supreme Court and the High Courts have the power to order the State to pay compensation to the aggrieved party to remedy the wrong done to him as well as to serve as a deterrent for the wrongdoer;⁶¹ but there is no set framework

⁶⁰ (2006) 3 SCC 178.

⁶¹ See: *Dr. Rini Johar & Anr. v. State Of M. P. & Ors.*, Judgement dated 3 June 2016 in Criminal Writ Petition No. 30 of 2015; *Ram Lakhan Singh v. State Government of Uttar Pradesh*, (2015) 16 SCC 715; *Raghuvansh Dewanchand Bhasin v. State of Maharashtra and Anr.*, AIR 2011 SC 3393. See also: *Geeta v. Lt. Governor*, 75 (1998) DLT 822;

(statutory or otherwise) within which the right to compensation or the quantum of compensation is determined. Compensation for violation of fundamental rights in aforementioned cases is a public law remedy but there is no express provision in the Constitution of India for grant of compensation by the State in such cases.⁶² It is a remedy determined and decided on case-to-case basis dependent on the facts of each case, the disposition of the court hearing the case etc.⁶³; which makes this remedy arbitrary, episodic and indeterminate.

4.19 As is evident from the famous case of *Adambhai Sulemenbhai Ajmeri & Ors. v. State of Gujarat (the Akshardham Temple case)*,⁶⁴ where the accused persons spent more than a decade in prison; the Supreme Court 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

Phoolwati v. National Capital Territory of Delhi, 84 (2000) DLT 177, *Sunita v. State of National Capital Territory of Delhi*, 151 (2008) DLT 192.

⁶² *Vibin P.V. v. State of Kerela*, AIR 2013 Ker 67.

⁶³ See: *Inder Singh v. State of Punjab*, (1995) 3 SCC 702; *Malkiat Singh v. State of U.P.*, (1998) 9 SCC 351; *Ajab Singh v. State of Uttar Pradesh*, (2000) 3 SCC 521; and *Munshi Singh Gautam v. State of MP* (2005) 9 SCC 631.

⁶⁴ (2014) 7 SCC 716; see also: *State of Orissa v. Duleshwar Barik*, 2017 (I) OLR 824; *Gopal Ramdas Sheyte v. State of Maharashtra*, Judgement dated 5 May 2017 in Criminal Writ Petition No. 3960 of 2015.

and if compensation is to be awarded for acquittal, it will set a 'dangerous precedent', post which the petition was withdrawn.⁶⁵

4.20 The foregoing is in contrast to the other cases where under similar circumstances the court held the State accountable and awarded compensation. Perhaps it was owing to this kind of variance in the decisions on otherwise similar facts that the High Court of Delhi in its Reference to the Commission noted that "these (awards of compensation for wrongful incarceration under public law) are episodic and are not easily available to all similarly situated persons."⁶⁶

4.21 Further, whether awarding or denying compensation, as noted above, most of these cases did not provide much clarity as to the basis of how the amount of compensation was arrived at – the pecuniary and non-pecuniary factors and peculiarities considered by the Court while determining the amount. In few of these cases in the last few decades, the compensation standard fixed at Rs. 50,000/- in the *Bhim Singh, MLA* case (supra) was applied after adjustment for inflation; which in many instances amounts to a very modest sum, all things considered.⁶⁷

B. Private Law Remedy

4.22 The private law remedy for errant acts of State officials exists in the form of a civil suit against the State for monetary damages. The Supreme Court has time and again emphasised the above discussed Constitutional remedy of a claim based on strict liability

⁶⁵ "There Must Be a Price to Pay for Wrongful Convictions" *The Wire*, 30 August 2016. Available at: <https://thewire.in/law/cops-judges-andterrorists>. (Last Accessed: 30 July 2018)

⁶⁶ I (2018) CCR 482 (Del.).

⁶⁷ *Kamla Devi v. Govt. of NCT of Delhi*, 114 (2004) DLT 57; *Ashok Sharma v. Union of India*, 2009 ACJ 1063; *Prempal & Ors. v. The Commissioner of Police & Ors.* (2010) ILR 4 Delhi 416; *Neema Goyal v. Union of India*, 2011 (125) DRJ 273.

of the State being distinct from and in addition to the remedy available in private law for damages on account of tortious acts of public servants⁶⁸ – especially negligence by a public servant in the course of employment.

4.23 The question of tortious liability of the state was examined in the *State of Rajasthan v. Vidyawati Mst.*⁶⁹, the case regarded as the precursor of a new trend in the area of State liability; where the Supreme Court held that the State was vicariously liable for the rash and negligent acts of a driver of a State official car that fatally injured a pedestrian. Rejecting the State’s plea of exercise of sovereign powers/defence of sovereign immunity, the Supreme Court laid down the proposition that the government would be liable to pay damages for the negligence of its employees if the negligence was “such as would render an ordinary employer liable”.

4.24 This broadened scope of the State’s liability was, however, later curtailed by the Supreme Court in the case of *Kasturi Lal Ralia Ram Jain v. State of U.P.*;⁷⁰ where in a suit filed against the State of Uttar Pradesh seeking damages for the gold ornaments lost because of the negligence of the police officials, the Supreme Court applied the principle of sovereign immunity, observing that the government was not liable to pay damages because the police officers were performing a sovereign function. The police in exercise of sovereign power has immunity from tortious liability; a stark contrast from judicial pronouncements under public law,

⁶⁸ *Rudal Sah* (supra); *Nilabati Behera* (supra).

⁶⁹ AIR 1962 SC 933.

⁷⁰ AIR 1964 SC 1039.

where the defence of sovereign immunity was rendered inapplicable in cases of police misconduct.⁷¹

4.25 Nevertheless, civil/money suits is also a remedy for holding the State accountable by payment of monetary damages. For instance, in cases of malicious prosecution, such as in *State of Bihar v. Rameshwar Prasad Baidya & Anr.*⁷², where criminal proceedings were initiated against an accused for the purpose of harassing him, the Court held the State liable to pay damages to the accused person for his malicious prosecution by the State employees. At the same time, there is a plethora of such civil suits where the function of maintaining law and order, since performed only by the State or its delegates, has been held to be a sovereign function, rendering the State to not be liable for consequences ensuing therefrom.⁷³ The Law Commission also looked into the scope of immunity of the government for the tortious acts of its employees in its 1st Report on 'Liability of State in Tort' (1956); and recommended that "the old distinction between sovereign and non-sovereign functions should no longer be invoked to determine the liability of the State."

4.26 Though there are these alternate remedies, a review of the precedent shows that with respect to illegal detention, wrongful incarceration, and police/other investigating agencies' misconduct, public law remedy under Articles 32 and 226 has been resorted to

⁷¹ *Nilabati Behara* (supra); *D. K. Basu* (supra); *CERC v. Union of India* (supra); *People's Union for Civil Liberties* (supra); *Saheli, A Women's Resources center & Ors* (supra); *Consumer Education and Research Center & Ors.* (supra).

⁷² AIR 1980 Pat 267.

⁷³ *State of Madhya Pradesh v. Saheb Dattamal & Ors.*, AIR 1967 MP 246; *State of Orissa v. Padmalochan Panda*, AIR 1975 Ori 41; *State of Madhya Pradesh v. Chironji Lal*, AIR 1981 MP 65; *Roop Lal Abrol v. Union of India and Ors.*, AIR 1972 J&K 22; *State of Madhya Pradesh v. Premabai and Ors.*, AIR 1979 MP 85.

more heavily than the remedy of civil suits. One of the reasons being that the foregoing actions also entail violation of fundamental rights for which this is the Constitutional remedy, that also tends to be speedier compared to ordinary civil proceedings. Further, the Constitutional Courts have also on various occasions emphasised public law remedy as the remedy for calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the remedy by way of a civil suit or criminal proceedings.⁷⁴

4.27 The Apex Court distinguishing public law proceedings from private law proceedings in *D. K. Basu* (supra) held that public law proceedings serve a different purpose i.e. to civilise public power but also to assure the citizens that they live under a legal system wherein their rights and interest shall be protected and preserved. Constitutional remedy for the established violation of the fundamental rights under Article 21 is for fixing the liability for the public wrong on the State, which in the first place failed in the discharge of its public duty to protect the fundamental rights of the citizen.

4.28 Further, 'damages' pursuant to a civil action are different from 'compensation' under Article 32 or Article 226, because the former is dependent on the rights available under the private law in an action based on tort, while the latter is compensation in the nature of exemplary damages. It is giving relief by way of making 'monetary amends' for the wrong done due to breach of public duty of protecting the fundamental rights of a citizen.

⁷⁴ Ibid.

C. Criminal Law Remedy

4.29 In terms of the remedy for wrongful prosecution, incarceration on account of police and prosecutorial misconducts, the applicable criminal law provisions focus on the other end of the miscarriage of justice i.e. wrongdoers - the concerned public officials. These provisions, as contained in the Indian Penal Code, 1860 (IPC) and the Criminal Procedure Code, 1973 (CrPC), lay down the substantive and procedural contours of the action(s) that can be taken against the wrongdoers.

(i) Indian Penal Code, 1860

4.30 Chapter IX of the IPC titled '*Of offences by or relating to Public Servants*', deals with offences which can be committed by public servants and the offences which relate to public servants, though not committed by them. Chapter XI titled '*Of false evidence and offence against public justice*', lays down the offences which obstruct the administration of justice. The sections as contained in these chapters together list offences that provide possible instances of police, investigating agency and prosecutorial misconduct concerning an investigation, prosecution, trial and other criminal proceedings.

(a) Offences by or relating to Public Servants

4.31 With respect to the issue under consideration, sections 166, 166A and 167 under Chapter IX are to be taken note of. Section 166 criminalises willful departure from the direction of the law by a public servant with an intent to cause injury to any person. To make an offence under the section it is required that (i) the

offender must have done the act 'being a public servant'; (ii) there must be a direction of law which the public servant was bound to obey; (iii) public servant knowingly disobeyed such direction; (iv) by such disobedience public servant must have intended to cause or knew it to be likely to cause injury to a person. This section has been observed to be comprehensive and generally includes several offences involving abuse of official authority. Offence hereunder is punishable with maximum imprisonment for one year with or without fine.

4.32 While section 166 deals with the disobedience of any direction of law in a general sense, a relatively more specific provision as contained in section 167 deals with particular instance of a public servant assigned the duty of preparation of a document, incorrectly prepares, frames, translates such document. A false entry in his diary by a Station House Officer (SHO) to support an Inspector rendered him guilty under this section of intentionally framing an incorrect public record⁷⁵. The section prescribes a maximum imprisonment of three either description upto 3 years, or fine, or with both.

4.33 To constitute a charge under section 167, it is also required that such public servant knew or believed that he was incorrectly framing or translating the document, and that he did the same with the intent or with the knowledge that it was likely that he would thereby cause injury. The intention to cause injury to any person by perversion of official duty is a requirement under the section, however, it is notable that where the act is in itself

⁷⁵ *Pasupuleti Ramdoss v. Emperor*, 1911 MWN 64.

unlawful, the proof of justification or excuse lies with the defendant; and in failure thereof, the law implies criminal intent.⁷⁶

4.34 In the case of *State v. Saqib Rehman & Ors.*,⁷⁷ the Sessions Court, Dwarka, New Delhi, vide its order dated 2 February 2011, made a finding that the concerned police officials had framed the persons accused in a false criminal case, fabricating evidence etc., and ordered lodging of a complaint against the concerned officials under sections 166 and 167, IPC, among others. In this case, the persons accused were already in illegal custody when the police officials scripted an encounter basing it on a 'fake secret informer' and showing an arrest of a later date.

4.35 In addition to the above, there is also section 166A, IPC, titled 'Public servant disobeying direction under law.'⁷⁸ This section lays down three kinds of derelictions of law by a public servant which would amount to an offence thereunder: public servant (a) knowingly disobeys any direction of law prohibiting him from requiring attendance at any place of any person for the purpose of investigation into an offence or any other matter; (b) knowingly disobeys, to the prejudice of any person, any direction of law regulating the manner in which he is to conduct such investigation; and sub-clause (c) fails to record FIR in relation to offence under certain sections specified therein. The punishment provided is minimum of 6 months rigorous imprisonment and maximum of 2 years, and fine.

⁷⁶ *Krishna Govind Patil v. The State of Maharashtra*, AIR 1973 SC 138. See also: *Dattajirao Bhausaheb Patil v. The State of Maharashtra*, (1971) 3 SCC 410; *Woodfall* (1770) 5 Burr. 2661.

⁷⁷ Unique Case ID 02405R1310232005.

⁷⁸ Inserted vide the Criminal Law (Amendment) Act, 2013 with retrospective effect from 3 February 2013.

4.36 If a public officer abuses his office either by commission or omission, and that results in an injury to any individual, an action may be maintained for an offence under Section 166(A), IPC against such an officer; when a duty is performed arbitrarily or capriciously, or the exercise of power results in harassment and agony then responsibility will be fastened upon erring officials and they be will be punished accordingly.⁷⁹

4.37 In addition to the above provisions in Chapter IX, sections 218 to 220 under Chapter XI also deal with disobedience on the part of public servants in respect of official duty. The said sections though better suited under Chapter IX are included in Chapter XI.

4.38 Section 218, IPC on the same lines as section 167, IPC criminalises intentional preparation of a false/incorrect record by a public servant with the intent to cause or knowing it to be likely to cause loss or injury to any person. It is wider in scope compared to section 167 because it includes within its purview incorrect preparation or framing with the intention of saving any person from legal punishment or saving some property from forfeiture or other charge. An offence under section 218, IPC is punishable with a maximum imprisonment of 3 years of either description, or with fine, or with both.

4.39 An Assistant Sub-Inspector making incorrect entries in the general diary was held guilty of offence under section 218, IPC.⁸⁰ In

⁷⁹ Vide: *Bharatbhai Chandubhai Gadhia v. State of Gujarat*, High Court of Gujarat, Order dated 19 March 2014 in R/SCR.A/951/2014. See also: *Jagdeo & Ors. v. The State of Maharashtra & Ors.*, 2017 (2) BomCR (Cri) 832.

⁸⁰ Vide: *Ashfaq Ahmed*, 1981 All LJ 871

Maulad Ahmed v. State of Uttar Pradesh,⁸¹ the Supreme Court observed that if a police officer manipulates the record such as police diary etc., it will be the end of honest investigation; and, such offences shall receive deterrent punishment.⁸²

4.40 Section 219, IPC deals with corrupt or malicious exercise of power by public servants engaged in the discharge of judicial function; criminalising corrupt or malicious making or pronouncing of any report, order, verdict etc. by a public servant in a judicial proceeding knowing it to be contrary to law. An offence under this section is punishable with a maximum imprisonment of 7 years of either description, or fine, or with both.

4.41 This section is invoked only with respect to judicial proceedings. Further, there must be the judicial proceeding actually commenced or pending, wherein a party claims relief against another and seeks the decision of the court in regard thereto, and there must be the making of real report or a real pronouncement of an order, verdict or decision.⁸³ Where a report was submitted by the police before any order under sections 112 or 145, CrPC was made, it was held that the report did not fall within the scope of section 219, IPC even if the same was corruptly or maliciously furnished.⁸⁴

4.42 While section 219, IPC is specific in application, extending only to judicial officers, its following section 220 is more general and applies to any person in an office which gives him the legal authority to commit persons for trial or to confinement, such as a

⁸¹ (1963) Supp 2 SCR 38

⁸² See also: *Sohan Lal v. State of Punjab*, High Court of Punjab & Haryana Order dated 24 March 2011 in CrI. Revision No. 31 of 2011.

⁸³ Vide: *Narapareddi Seshareddi (in re:)*, (1938) 39 Cr LJ 875

⁸⁴ Vide: *Kodali Puranchandra Rao v. Public Prosecutor, A.P.*, AIR 1975 SC 1925; see also: *Ram Narain*, 1980 Cri LJn (NOC) 55 All.

magistrate or a police officer. The section criminalises corrupt or malicious commitment for trial or confinement of any person by such an officer knowing that in so doing he is acting contrary to law. An offence under this section is punishable by a maximum imprisonment of 7 years of either description, or fine, or with both. Knowledge that confinement is contrary to law' is a question of fact and not of law, and it must be proved in order to satisfy the requirement of section 220, IPC.⁸⁵

4.43 This section addresses executive abuses in intentionally illegally confining innocent persons. It is aimed at preventing abuse of power by officers with the power to commit persons to trial or confinement. One such instance, also relevant to the issue under discussion, would be the power of police under section 41, CrPC to arrest a person without warrant in certain cases, subject to the requirement under Article 22(2) of the Constitution i.e. to produce the person arrested before the magistrate within 24 hours. A failure on the part of the police to comply with the foregoing requirement without a reasonable cause would come under the purview of this section, making the concerned officer liable for punishment thereunder.

4.44 However, for the purposes of this section 220, IPC, unlawful commitment to confinement will not of itself warrant the legal inference of malice; it needs to be alleged and proved that the concerned officer corruptly and maliciously confined a person wrongfully.⁸⁶

⁸⁵ See: *Narayan Babaji*, (1872) 9 BHC 346.

⁸⁶ *Sita Ram Chandu Lall v. Malika Singh*, AIR 1956 Pep 30; *Narayan Babaji* (1872) 9 BHC 346; *Smt. Priya Dubey v. The State of Jharkhand*, High Court of Jharkhand Order dated 13 November 2013 in Cr. M.P. No. 1146 of 2010.

4.45 Confining a person on suspicion but with the knowledge that it is contrary to law invokes section 220, IPC.⁸⁷ If the confinement of a person is itself contrary to law, regardless of the legal authority of the officer to confine, it would be an offence under section 220, IPC.⁸⁸ Excess of his legal powers of arrest by a police officer invokes the requirements of acting corruptly or maliciously or the knowledge that he was acting contrary to law under section 220, IPC. However, where the arrest is legal, there can be no guilty knowledge “superadded to an illegal act”, such as it is necessary to establish against the accused to justify a conviction under section 220, IPC.⁸⁹ Interpreting the expression ‘maliciously’ as it appears in section 220, IPC, the Court observed that unlawful confinement to put pressure on the person confined to come to terms with a person in whom the accused is interested amounts to ‘malice’.⁹⁰ The expression ‘corruptly and maliciously’ was also interpreted to include wrongful confinement for the purpose of extortion.⁹¹

(b) False Evidence and Offences Against Public Justice

4.46 Including the above-discussed sections 218 to 220, there are 44 sections in Chapter XI of IPC - relating to giving and fabricating of false evidence (Section 191 to 200), and to offences against public justice (Sections 201 to 229). With respect to the issue under discussion, this part of the report delves into the working of sections 191 (giving false evidence), 192 (fabricating false

⁸⁷ *T.K. Appu Nair v. Earnest & Ors.*, AIR 1967 Mad 262.

⁸⁸ *Afzalur Rahman & Ors. v. Emperor*, AIR 1943 FC 18.

⁸⁹ Vide: *Amarsingh Jetha*, (1885) 10 Bom 506. See also: *Beharry Singh*, (1867) 7 WR (Cr) 3.

⁹⁰ *Sita Ram Chandu Lall v. Malkiat Singh*, AIR 1956 Pep 30.

⁹¹ Vide: *Mansharam Gianchand and Anr. v. Emperor*, AIR 1941 Sind 36. In this case a Sub-inspector who wrongfully confined certain persons on charges of gambling to extort money on threat of prosecution that he knew to be false, was held guilty under section 220, IPC.

evidence), 193 to 195 (punishment for the aforesaid), and 211 (false charge with an intent to injure).

4.47 Not specific to public servants, sections 191 and 192, IPC deal with the offence of giving or fabricating false evidence, where section 191 defines what amounts to giving false evidence. To make a statement false evidence within the meaning of section 191, IPC, it must be established that the accused was legally bound by an oath or an express provision of law to state the truth or to make a declaration upon any subject. And, the statement made by the accused must be a false statement and he must know or believe it to be false or must not believe it to be true. The essence of the section lies in intentional making of a false statement.

4.48 In *Ranjit Singh v. State of Pepsu*⁹² in a matter concerning illegal detention of a person by the police, the accused, a police officer when called upon to make a statement against an application under Article 226 of the Constitution for a writ of *habeas corpus*, filed a false affidavit denying that the man was ever arrested by the police or was in his custody. The Court held that the accused had committed the offence of giving false evidence under section 191, IPC.

4.49 Section 192, IPC criminalises fabrication of false evidence done with an intention that such evidence appear in a judicial proceeding, and cause an erroneous opinion touching any point material to the result of such proceeding. The essence of the offence lies in either making a false entry in any book/record or making a document or electronic containing a false statement so

⁹² AIR 1959 SC 843.

as to cause a judge, a public servant or an arbitrator to entertain an erroneous opinion upon any material point.⁹³

4.50 It is the duty of the police officers as well as government officials to allow a case to come before the court without fabrication or padding; prosecution not to determine the guilt of an accused in advance and deceive the court in to giving a verdict based on false evidence.⁹⁴ It is to be noted that under both sections 191 and 192, IPC, *mens rea* is an essential element, making punishable ‘intentional’ giving or ‘intentional’ fabrication of false evidence.

4.51 Sections 193 to 195, IPC lay down the punishment for the giving and fabricating of false evidence including with the intent to procure conviction for offence punishable with capital punishment and life imprisonment. An investigating officer who was found to be concocting false evidence framing an accused for murder – was found to be guilty under section 194, IPC.⁹⁵

4.52 With respect to the issue of miscarriage of justice resulting in wrongful prosecution, the next important section is 211, IPC. Under this section it is an offence if a person with the intention to cause injury to another, either (i) institutes criminal proceedings against such person; or (ii) falsely charges him of having committed an offence, knowing that there is no just or lawful ground for such proceedings or charge. Phrased generally, this section is applicable to anyone who commits an offence thereunder

⁹³ Vide: *Ashiq Mahomed v. Emperor*, AIR 1936 Lah 330.

⁹⁴ *Ashiq Mahomed* (supra); Police padding evidence to establish a charge where evidence is otherwise weak is flagrant fabrication under section 192, IPC. (Vide: *State of M.P. v. Babulal Ramratan & Ors.*, AIR 1958 MP 55).

⁹⁵Vide: *Darshan Singh*, 1985 CrLJ NOC 71 (P&H).

– public or a public servant alike. In one of the early judicial pronouncements, section 211, IPC was interpreted to be specifically applicable to investigating agencies including the police when they bring a false charge of an offence with an intent to injure.⁹⁶

4.53 The essence of section 211, IPC contained in the words “with intent to cause injury to any person, institutes any criminal proceedings knowing that there is no just or lawful ground” has been held to be parallel to the foundation for an action for malicious prosecution – without any reasonable or probable cause. The expression ‘reasonable and probable cause’ has been defined as the honest belief in the guilt of the accused based upon a full conviction, founded upon existence of circumstances, which would reasonably lead any ordinary prudent and cautious man to the conclusion that the person charged was probably guilty of the crime imputed.⁹⁷

4.54 While invoking section 211, IPC what needs to be established is that the person making the statement constituting the charge, did so, with the intention and object of setting the criminal law in motion against the person against whom such statement is directed.⁹⁸

4.55 In an instance of prosecutorial misconduct, where false evidence lead to wrongful conviction of an accused under section

⁹⁶ Vide: *Nabodeep Chinder Sirkar*, (1869) 11 WR (Cr) 2.

⁹⁷ *Kapoor R. P. v. Pratap Singh Kairon*, AIR 1966 All 66.

⁹⁸ See: *State v. Bala Prasad*, AIR 1952 Raj 142, the Court observed that the term ‘false charge’ is not giving of false evidence by a prosecution witness against an accused during the course of a criminal trial, it refers to a criminal accusation that sets in motion the process of a criminal investigation.

363, 366 and 376 IPC, the Court directed the authorities to register a case against the prosecutor under section 211, IPC.⁹⁹ A false report by a head constable to superiors, leading to prosecution of an accused who was later acquitted, made the constable liable under section 211, IPC.¹⁰⁰ On the other hand, in a case where the report by the police officer was found to be false by the Magistrate after hearing the evidence, but not resulting in criminal proceedings against the accused, the police officer was held not to be liable under section 211, IPC;¹⁰¹ thereby emphasising the element of ‘institution of criminal proceedings’ for establishing an offence under section 211, IPC. However, subsequently in another case, interpreting the expression “institutes or causes to be instituted any criminal proceeding”, the Court held that just the laying of information before a Magistrate constitutes institution of a criminal proceeding.¹⁰² Similarly, providing information to a police officer which he has power to investigate and/or causing the officer to investigate the information amounts to institution of criminal proceedings.¹⁰³

4.56 Distinguishing the expression “instituting criminal proceedings” from “falsely charge any person with having committed an offence”¹⁰⁴, the Supreme Court in *Hari Das v. State of West Bengal*¹⁰⁵, held that the scope of section 211 is wide enough to include both. The expression ‘falsely charges any person’ as used in section 211, IPC means a false accusation, and

⁹⁹ *Jitendra (in jail) v. State of U.P.*, 2000 Cri LJ 3087 (All).

¹⁰⁰ *Rhedoy Nath Biswas*, (1865) 2 WR (Cr) 44.

¹⁰¹ *Thakur Tewary*, (1900) 4 CWN 347.

¹⁰² *Boaler*, (1914) 1 KB 122.

¹⁰³ *Nanhkoo Mahton v. Emperor*, AIR 1936 Pat 358.

¹⁰⁴ The term ‘offence’ as used here is not only limited to the offences under IPC, but also includes offence under any special or local laws.

¹⁰⁵ AIR 1964 SC 1173.

there is no necessity of this false accusation being made in connection with a criminal proceeding.¹⁰⁶ False charge must be made to a court or to an officer who has the power to investigate, send it for trial, who is in a position to get the other person punished.¹⁰⁷

4.57 In addition to the intention to cause injury, another important requirement for proving an offence under section 211, IPC is that the accused should have known that there is 'no just and lawful ground' for the proceeding or the charge. It has been held that it is not enough that the person making the charge acted in bad faith, without due care of inquiry or maliciously or that he did not believe the charge to be true. Recklessness in acting upon information without scrutinising the sources, malice towards the person charged are all relevant evidence but the ultimate test under section 211, IPC is that the accused knew that there was no just or lawful ground for the proceedings; and the same must be proved.¹⁰⁸

4.58 In *Santosh Singh v. Izhar Hussan*,¹⁰⁹ the Supreme Court looking into section 211 on one hand, and sections 191 and 192 on the other, noted that the two are not intended to overlap, with proceedings under each optional to the other.

4.59 The offences described in the above-discussed provisions of Chapter IX and XI, IPC – public servant disobeying law, framing

¹⁰⁶ *Dasrathi Mandal v. Hari Das*, AIR 1959 Cal 293.

¹⁰⁷ *Jamona* (1881) 6 Cal 620; *Brajobashi Panda* (1908) 13 CWN 398.

¹⁰⁸ *Murad* (1893) PR No. 29 of 1894; See also: *Badri Prasad Sharma v. Shanti Prasad Sharma*, 1982 A Cr R 9; *Ahmed Kutty* (1963) 1 Cri LJ 597 (ker.); *Mirza Hassan Mirza v. Mussamat Mahbuban* (1913) 18 CWN 391; *Chidda* (1871) 3 N.W.P. 327.

¹⁰⁹ AIR 1973 SC 2190.

incorrect document, giving false evidence, fabricating false evidence, falsely charge a person of an offence – more often than not underscore the wrongful investigations, prosecutions, proceedings which are the subject of this report; but to make an offence under these sections there needs to be proven an element of *mens rea* (knowledge, intention) on the part of the accused thereunder. *Mens rea* in these cases is not only difficult to establish or prove in a court of law but also very often may not even be there for these cases of wrongful convictions, preceded by or entailing tainted investigations or other police and prosecutorial misconducts, also result from lack of due care, or negligence or recklessness on the part of the police or investigating agency and/or prosecutors. Further, institution of criminal proceedings against a police officer/public servant is also subject to the procedural safeguards such as the requirement of Government sanction under section 197, CrPC (discussed in detail later in this Chapter).

(c) Case law

4.60 The aforesaid is evident from the caselaw, discussed hereafter, where the accused persons were wrongfully charged/convicted to be exonerated later on grounds of lapses and deficiencies in investigation; of the evidence submitted by the police and the prosecution being false, tampered with, fabricated, or was without any legal sanction; or of the prosecution's case being unreliable.

4.61 In *State v. Mohd. Naushad & Ors.* (the 1996 Lajpat Nagar Bombing case),¹¹⁰ the Delhi High Court in its order noted that the police showed casualness, and that there were grave lapses on the part of the police – not recording the statement of witnesses support its case, complete absence of diary entries to corroborate the movements of the police – “all betray(ing) a slipshod approach.” The Court further noted that the flaw is in the understanding and implementation of the law by the police force. Highlighting prosecutorial misconduct, the Court noted that there was a flaw in the presumption of guilt, a violation of the principle that the burden of proof is on the prosecution - to prove the accused person’s guilt and not on the accused to prove his innocence.

4.62 Similarly, in *Adambhai Sulemanbhai Ajmeri & Ors.* (supra), in an appeal against conviction order based primarily on the confessions of the accused, the Supreme Court highlighted various peculiarities and deficiencies in the method of investigation - the nature of confessions, the absence of independent evidence etc. The Apex Court specifically noted that there was fabrication of evidence, an attempt on the part of the investigating agency to fabricate and make a case against the accused person since they had not been able to solve the case even after almost a year of the incidence.

4.63 In the case of Mohd. Aamir Khan, who was wrongfully incarcerated for 14 years as the main accused in multiple terror cases, there appeared a uniform noting in all the cases against him with regard to the lack of incriminating evidence connecting the accused with the explosions. The Delhi High Court in one of the

¹¹⁰ Delhi High Court Order dated 22 November 2012 in Criminal Appeal Nos. 948, 949, 950 and 951 of 2010.

said cases *Mohd. Aamir Khan v. State*,¹¹¹ noted the above and setting aside the conviction, held that the prosecution has “*failed to adduce any evidence to connect the accused with charges framed much less prove them*”.

4.64 One of the gravest instances of miscarriage of justice resulting in an extremely long wrongful incarceration was in the case of *Mohd. Jalees Ansari & Ors. v. Central Bureau of Investigation*.¹¹² The accused Mohammad Nissarudin was taken in to police custody in the year 1994, then booked for a bomb blast in Hyderabad (October 1993), later booked under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) for bomb blasts in five trains in Mumbai (December 1993). Subsequently, after a ‘confession,’ Nissarudin was sent to a prison in Ajmer, where he spent the next 23 years - during which time, in 2005 a TADA court at Ajmer convicted him and gave him life sentence. In 2016, the matter reached the Supreme Court, where the Apex court, overturning the TADA court’s decision, ruled that the confession (which was taken in police custody) and formed the basis of the conviction did not have legal sanction and was inadmissible. And, after suffering through 23 long years of wrongful incarceration, Nissarudin was exonerated of all charges.

4.65 A report by the Jamia Teachers’ Solidarity Association highlights more of such cases where the accused persons were charged with offences of planning and causing bomb blasts, criminal conspiracy, collection of arms, training of terrorists etc., but later acquitted for the reasons of shoddy investigation and flimsy evidence, or that the prosecution’s case was doubtful and

¹¹¹ 138 (2007) DLT 759.

¹¹² AIR 2016 SC 2461.

lacked credibility, or that there were procedural lapses and the investigating agency violated established legal norms, lacking transparency.¹¹³ The report also noted a certain pattern of procedural lapses and misconducts in investigations and prosecutions/proceedings of the cases discussed therein:

- (i) Illegal detention, where the time and date of the actual ‘picking up’ of the accused, as revealed during the trial, is earlier than that alleged in the police’s case.
- (ii) Secret information, often central to the police’s case leading them to the accused cannot be verified or disclosed.
- (iii) Public and independent witnesses are rarely joined in the actual operation, even in cases where the accused were apprehended in public places with people around.
- (iv) Private vehicles used in the operation doing away with the need of maintaining logs, making it difficult to verify the information about the operation.
- (v) Delayed seizure memos – not made at the time of actual seizure – made later in the police station, often found to be in the same handwriting and ink as the FIR.¹¹⁴

(i) Code of Criminal Procedure, 1973

4.66 Procedural embargoes to the substantive provisions of the IPC discussed hereinabove, sections 132 and 197, CrPC entail safeguards to protect judges and public servants from vexatious

¹¹³ “*Framed, Damned, Acquitted: Dossiers of ‘Very’ Special Cell*”. A Report by Jamia Teachers’ Solidarity Association (2012). Available at: <http://www.jamiajournal.com/wp-content/uploads/2012/09/JTSA-Report-Framed-Damned-and-Acquitted-Dossiers-of-a-Very-Special-Cell.pdf> (Last Accessed: 16 August 2018).

¹¹⁴ Ibid.

litigation with respect to their actions while performing a public function.¹¹⁵ While section 132, CrPC mandates sanction of the government for the prosecution of police officers for any act purporting to be done under section 129 to 131 CrPC, which deal with controlling an unlawful assembly that is alleged to have caused a breach of peace;¹¹⁶ section 197 requires 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”.

4.67 As a general guiding principle for invoking section 197, CrPC the Supreme Court in *Subramanian Swamy v. Manmohan Singh & Anr.*¹¹⁷ held “...These procedural provisions relating to sanction must be construed in such a manner as to advance the causes of honesty and justice and good governance as opposed to escalation of corruption”. Over the years, numerous judicial pronouncements have examined the scope of section 197, CrPC, and have ruled for police officers to have the protection of Section 197, CrPC, while also drawing exceptions for cases and situations where this protection will not be applicable.¹¹⁸ A few of these decisions are discussed hereinafter.

¹¹⁵ *Jaysingh Wadhu Singh v. State of Maharashtra*, 2001 CrLJ 456 (Bom).

¹¹⁶ *Nagraj v. State of Mysore*, AIR 1964 SC 269, the Supreme Court held that under Section 132, if the accused police officer is able to establish that he attempted to disperse the unlawful assembly and that he used force only on the failure of such attempt, then he gets protection under Section 132, CrPC.

¹¹⁷ (2012) 3 SCC 64.

¹¹⁸ *Baijnath v. State of Madhya Pradesh*, AIR 1996 SC 220; *Balbir Singh v. D.N. Kadian*, AIR 1986 SC 345; *S.B. Saha v. M.S. Kochar*, AIR 1979 SC 1841; *Matajog Dubey v. H.C Bhari*, AIR 1956 SC 44; *Amrik Singh v. State of PEPSU*, AIR 1955 SC 309.

4.68 In *Dhannjay Ram Sharma v. M.S. Uppadaya & Ors.*¹¹⁹, the Supreme Court observed that before the protection of Section 197, CrPC can be claimed by an accused person but he has in the first instance to satisfy the Court that he is a Public Servant "not removable from his office save by or with the sanction of a State Government or the Central Government", and next that the acts complained of, if committed by him were committed "while acting or purporting to act in the discharge of his official duty".¹²⁰

4.69 In *P.P. Unnikrishnan v. Puttiyotttil Alikutty*¹²¹, a case of illegal detention and custodial torture, the Supreme Court discussing the scope of section 197(1), CrPC held that there must be a reasonable connection between the act in question and the discharge of official duty. The act must bear such relation to the duty that the accused could lay a reasonable, and not just a pretended claim, that he did it in the course of his duty. The Court illustrated the foregoing with an example: if a police officer wrongly confines a person in lock-up for more than 24 hours without sanction of the court or assaults a prisoner, he is acting outside the contours of his duty, and therefore, not entitled to protection under section 197, CrPC.¹²²

¹¹⁹ AIR 1960 SC 745.

¹²⁰ *H. H. B. Gill v. The King*, AIR 1948 PC 128, the Court observed that a public servant can only be said to act or to purport to act in the discharge of his official duty if his act is such as to be within the scope of his official duty.

¹²¹ AIR 2000 SC 2952, a defence was 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 Court considered this provision to be based on the rationale of Section 197 of the CrPC.

¹²² See also: *S.S. Khandwala (I.P.S.) Addl. D.G.P. & Ors v. State of Gujarat*, (2003) 1 GLR 802, the Gujarat High Court 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.

4.70 On the same lines, it was held in *Rajib Ranjan & Ors. v. R. Vijaykumar*¹²³, as follows:

even while discharging his official duties, if a public servant enters into a criminal conspiracy or indulges in criminal misconduct such misdemeanor on his part is not to be treated as an act in discharge of his official duties and, therefore, provisions of Section 197 of the Code will not be attracted.¹²⁴

4.71 With respect to the issue under consideration, reference needs to be made to *Uttarakhand Sangharsh Samiti v. State of U.P.*¹²⁵, where the Court specifically held 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; and that no sanction of the Government is required in ordering prosecution of such police officials. The Court also granted exemplary damages to the victims of police atrocities.

4.72 The Courts have in a series of caselaw defined and whittled down the scope of section 197, CrPC, however, it appears that the procedural safeguards under the said section are often misused by the police officials by not allowing lodging of complaints or First Information Report (FIRs), thereby hindering the process of remedying police and prosecutorial misconducts.¹²⁶

¹²³ (2015) 1 SCC 513.

¹²⁴ See also: *Shambhoo Nath Misra v. State of U.P. & Ors.*, (1997) 5 SCC 326.

¹²⁵ (1996) 1 UPLBEC 461, this case involved mass human rights violations including firing by the police and paramilitary forces on an assembly of protestors, resulting in the loss of many lives, mass scale molestation and rape, illegal detentions and incarceration of large number of persons. See also: *H. H. B Gill* (supra); *Amrik Singh v. State of PEPSU*, AIR 1955 SC 309; *Matajog Dubey v. H.C Bhari*, AIR 1956 SC 44; *Balbir Singh v. D.N. Kadian*, AIR 1986 SC 345.

¹²⁶“Accountability for The Indian Police: Creating An External Complaints Agency”. Human Rights Law Network (August 2009). Available at:

4.73 In addition to these provisions in CrPC, there are also similar procedural safeguards vis-à-vis the police under a few of the States' Police Acts and the Rules thereunder. Further, various High Court Rules also contain provisions with respect to instituting proceedings against police officials or other Government servants.

4.74 In this context, lastly reference needs to be made to the Supreme Court judgment in the case of *The State of Uttar Pradesh v. Mohammad Naim*,¹²⁷ which laid down the guidelines for the courts to bear in mind while making remarks about police or other public officials and authorities' "improper conduct". The Apex Court in this case was reviewing Justice Mulla's (of the Allahabad High Court) observation on police conduct *inter alia*, "... That there is not, a single lawless group in the whole of the country whose record of crime comes anywhere near the record of that organised unit which is known as the Indian Police Force...", and held that courts of law while making observations on the objectionable and improper conduct of the persons and authorities whose conduct comes before them for scrutiny should consider: "... (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct."

http://indiagovernance.gov.in/files/police_reforms.pdf (Last Accessed: 10 August 2018). See also: "*Torture in India 2011*". Asian Centre for Human Rights (November 2011). Available at: <http://www.indianet.nl/pdf/torture2011.pdf>. (Last Accessed: 11 August, 2018)

¹²⁷ AIR 1964 SC 703; see also: *In the Matter of: K, a Judicial Officer*, (2001) 3 SCC 54; *Amar Pal Singh v. State of UP*, AIR 2012 SC 1995.

4.75 Under the CrPC, another provision that merits a quick mention in this context is section 358 – providing for compensation to persons groundlessly arrested. From the wording of the section, it appears that it primarily targets groundless arrests instigated by one person against the other. It empowers the Court to order the person who has caused for a police officer to make such arrest to pay compensation to the person wrongfully arrested without any “sufficient ground”. That is to say, if a person is instrumental in causing a groundless arrest of a person through the police, the Court may order such person to pay compensation to the person so arrested to make up for his loss of time and expense. In order to invoke this section, there must be some direct and proximate nexus between the complainant – complaint/information provided and the arrest that is made on the basis of such complaint/information. There should be evidence to indicate that the informant caused the arrest of accused without any sufficient cause. The test should be that but for the efforts of the complainant the arrest could not have been made.¹²⁸

4.76 The person at whose instance the arrest was made may be ordered to pay compensation of maximum Rs.1000/- to the person(s) arrested, and the amount thereof may be recovered as if it were a fine; Such person may be liable to be sentenced to simple imprisonment for a maximum period of 30 days if the ordered compensation amount cannot be recovered. Though addressing wrongful (groundless) arrests, this section is not directly relevant to the discussion herein for it does not address the police officer(s) making such an arrest, even if he were acting in collusion with the person who caused the arrest. Further, the modest amount of (maximum) compensation provided for in the section, hardly

¹²⁸ *Mallappa v. Veerabasappa & Ors.*, 1977 CriLJ 1856 (Kant.)

makes it a relief for the wrong done or the suffering caused, or a deterrent to preclude such wrongs from happening.

(ii) The Police Act, 1861

4.77 In addition to the above discussed provisions of IPC, a police official can be held liable for violating laws and rules through internal police mechanisms of remedial action such as those provided for under the Police Act, 1861. With provisions such as section 7, which deals with the “Appointment, dismissal, etc of inferior officers”; and section 29 that deals with “Penalties for neglect of duty etc.”

4.78 Such proceedings usually take place through internal disciplinary authorities that collect evidence and pass binding orders.¹²⁹ As per the Act 1861, orders from these proceedings can be challenged before the High Court and the Supreme Court. However, it appears from caselaw on the issue that the powers of the courts in terms of interfering with the order(s) of these proceedings is largely contained to assessing the punishment given on the ground of proportionality.¹³⁰

D. Human Rights Commissions

4.79 The National Human Rights Commission (NHRC) and State Human Rights Commissions (SHRCs) established, under The Protection of Human Rights Act, 1993, have the power to inquire *suo motu* or on petitions filed for matters pertaining to human

¹²⁹ See: *Dayal Singh & Ors. v. State of Uttaranchal*, AIR 2012 SC 3046, the Supreme Court in this case directed the concerned authority to initiate disciplinary proceedings against a police officer even if such officer had retired, for dereliction of duty or misconduct in investigation. See also: *Karan Singh v. State of Haryana & Anr.*, AIR 2013 SC 2348.

¹³⁰ *Ramanuj Pandey v. The State of M.P. & Ors.*, (2009) 7 SCC 248; *B.C. Chaturvedi v. Union of India*, AIR 1996 SC 484

rights violations, which is often the case in matters of illegal detentions, wrongful investigations, incarcerations etc. However, it is pertinent to note that under the Act 1993, if the NHRC or a SHRC through inquiries has proven certain human rights violations or negligence in the prevention of violation of human rights or abatement by a public servant, it may only recommend to the concerned Government or authority to pay compensation to the victims or to prosecute the concerned wrongdoer (Section 18).

4.80 The Act 1993 does not specify if these recommendations are binding on the Government, nor does it empower the NHRC or SHRCs to give any directions to the Government or authorities in this regard. So, while every death in police and judicial custody is to be reported to the NHRC for scrutiny, irrespective of whether such death was natural or otherwise¹³¹, its role and powers are limited to advising the government to prosecute the concerned persons or grant relief to the victim. This lack of power to obtain compliance makes this remedy inefficacious on both the fronts – compensating the victim and holding the concerned public servant accountable.

4.81 As is evident from the NHRC's Annual Report for the year 2015 – 2016, in which out of a total of 332 recommendations of compensation made during the said year, 229 (i.e. 69%) recommendations remained not complied with by the concerned

¹³¹ “*Guidelines on Procedure to be followed in case of Death during Police Action*”. National Human Rights Commission. (May, 2010). Available at: <http://nhrc.nic.in/documents/death%20during%20the%20course%20of%20police%20action.pdf> (Last Accessed: 10 August 2018); see also: “*On Custodial Deaths/Rapes*”. National Human Rights Commission. (December, 1993). Available at: <http://nhrc.nic.in/documents/sec-1.pdf>. (Last Accessed: 10 August 2018).

Government or authorities.¹³² Though dealing with one of the most crucial aspects of Rule of Law i.e. Human Rights and its violations, this dependence of the NHRC on the Government or authorities for execution of relief or proceedings makes it a rather weak institution/mechanism.

¹³² This status is as of 14 March 2017. “*Annual Report 2015-2016*”. National Human Rights Commission. (June 2017). Available at http://nhrc.nic.in/Documents/AR/NHRC_AR_EN_2015-2016.pdf. (Last Accessed: 11 August 2018). Further, as of 14 March 2017, a total of 437 of Commission’s recommendations for compensation/disciplinary action against the errant public servants remained not complied with, out of which, while 299 cases were pertaining to the year 2015-2016, 66 cases were pertaining to the year 2014-2015, and 72 cases were pertaining to the years 2008-2009 to 2013-2014.

Chapter - 5
STANDARD OF ‘MISCARRIAGE OF JUSTICE’

5.1 One of the most critical aspects of laying down a legal framework for addressing miscarriage of justice, with respect to the issue under consideration, is identifying what amounts to miscarriage of justice. Whether the standard of miscarriage of justice should be wrongful prosecution, incarceration, conviction, or all three; also, what would constitute ‘wrongful’.

A. Standard to be applied to ‘Miscarriage of Justice’

5.2 The international law standard as laid down in the ICCPR¹³³, and included in the law of compensation for miscarriage of justice of many Western countries (including the federal and state laws in the United States, Canada, Germany and others discussed in the previous chapter), recognize miscarriage of justice as resulting in ‘wrongful conviction’ by virtue of a final order, after all avenues of appeal have been exhausted and a new fact surfaces which then proves conclusively that the convicted person was factually innocent, and only in such case does the claimant qualify for the relief of compensation. The said standard bars compensation in cases where the conviction was (partly or fully) attributable to the claimant.

5.3 This standard of miscarriage of justice is, therefore, invoked only when a new fact establishes factual innocence of the claimant after a final conviction order by the final appellate court and after all avenues of appeal have been exhausted; thereby recognizing

¹³³ Article 14(6), ICCPR (supra).

‘wrongful conviction’ (and suffering of punishment on its account) as the standard of miscarriage of justice. This standard if applied, however, will fail to consider the systemic shortcomings of the criminal justice system in India.

5.4 Firstly, this standard would not include within its purview forms of miscarriage of justice that an accused person may suffer even if they are eventually acquitted. For example, illegal and wrongful detention, torture in police custody, long incarceration, repeated denial of bail, among others. A requirement that all ‘avenues of appeal be exhausted and post which a new fact shows that there has been a miscarriage of justice’ does not work in the Indian conditions because of the delays in the criminal trial/appeal process; the accused person may be in the prison (or suffer otherwise) for the period which may be as long as or longer than the sentence for the offence for which he is ultimately acquitted.

5.5 The second issue in applying this standard is the parameter of ‘new fact proving factual innocence’ post the (final) conviction. In most of the western jurisdictions using this standard, given their advanced forensic investigation system, factual innocence is often proved through the use of DNA technology/evidence. For example, in the United States, since the early 1990s there is the Combined DNA Index System (CODIS) for the purpose of amalgamating forensic sciences and computer technology into an effectual apparatus for solving serious crimes.¹³⁴ Similarly, in the United

¹³⁴ This was corroborated by the recent judgment of the US Supreme Court in *Maryland v. King*, 133 S. Ct. 1958 (2013), wherein it was held that officers making an arrest for a serious offence are authorized to take and analyse a cheek swab of the arrestee’s DNA and the same is legitimate under the Fourth Constitutional Amendment. See: Law Commission of India, Report No. 271 “*Human DNA*

Kingdom, there is the National DNA Database (NDNAD), and the Criminal Justice and Public Order Act that allows the police to take DNA samples of the arrested person before the investigation process begins so as to make the process faster, and to eliminate innocents. In India, however, since the forensic investigation system is not that well developed, and the use of DNA based technology in criminal investigation and proceedings is yet to gain ground, the chances of DNA based evidence contributing towards the exoneration of innocents are very limited.

5.6 Thirdly, this standard excludes claims of compensation in cases where the conviction was partly or wholly attributable to the accused person; for example, causation of prosecution by the claimant such as confessing to guilt despite being innocent. This exclusion, if applied, would disqualify from relief cases where the accused are forced to confess under duress and they do so despite being innocent; a practice endemic to criminal investigations in India.¹³⁵

5.7 Further, if wrongfulness is understood as convicting a person of an offence of which they were factually innocent, it will create a hierarchy of acquittals – those who were factually innocent and those who were not. Currently, the Indian legal system presumes anyone who is not convicted of an offence to be innocent of it. This presumption of innocence would be in jeopardy by creating categories of innocent persons, and would seriously disadvantage those who cannot show that they were factually

Profiling – A draft Bill for the Use and Regulation of DNA-Based Technology” (2017).

¹³⁵ See: *Adambhai Sulemanbhai Ajmeri* (supra); and *Mohd. Jalees Ansari & Ors*, (supra).

innocent. This is especially problematic because, as noted above, factual innocence is very difficult to prove.

5.8 In this manner, wrongful conviction is too high a standard, and there are many forms of miscarriage of justice that arise even though there is no conviction ultimately. This standard would therefore be under-inclusive in application in the Indian context.

5.9 The second standard is that of 'wrongful incarceration', i.e. miscarriage of justice resulting in wrongful incarceration - where the person has spent time in prison for an offence for which they may ultimately not be convicted, prosecuted, or even charged. This standard would invoke miscarriage of justice in all cases of acquittals where the person has spent some or substantial time in prison i.e. all cases with long-drawn trials resulting in acquittals.

5.10 Although addressing a very serious form of miscarriage of justice, this standard in application would be both over-inclusive and under-inclusive. Firstly, because not all cases of acquittals are a result of wrongful prosecution; acquittals may very well be on account of other reasons such as factual or legal errors, or the inability of the prosecution to prove the case beyond reasonable doubt, or the accused being given the benefit of doubt. But, this standard would include each of the cases where the person was incarcerated for whatever amount of time and was later found to be not guilty. A corollary of the foregoing would be relief being granted to those who may be factually guilty, but were acquitted for procedural reasons such as witness turning hostile etc. In this manner, this standard in practice will overshoot its intended objective.

5.11 Secondly, making only wrongful incarceration as the standard of miscarriage of justice will exclude such cases of wrongful prosecution (resulting in acquittal) where the accused was granted bail and/or did not spend any time in prison; but, they nonetheless suffered on account of such wrongful prosecution/charges – prolonged trial, social stigma, loss of employment, legal expenses and the mental and physical harassment etc. This standard of ‘wrongful incarceration’ in this manner would be under-inclusive.

5.12 The third standard is that of wrongful prosecution. This standard identifies miscarriage of justice as police or prosecutorial (procedural) misconducts resulting in malicious or negligent investigation or prosecution of an innocent person. It targets cases where the police or prosecution maliciously, falsely or negligently investigated or prosecuted a person who was found not guilty of the crime.

5.13 This standard is based on a finding that the accused was not guilty of the offence, but the police and/or prosecution engaged in some form of misconduct in investigating, charging and/or prosecuting the person. Since the qualifying threshold of this standard is wrongful prosecution, it would include both the cases where the person spent time in prison as well as where he did not; and cases where the accused was adjudged innocent by the trial court or where the accused was convicted by one or more courts but was ultimately found to be not guilty.

5.14 In the Indian context, the standard of wrongful prosecution should be the most effective for identifying the cases of miscarriage of justice as it directly targets procedural and other police and

prosecutorial misconducts, which appears to be one of the primary sources of factual errors that results in innocent people being held guilty of offences they did not commit. As is evident from the cases discussed earlier in the Report (Chapter IV - 'Current Scenario – Overview and Inadequacies'), bringing to light instances of police, investigating agency, and/or prosecutorial misconduct leading to wrongful prosecution of persons who were ultimately found not guilty in trial/appeal, with many of the court orders also recording a finding to that effect.

5.15 Reference is made to an Order dated 31 May 2018 of a Special CBI Court in *CBI v. Om Prakash Aggarwal & Ors.*¹³⁶, where the Court noted the abuse of process of law, excess of discretion and jurisdiction and violation of the mandate of law by the IO (Investigating Officer) in booking innocent persons for a bank fraud; who were then acquitted, after a long trial of 14 years, for the lack of any incriminating evidence. The Court specifically observed that:

It is astonishing to note that IO despite having come to the conclusion regarding 'no misuse' of power or breach or non-following of the procedure by accused bank officers, yet decided to file the charge sheet against them.

5.16 The underlined determining factor of this standard is the malpractice on the part of the police, investigating agency, and/or the prosecution in the proceedings leading up to and/or during the wrongful prosecution of the accused, who was later found to be not guilty of the offence.

¹³⁶ CC No. 39/2016 (Unique Case ID No.: DLST01-000011-2003) in the Court of Savita Rao, Spl. Judge, (PC Act) CBI-01, (South) Saket Courts: New Delhi.

B. What amounts to Wrongful Prosecution?

5.17 Wrongful prosecution, as noted above, are the cases of miscarriage of justice where procedural misconducts - police or prosecutorial, malicious or negligent - resulted in wrongful prosecution of an innocent person, who was ultimately acquitted, with a court making an observation or recording a finding to that effect. The underlying sentiment being that such person should not have been subjected to these proceedings in the first place.

5.18 This section delves into the forms in which the said police and prosecutorial misconducts manifests. A review of the caselaw discussed earlier and other comparative examples shows that the said misconducts broadly surfaces in the form of disregard of procedural rules such as improper disclosure of information; falsifying or planting or fabricating evidence; withholding, suppressing or destroying exculpatory evidence; coercing confessions/recoveries or other abuse of process of law etc. Within the existing criminal law framework, to determine what could amount to such misconduct, reference can be made to the provisions contained in Chapters IX and XI of the Indian Penal Code (IPC) (discussed in detail in Chapter IV - 'Current Scenario - Overview and Inadequacies').

5.19 Based on the aforesaid, an illustrative list of procedural misconduct would include the following:

- (i) Making or framing a false or incorrect record or document for submission in a judicial proceeding or any other proceeding taken by law;

- (ii) Making a false declaration or statement authorized by law to receive as evidence when legally bound to state the truth - by an oath or by a provision of law;
- (iii) Otherwise giving false evidence when legally bound to state the truth - by an oath or by a provision of law;
- (iv) Fabricating false evidence for submission in a judicial proceeding or any other proceeding taken by law
- (v) Destruction of an evidence to prevent its production in a judicial proceeding or any other proceedings taken by law
- (vi) Bringing a false charge, or instituting or cause to be instituted false criminal proceedings against a person;
- (vii) Committing a person to confinement or trial acting contrary to law; or
- (viii) Acting in violation of any direction of law in any other manner not covered in (i) to (vii) above, resulting in an injury to a person.

Chapter - 6

CONCLUSION AND RECOMMENDATIONS

A. Conclusion

6.1 After identifying ‘wrongful prosecution’ as the standard of miscarriage of justice and determining the contours of term ‘wrongful’, this chapter discusses the rectification of the said miscarriage i.e. how to make reparations for the same because mere acquittals are not enough. This chapter, therefore, concludes the Report with Commission’s recommendations on rectification of this miscarriage of justice resulting in wrongful prosecution.

6.2 A person wrongfully prosecuted though acquitted and released from jail is free to go back to his life; but is it actually possible for him to go back to the same life – the life he had before he were subjected to the ordeal of wrongful prosecution. For a person who has been accused of a crime, who underwent criminal proceedings (often long drawn), whose name and reputation has been affected for being accused and/or convicted of a crime he did not commit, who has spent time in prison for a crime he did not commit, there still lies an uphill battle even after acquittal.¹³⁷

6.3 There needs to be recompense for the years lost, for the social stigma, the mental, emotional and physical harassment, and for the expenses incurred etc. There needs to be compensatory assistance by the State to help the innocent victims of miscarriage

¹³⁷ “For the prisoner himself, imprisonment for the purposes of trial is as ignoble as imprisonment on conviction for an offence since the damning finger and opprobrious eyes of society draw no difference between the two....”, the Supreme Court in *Thana Singh v. Central Bureau Of Narcotics* (supra).

of justice, who have suffered through wrongful prosecution, to rehabilitate and to adjust to the life-after, and to reintegrate into society.

6.4 Article 14(6) of the ICCPR read with the General Comment 32 of the United Nations Human Rights Committee (*supra*), dealing with miscarriage of justice, requires that the victims of proven cases of such miscarriage to be compensated 'according to law'. These provisions collectively create an obligation on the state parties to it to enact a legislation ensuring that the said victims are compensated, and such compensation is made within a 'reasonable period of time'. As noted earlier, many countries including the United Kingdom, the United States, and Germany have converted this commitment into law, where the State has assumed statutory responsibility for compensating the victims of such miscarriage of justice. India ratified ICCPR in the year 1968 (with certain reservations) but is yet to comply with its obligations and enact a legislation laying down the law for compensation of the victims of this miscarriage of justice.

6.5 One of the reservations made by India, while ratifying ICCPR, was that the Indian legal system does not recognize the right to compensation for victims of unlawful arrest and detention.¹³⁸ However, subsequently by virtue of judicial decisions, compensation was recognised as a remedy for redressal of miscarriage of justice resulting in violation of right to life and personal liberty including wrongful prosecution; albeit under

¹³⁸ See: "*1st Peoples' Tribunal on Innocent Acquitted, Report of the Jury, Towards a Framework for Compensation & Rehabilitation for Victims of Wrongful Prosecution/ Conviction*". Innocence Network India (October 2016). Available at: <http://jtsa.in/document/Innocence%20Network%27s%201st%20People%27s%20Tribunal%20-%20Jury%20Report.pdf> (Last Accessed on 25 July 2018).

public law as a claim of constitutional tort against the State, to be filed in the Constitutional Courts i.e. the Supreme Court and the High Courts.

6.6 From the landmark cases of *Rudal Sah* (supra), *Nilabati Behera* (supra), *D. K. Basu* (supra) to the 2016 case of *Dr. Rini Johar* (supra), the Supreme Court has recognised the remedy of recovering appropriate damages from the State as one of the telling ways in which the violation of fundamental rights can be prevented “...to mulct its violations in payment of monetary compensation”¹³⁹. Holding monetary compensation for the suffering and humiliation as “a redeeming feature”¹⁴⁰; “...an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement....to apply balm to the wounds of the family members of deceased victim who may have been the breadwinner of the family.”¹⁴¹. This view has also been echoed by various High Courts over the years, as was also observed in the Order dated 6 July 2018 of a Division Bench of the Madhya Pradesh High Court in the case of *Durga @ Raja v. State of Madhya Pradesh*¹⁴² and *Nandu @ Nandkishore v. State of Madhya Pradesh*,¹⁴³ where the Court held that appellants who are innocent and have suffered because of poor investigation and tainted prosecution, deserve compensation from the State.

¹³⁹ *Rudal Sah* (supra).

¹⁴⁰ *Dr. Rini Johar* (supra).

¹⁴¹ *D. K. Basu* (supra); See also: ‘*1st Peoples’ Tribunal on Innocent Acquitted, Report of the Jury, Towards a Framework for Compensation & Rehabilitation for Victims of Wrongful Prosecution/ Conviction*’, Innocence Network India (October 2016); Available at: <http://jtsa.in/document/Innocence%20Network%27s%201st%20People%27s%20Tribunal%20-%20Jury%20Report.pdf>. Last Accessed on 25 July 2018.

¹⁴² Criminal Appeal No. 812 of 2008.

¹⁴³ Criminal Appeal No. 866 of 2008.

6.7 Despite the above, under the current set of remedies, claim and grant of compensation for the said miscarriage of justice still remains complex and uncertain. Under public law (as discussed earlier, in Chapter IV – ‘Current Scenario – Overview and Inadequacies’), a violation of fundamental rights due to police and prosecutorial misconduct can invoke State liability (as noted in the case laws discussed); but the amount and payment of compensation remains arbitrary and lacks transparency. In other words, despite decades of jurisprudence on compensation under public law, there is no set legislative principle regarding the basis for determining the award of compensation or its amount thereof.

6.8 It needs to be noted that Article 21 protects ‘life and personal liberty’, and by virtue of judicial pronouncements, deprivation of the ‘life and personal liberty’ invokes the aforesaid public law remedy of compensation, but there is no explicit provision in the Constitution of India for grant of compensation by the State for the infringement of right to life and personal liberty (as noted earlier in the Report). In this manner, the currently available remedies only create an *ex gratia* obligation, and not a statutory obligation on the State to compensate. A natural corollary of which is that while there is judicial precedent enabling a victim of the said miscarriage of justice to approach the Supreme Court and the High Courts under their respective writ jurisdiction for relief, there is still no statutory right of compensation for such victim/claimant.

6.9 The criminal justice system, as it stands, does not provide for an effective response from the State to the victims of miscarriage of justice resulting in wrongful prosecutions. As things stand, there is no statutory or legal scheme articulating the State’s

response to this issue. Moreover, given the endemic and sensitive nature of the issue, and the glaring inadequacies of the available remedies, there is a pressing need for an explicit law for compensating the victims who have suffered miscarriage of justice at the hands of the State machinery – laying down State’s statutory obligation to recompense these victims of wrongful prosecution, and a dedicated judicial mechanism to give effect to the same.

B. Recommendations

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

6.11 The need for a legislative framework for redressal of harms inflicted by wrongful prosecution arises on many counts. One of the most important being that the injustice caused to the innocents needs to be redressed within the framework of rights and not *ex gratia* by the State. The other being that there needs to be an established legislative process according a transparent,

uniform, efficacious, affordable and timely remedy for the loss and harms inflicted on the victims on account of wrongful prosecution. In view of the foregoing, the core principles underlining the recommended legal framework would be as follows:

(i) Special Court: One of the most important considerations in creating this remedy framework is that the claims need to be decided as speedily and swiftly as possible. The element of speed and time efficiency particularly gains importance because the claim itself arises from unjustified prosecution (often prolonged), which the wrongfully accused and his family should not have been put through in the first place. Any process of relief so designed, therefore, needs to be speedy, expedient, and be made keeping in mind the interest of the claimant; and the most crucial aspect of this is the forum at which these claims are adjudicated.

Accordingly, the Commission recommends designation of special courts in each district for adjudicating upon the claims of compensation for wrongful prosecution. The choice jurisdiction should be made by the applicant, as follows: (i) either the Special Court having jurisdiction over the area in which the wrongful prosecution occurred; or (ii) the Special Court within the local limits of whose jurisdiction the applicant resides.

(ii) Cause of Action: Within this legal framework, the cause of action for filing a claim for compensation would be that of ‘wrongful prosecution’, which ended with an order or judgment in favor of the accused, *inter alia* acquitting him. The ambit of ‘wrongful prosecution’ herein would include (i)

malicious prosecutions; and (ii) prosecutions instituted without good faith.

Malicious prosecution, as included herein, means malicious institution by one against another of unsuccessful proceedings without reasonable or probable cause. Where the expression 'reasonable and probable cause' is the honest belief in the guilt of the accused based upon a full conviction, founded upon existence of circumstances, which would reasonably lead any ordinary, prudent and cautious man to the conclusion that the person charged was probably guilty of the crime imputed¹⁴⁴; the question being whether there was a case fit to be tried. The foundation of this cause of action lies in the abuse of legal process by wrongfully setting the law in motion, and it is designed to discourage the perversion of the machinery of justice for an improper cause.¹⁴⁵

A prosecution instituted without 'good faith' would also be included within the purview of wrongful prosecution, giving rise to a claim for compensation hereunder. Section 52, IPC, laying down an exclusionary definition of the term 'good faith', says that no act is done in good faith if it is done without "due care and attention"¹⁴⁶; where 'due care' denotes the degree of reasonableness in the care sought to be exercised¹⁴⁷ - when holding an office or duty requiring skill or

¹⁴⁴ *R. P. Kapoor v. Pratap Singh Kairon*, AIR 1966 All 66.

¹⁴⁵ *Mohammad Amin v. Jogendra Kumar*, AIR 1947 PC 106.

¹⁴⁶ "Nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention.": Section 52, IPC.

¹⁴⁷ *S.K. Sundaram*, AIR 2001 SC 2374; Black's Law Dictionary explains 'reasonable care' as "such a degree of care, precaution, or diligence as may fairly and properly be expected or required, having regard to the nature of the action, or of the subject matter and the circumstances surrounding the transaction. It is such care as an

care, merely good intention is not enough but such care and skill as the duty reasonably demanded for its due discharge. Absence of 'good faith' can, therefore, be understood to mean negligence or carelessness;¹⁴⁸ i.e. a prosecution instituted negligently without due care and attention would be included within the definition of wrongful prosecution under this legal framework.

- (iii) Who can apply: A claim for compensation hereunder would be for the harm or damage caused to any accused person in body, mind, reputation or property as a result of the wrongful prosecution – i.e. for the 'injury' resulting from wrongful prosecution. The claim for compensation can be brought by the accused person so injured; or by any agent duly authorized by the said accused person; or where the accused person died after the termination of the wrongful prosecution, by all or any of the heirs or legal representatives of the deceased.

- (iv) Nature of Proceedings: Keeping in mind the objective of efficiency in terms of time and process, it is recommended that the Special Court for the purpose of inquiry and adjudication herein, follow summary procedures as may be prescribed. The standard of proof in these proceedings on probabilistic threshold will be that of 'balance of

ordinary prudent person would exercise under the conditions existing at the time he is called upon to act." (Black's Law Dictionary (8th ed. 2004).

¹⁴⁸ *Bux Soo Meah Chowdry*, AIR 1938 Rang 350; see also: *Harbhajan Singh v. State of Punjab & Anr.*, AIR 1966 SC 97.

probabilities¹⁴⁹; with the burden on the claimant (accused) to prove misconduct which lead to wrongful prosecution, and/or the misconduct during the prosecution which made it wrongful. The standard is the supposition of a prudent man faced with connecting probabilities or improbabilities concerning a fact-situation, after weighing the various probabilities and improbabilities, and arriving at the preponderance¹⁵⁰ - i.e. whether a reasonable man could have come to the same conclusion.¹⁵¹

Additionally, the framework will also include prescribed timelines for the disposal of the application, for payment of compensation; period of limitation for filing the claim for compensation, and for filing an appeal against the order of the Special Court.

Upon receiving an application for claim of compensation, the Special Court, after giving notice to the contesting parties (including the Central/State Government, as the case may be), and giving them an opportunity of being heard, inquire into the claim, and may make an award determining the compensation to be paid by the Central/State Government. The Special Court may also direct the concerned authorities to initiate proceedings against the erring official(s) in accordance with law.

¹⁴⁹ See: *Mahesh Dattatray Thirthakar v. State of Maharashtra*, AIR 2009 SC 2238; *State of Rajasthan v. Netrapal*, (2007) 4 SCC 45; and *Sarjudas v. State of Gujarat*, AIR 2000 SC 403.

¹⁵⁰ *Gulabchand v. Kudilal*, AIR 1966 SC 1734. See also: *Dr. N. G. Dastane v. Mrs. S. Dastane*, AIR 1975 SC 1534.

¹⁵¹ See: *U.P. State Road Transport Corporation v. State of U.P.*, 2000 All LJ 1461.

- (v) Compensation: The essence of a statutory response to the victims of wrongful prosecution lies in the relief provided to them, for that underlines the basic intent and objective of this law i.e. to assist the wrongfully accused/convicted in reintegrating into society or their lives for that matter. Accordingly, this statutory framework in addition to establishing the State's liability to pay compensation in the proven cases of wrongful prosecution, will also elaborate on the relief i.e. compensation to be paid in such cases. While at this point, it does not appear feasible for the law to lay down a fixed amount of monetary compensation to be paid, the law will include the guiding principles/factors that a Special Court will be required to consider while determining the compensation including the amount of monetary compensation. There also needs to be a provision providing for interim compensation in certain specified category of cases, if applied for, for immediate assistance; to be paid pending the adjudication of the claim.

Compensation under this framework will include both pecuniary and non-pecuniary assistance to effectuate the rehabilitation of these victims of wrongful prosecution into society. While pecuniary assistance will be in terms of monetary award as may be determined by the Special Court; non-pecuniary assistance will be awarded in the form of services such as counselling, mental health services, vocational/employment skills development, and such other similar services.

Non-pecuniary assistance shall also include a specific provision for removing disqualifications attached to a

prosecution or conviction – particularly affecting wrongfully accused person’s chances of finding employment in public and private sectors; getting admission in an educational institution etc. The foregoing is of utmost importance because of the social stigma and other such disadvantages attached to a prosecution and conviction (notwithstanding that it was wrongful in the first place). In a criminal case, acquittal by a trial court or by the appellate court recording a finding that the accused had been wrongly implicated in a case must take away the stigma because the charges themselves stand washed off, i.e. in cases of honourable acquittals¹⁵². An order of acquittal operates retrospectively, and when given by the appellate court it also wipes out the sentence awarded by the lower court.¹⁵³ To give practical effect to the foregoing, it is imperative to include a specific provision removing the aforesaid disqualifications. Such a provision, backed by statutory force, would go a long way in assisting the accused person to reintegrate into society.

The factors to be taken into consideration while determining the amount of compensation can be broadly categorised as ‘financial’ and ‘other factors’ including *inter alia* seriousness of the offence, severity of the punishment, the length of incarceration, loss or damage to health, psychological and

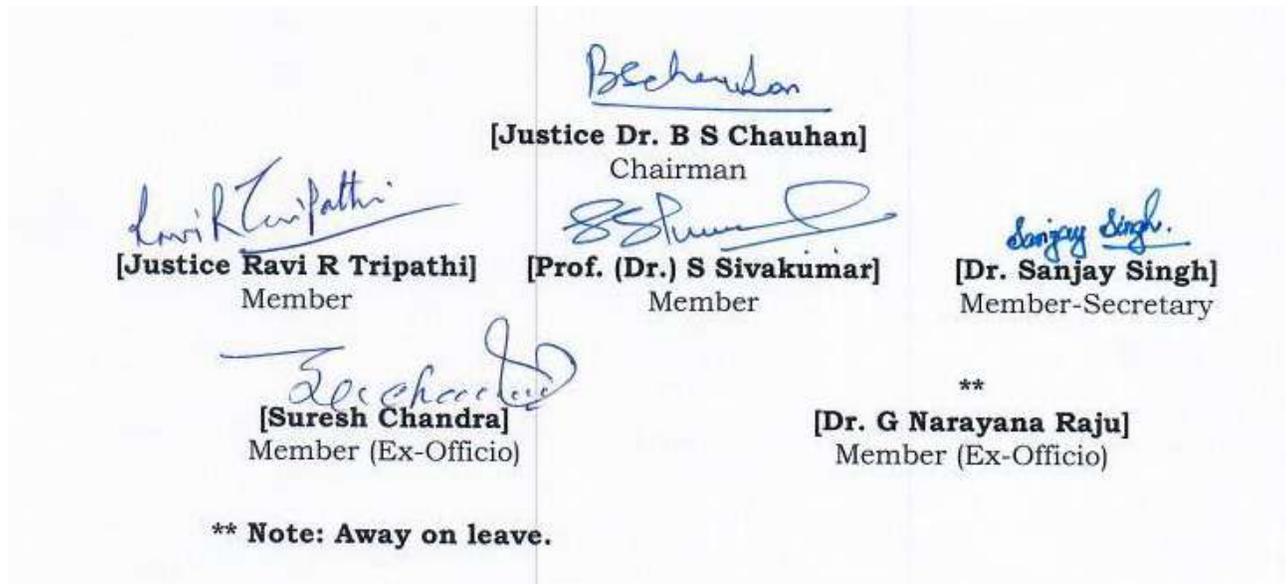
¹⁵² “When the accused is acquitted after full consideration of prosecution evidence and that the prosecution had miserably failed to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted.”: *Management of Reserve Bank of India v. Bhopal Singh Panchal*, (1994) 1 SCC 541. See also: *Baljinder Pal Kaur v. State of Punjab*, (2016) 1 SCC 671; *Deputy Inspector General of Police and Anr. v. S. Samuthiram*, (2013) 1 SCC 598; and *Commissioner of Police New Delhi v. Mehar Singh*, (2013) 7 SCC 685.

¹⁵³ *B.R. Kapur v. State of Tamil Nadu & Ors.*, AIR 2001 SC 3435; and *Vidya Charan Shukla v. Purshottam Lal Kaushik*, AIR 1981 SC 547.

emotional harm; status of the victim in the society, harm to reputation, loss of opportunities (of education, livelihood), loss of income/earnings, loss or damage to property.

6.12 The principles discussed in the Report are articulated in the Code of Criminal Procedure (Amendment) Bill, 2018, attached herewith as 'Annexure'.

The Commission recommends accordingly.



**THE CODE OF CRIMINAL PROCEDURE (AMENDMENT) BILL,
2018**

A

BILL

further to amend the Code of Criminal Procedure, 1973.

BE it enacted by Parliament in the Sixty-ninth year of the Republic of India as follows:

1. **Short title and commencement.**— (1) This Act may be called the Code of Criminal Procedure (Amendment) Act, 2018.
(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. **Amendment of Section 2.**— In the Code of Criminal Procedure, 1973 (2 of 1974) (hereinafter referred to as the Code of Criminal Procedure), in section 2 —

(ii) after clause (j), the following clause shall be inserted, namely:—

‘(ja) “*malicious prosecution*” means instituting the prosecution complained of without any existing reasonable or probable cause;’

(iii) after clause (x), the following clause shall be inserted, namely:—

‘(xa) “*wrongful prosecution*” means malicious prosecution or prosecution instituted without good faith, which concluded in favour of the accused, and includes any of the following, namely:—

- (i) making or fabricating a false or incorrect record or document for submission;
- (ii) making a false declaration or statement before an officer authorised by law to receive as evidence when legally bound to state the truth that is to say by an oath or by a provision of law;
- (iii) otherwise giving false evidence when legally bound to state the truth that is to say by an oath or by a provision of law;
- (iv) fabricating false evidence for submission;
- (v) suppression or destruction of an evidence to prevent its production;
- (vi) bringing a false charge, or instituting or cause to be instituted false proceedings against a person;
- (vii) committing a person to confinement or trial acting contrary to law;
- (viii) acting in violation of any law in any other manner not specifically covered under (i) to (vii) above;’

3. Insertion of new Chapter XXVIIA.— In the Code of Criminal Procedure, after Chapter XXVII, the following chapter shall be inserted, namely:—

‘CHAPTER XXVIIA

Compensation to persons wrongfully prosecuted

Section 365A Application for compensation.—

(1) An application seeking compensation for a wrongful prosecution may be made—

(a) by the accused person, who has sustained the injury;

or

(b) by any agent duly authorised by the accused person, who has sustained the injury; or

(c) where the accused person died either before or after the termination of the wrongful prosecution, by all or any of the heirs or the legal representatives of the deceased:

Provided that where all the heirs or the legal representatives of the deceased have not joined in any such application for compensation, the application shall be deemed to have been made on behalf of and for the benefit of all the heirs and the legal representatives of the deceased.

Explanation 1.— In this section and section 365B, “injury” means any harm caused to any accused, of body, mind, reputation or property, actual or as a probable result of the wrongful prosecution.

Explanation 2.— In this section and sections 365B, 365C, 365D, 365E, 365F and 365I, “compensation” includes pecuniary or non-pecuniary compensation, or both; whereas the non-pecuniary compensation includes counseling services, mental health services, vocational or employment skills development, and such other services

or assistance that the accused may require to facilitate reintegration into society.

(2) Every application under sub-section (1) shall be filed, at the option of the applicant, either in the Special Court having jurisdiction over the area in which the wrongful prosecution occurred or to the Special Court within the local limits of whose jurisdiction the applicant resides, in such form containing such particulars as may be prescribed.

(3) In case of longer incarceration exceeding six months, the Special Court may, after providing an opportunity of hearing to the applicant and the other parties, award interim compensation to the applicant, if so claimed, to facilitate his immediate rehabilitation, such compensation which shall not exceed fifty thousand rupees, but in any case shall not be less than twenty five thousand rupees.

(4) Every application for such compensation under sub-section (1) shall be preferred within a period of two years from the date when acquittal attains finality:

Provided that the Special Court may entertain the application after the expiry of the said period of two years but not later than three years, if it is satisfied that the applicant was prevented by sufficient cause from making the application in time.

Section 365B Option regarding claims for compensation in certain cases.—

Notwithstanding anything contained in any other law for the time being in force, where an injury gives rise to a claim for compensation under this Chapter, or through any other

remedy, the person entitled to compensation may claim such compensation under any one of these remedies to the exclusion of other remedies.

Section 365C Award of the Special Court.—

- (1) On receipt of an application for compensation made under section 365A, the Special Court shall, after giving notice of the application to the Central Government or as the case may be the concerned State Government, and after giving an opportunity of being heard to all the parties, hold an inquiry into the claim or, as the case may be, into each of the claims and, may make an award determining the just and reasonable compensation, specifying the person or persons to whom it shall be paid, and shall also specify the amount which shall be paid by the Central or the State Government concerned, as the case may be, and may also direct the Central or the State Government concerned to proceed against the erring official in accordance with law.
- (2) The Special Court shall arrange to deliver copies of the award to the parties concerned, free of cost, within fifteen days from the date of the award.
- (3) The application made under section 365A shall be disposed of within a period of one year from the date of receipt of the application.

Provided that in case the application is disposed of within the said period, the Court shall record the reasons in writing for not disposing of the application within the specified period.

- (4) An application for interim compensation shall be disposed of within a period of ninety days from the date of service of notice to the respondent(s).
- (5) On an award being made under this section, the person(s) who is liable to pay any amount in terms of such award shall, deposit the entire amount within a period of thirty days from the date of making the award in such manner as may be prescribed in the rules.

Section 356D Award of interest where any claim is allowed.—

Where a Special Court allows a claim for compensation made under this Code, it may direct that in addition to the amount of compensation interest shall also be paid at the rate of six per cent per annum and from such date not earlier than the date of making the claim as it may specify in the award.

Section 365E Factors to be taken into account by the Special Court.—

While adjudicating the quantum of compensation or interest under section 365C or 365D, as the case may be, the Special Court shall take into consideration the following financial and other factors, namely:—

- (i) seriousness of the offence; severity of the punishment; the length of incarceration;
- (ii) loss or damage to health;
- (iii) loss of income or earnings;
- (iv) loss or damage to property;

- (v) legal fees and other consequential expenses resulting from the wrongful prosecution;
- (vi) loss of family life;
- (vii) loss of opportunities (of education, of possibilities of livelihood, future earning abilities, skills);
- (viii) stigmatization that is harm to reputation or similar damage;
- (ix) psychological and emotional harm caused to accused and his family;
- (x) such other factors which the Special Court considers necessary as regards the claim in furtherance of justice.

Section 365F Removal of disqualification attaching to conviction.—

Notwithstanding anything contained in any other law for the time being in force, a person who is awarded compensation for wrongful prosecution under section 365C shall not suffer any disqualification on account of such prosecution or conviction.

Section 365G Procedure and powers of Special Court.—

- (1) For holding an inquiry under section 365C, the Special Court may, subject to any rules that may be made in this behalf, follow such summary procedures as it thinks fit.
- (2) The Special Court, while adjudicating a claim under this Chapter, shall have the same powers as are vested in a civil court under Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters, namely:—
 - (i) the summoning and enforcing the attendance of any party or witness and examining the witness on oath;

- (ii) the discovery and production of any document or other material object producible as evidence;
 - (iii) the reception of evidence on affidavits;
 - (iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;
 - (v) issuing of any commission for the examination of any witness;
 - (vi) any other matter which may be prescribed.
- (3) Subject to the provisions of this Chapter, a Special Court shall, for the purpose of the adjudication of a claim under this Chapter, have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed and shall adjudicate upon such a claim as if it were a Civil Court.

Section 365H Appeals.—

- (1) Subject to the provisions of sub-section (2), any person aggrieved by an award of a Special Court may, within a period of ninety days from the date of the award, prefer an appeal to the High Court.
- (2) No appeal by the person, who is required to pay any amount in terms of such award, shall be entertained by the High Court, unless he has deposited with it twenty-five thousand rupees or fifty per cent of the amount so awarded, whichever is higher, in the manner as may be prescribed.
- (3) The High Court may entertain an appeal after the expiry of the said period of ninety days, if it is satisfied that the

appellant was prevented by sufficient cause from preferring the appeal in time.

- (4) No appeal shall lie against an award of a Special Court if the amount awarded is less than fifty thousand rupees.

Section 365I Power of State Government to make rules.—

(1) The State Government may, by notification, make rules for the purpose of carrying out the purposes of this Chapter.

(2) Without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely: —

(a) the form of making application for claims for compensation and the particulars it may contain, to be paid in respect of such applications under sub-section (2) of 365A;

(b) the procedure to be followed by a Special Court in holding an inquiry under sub-section (1) and the powers vested in a Civil Court which may be exercised by a Special Court under sub-section (2)(vi) of section 365G;

(c) the form and the manner of the payment of amount for preferring an appeal against an award of a Special Court under sub-section (2) of section 365H;

(d) any other matter which is considered necessary.’

(2) Every rule made by a State Government under this section shall be laid, as soon as may be after it is made, before the State Legislature.

List of Cases

1. *Abrar v. State of Uttar Pradesh*, AIR 2011 SC 354
2. *Adambhai Sulemenbhai Ajmeri & Ors. v. State of Gujarat*, (2014) 7 SCC 716
3. *Afzalur Rahman & Ors. v. Emperor*, AIR 1943 FC 18.
4. *Ahmed Kutty* (1963) 1 Cri LJ 597 (ker.)
5. *Ajab Singh v. State of Uttar Pradesh*, (2000) 3 SCC 521
6. *Allarakha K Mansuri v. State of Gujarat*, AIR 2002 SC 1051
7. *Amar Pal Singh v. State of UP*, AIR 2012 SC 1995.
8. *Amarsingh Jetha*, (1885) 10 Bom 506
9. *Amrik Singh v. State of PEPSU*, AIR 1955 SC 309
10. *Anwar v. State of J & K*, (1977) 3 SCC 367.
11. *Ashfaq Ahmed*, 1981 All LJ 871
12. *Ashiq Mahomed v. Emperor*, AIR 1936 Lah 330
13. *Ashok Sharma v. Union of India*, 2009 ACJ 1063
14. *Ayodhya Dube & Ors. v. Ram Sumar Singh*, AIR 1981 SC 1415.
15. *B. C. Oraon v. State of Bihar*, cited in M. P. Jain, *Indian Constitutional Law Volume 1* (LexisNexis, Gurgaon, India Updated 6th Edition, 2013) 1618.
16. *B.C. Chaturvedi v. Union of India*, AIR 1996 SC 484
17. *B.R. Kapur v. State of Tamil Nadu & Ors.*, AIR 2001 SC 3435
18. *Babloo Chauhan @ Dabloo v. State Government of NCT of Delhi*, 247 (2018) DLT 31.
19. *Badri Prasad Sharma v. Shanti Prasad Sharma*, 1982 A Cr R 9
20. *Baijnath v. State of Madhya Pradesh*, AIR 1996 SC 220
21. *Balbir Singh v. D.N. Kadian*, AIR 1986 SC 345
22. *Baljinder Pal Kaur v. State of Punjab*, (2016) 1 SCC 671
23. *Bangalore City Cooperative Housing Society Ltd. v. State of Karnataka & Ors.*, AIR 2012 SC 1395.
24. *Beharry Singh*, (1867) 7 WR (Cr) 3.
25. *Bharatbhai Chandubhai Gadha v. State of Gujarat*, High Court of Gujarat, Order dated 19 March 2014 in R/SCR.A/951/2014
26. *Bhim Singh, MLA v. State of J & K & Ors.* (1985) 4 SCC 677.
27. *Bhimanna v. State of Karnataka*, AIR 2012 SC 3026
28. *Bibhabati Devi v. Ramendra Narayan Roy*, AIR 1947 PC 19.
29. *Boaler*, (1914) 1 KB 122.
30. *Brajbashi Panda* (1908) 13 CWN 398.
31. *Brooks v. Commissioner of Police for the Metropolis & Ors.*, [2005] UKHL 24
32. *Bux Soo Meah Chowdry*, AIR 1938 Rang 350
33. *CBI v. Om Prakash Aggarwal & Ors.*, CC No. 39/2016 (Unique Case ID No.: DLST010000112003) in the Court of Savita Rao, Spl. Judge, (PC Act) CBI01, (South) Saket Courts: New Delhi
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