THE ROLE OF COURTS VIS-À-VIS 'VIOLENCE AND HUMAN RIGHTS'

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Violence perpetrated by State Agencies

The role of the Courts in protecting citizens against violence by other citizens, and their role in protecting citizens against violence by State agencies are two distinct matters. The reason is that in the normal course the role of the Court starts after the role of the State's investigating agencies is completed. The Court tries the offence and punishes the offender on the basis of the investigation done by the State's investigating agencies, i.e., the police. But in the case of violence by State agencies, whether the police or the armed forces, the perpetrators of the violence are themselves the investigating agencies, or their close associates in the State structure. Hence the prerequisite for the entry of the Court into the picture, namely a prior investigation into the offence, is not met. Usually no investigation is at all done, or if done, it is perfunctory and exculpatory.

In Indian law the State is the prosecutor for all crimes (with a few specific exceptions), as crime is seen as an offence against Society. By necessary implication, the State is the prosecutor for crimes committed by its agencies, too. The law does provide for private initiation of criminal inquiry, but that is merely a formal right in such matters. This is because while Sec.190 of the Code of Criminal Procedure provides for offences to be taken up for inquiry (taken cognisance of) on a complaint by any person, an ordinary citizen has no power of investigation: to take any one into custody for the purpose of interrogation, to search any person or premises, or to seize any object from any person or premises. These are essential prerequisites for effective investigation. Without these powers, the complaint that the victim may file will necessarily be vague, and the evidence he can produce, necessarily inadequate. In the law as it stands, the State agencies, namely the various police forces, alone have the power of effective investigation into criminal offences, and since they rarely like to investigate their own offences, no prosecution takes place. Deterrence, an important preventive instrument, is thus wanting in the case of offences committed by State agencies.

One way of overcoming this problem would be to introduce a presumption in the Evidence Act, as recommended by the Law Commission of India following a suggestion made by the Supreme Court in State of U.P vs Ramsagar Yadav, AIR 1985 SC 416, namely that if any one dies or suffers injury in police custody, the Court will presume that the death or injury has been caused by the policemen who had the person's custody, until the presumption is rebutted by the accused police personnel.

This recommendation is in tune with the general rule of evidence, that a fact which is within the exclusive knowledge of a party shall be proved in evidence by that party. This would partly at least offset the problem that the citizen alleging offences by the police lacks the power of investigation necessary to make out a case. This recommendation has however been ignored by the law-makers.

The lower Courts can do very little in this situation when faced with stonewalling by the investigator in an offence committed by the police, except to return the investigating officer's report and direct him to investigate further, knowing full well that it is a futile exercise. But the Constitutional Courts, the High Courts of the Sates and the Supreme Court of India, need not have reduced themselves to the status of spectators with an occasional lecture thrown in. They have the power to issue wide-ranging orders including prerogative writs to ensure constitutional and lawful governance. They also have the power to exercise continuing mandamus, that is to say supervise the investigation by calling for periodical reports and issuing appropriate orders. But they have been hesitant to do so. Cases are not infrequently filed in these Courts alleging torture or killing by the police. There are occasional instances where the Courts have taken steps on their own to have the complaint inquired into. Nilabati Behera vs State of Orissa, AIR 1993 SC 1960 and PUCL vs Union of India, (1997) 3 SCC 433 are two instances. But much more often the Court merely calls for a report from the Superintendent of Police of the concerned district, who invariably sends a report claiming that the allegation is false, upon which the Court closes the case with the observation that the complainant may move the Criminal Court with a private complaint. As the complainant has no power to search the police station where the offence has taken place, seize any objects therefrom, or interrogate any police personnel, this remedy is no remedy at all.

The shape taken by the writ of habeas corpus in the hands of the Courts is an instance of how the higher Courts have enervated their jurisdiction in the matter of human rights violations by State agencies. In English law as well as Indian law, the habeas corpus is the only prerogative writ that is not discretionary. It compulsorily lies whenever or wherever there is unlawful confinement. That a person's confinement is unlawful not only when the confinement is ordered unlawfully or its duration exceeds the legally permitted time limit, but also when the conditions of confinement are unlawful was held by the Supreme Court in more than one case. Thus habeas corpus is a remedy available against custodial torture. However the Courts have ruled that once the detenu is set free from custody, habeas corpus no longer lies. Thus what could have been a comprehensive remedy against illegal detention and torture has been reduced to an instrument for merely getting the detenu set free. When a petition for a writ of habeas corpus is filed, all that the police need to do is to set the detenu free, or produce him in a Court of Law and charge him with some offence, true or false, and the Court will close the case with the observation that 'if the detenu has any further grievance, it is open to him to take recourse to appropriate proceedings in law', whereas the habeas corpus is itself the most appropriate proceeding.

It is true that if the Courts substitute themselves for the investigators in every case, the resultant burden on them would be enormous. Given the scale and frequency of illegal detention and torture in Indian police stations, this should have led to devising ways of remedying the situation and not giving up the remedy altogether. What has been devised however is a very week remedy, if not a parody of a remedy.

The Protection of Human Rights Act, 1993 (PHR Act) is believed to have been intended to answer this situation. It is well known that the law was enacted upon pressure from the UN bodies concerned with Human Rights, namely that there should be effective prosecution of violation of human rights by State agencies. The Act provides for the setting up of two types of institutions. One is the Central (called National) and State Human Rights Commissions and the other is the Human Rights Courts at the district level. The Commissions have the power to conduct inquiries by calling for documents and summoning witnesses but they have no power to issue binding orders. They can only make recommendations. Whether the recommendations made by the Commissions are binding on the Government is an undecided area of law. So long as the Commissions confine their orders to monetary compensation for the victim, the Governments have been heeding them. Orders to prosecute offenders meet a different fate.

Moreover an inquiry and an investigation are two different things. An inquiry arrives at conclusions on the basis of oral and documentary evidence which comes before it, including that which it is able to summon. An investigation unearths evidence by interrogation and search of persons and premises. Criminal prosecution requires effective investigation preceding the inquiry, but the PHR Act does not provide for any machinery of investigation in the control of the Human Rights Commissions. It provides, in Sec.14, for the use of Central & State investigating agencies by the Commissions for their investigations, with the concurrence of the respective Governments. This is a very weak and inadequate substitute for its own investigative agency. Human Rights organisations have been suggesting to the NHRC from the very beginning that it should to seek such an institutional change, but the request has not been heeded. The Human Rights Commissions must have their own investigative agencies which are recruited independently of the State and Central police forces and have the power of interrogation, search and seizure vis-à-vis the police. This requires an amendment to the PHR Act but neither the Government nor the Commissions are serious about this need.

The result is that the Human Rights Commissions in practice act as post offices. Complaints sent to them concerning human rights violations by State agencies are forwarded to the heads of those agencies for their comments. Their comments, if and when received, are forwarded to the complainant for rejoinder, and with that usually the matter is closed. It is no exaggeration to say that this is the fate of 999 out of 1000 complaints sent to the National or State Human Rights Commissions. Even for doing this little job, the Governments are reluctant to provide adequate staff and infrastructure to the Commissions. The Manipur State Human Rights Commission at Imphal, for instance, did not even have an office, and a concerned citizen had to move the High Court to get an order to the State Government to provide the Commission with an office and furniture!

Human Rights Courts are the other institutional mechanism proposed by the PHR Act. The way these Courts are provided for in that law is an indication of the utter lack of seriousness in drafting that law. In Sec.30 of the PHR Act, the State Governments are empowered to establish Human Rights Courts in each district. These Courts shall be Courts of Sessions and they will try 'offences arising out of violation of human rights'.

Since the word 'offence' is not independently defined in the Act, this expression must mean that violations of human rights are themselves the offences triable by the Human Rights Courts. This is as vague as can be since human rights are not listed out in the Act but defined as 'rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India'. If this is vague, the further category of 'offences arising out of violation of human rights' is even more vague. A Criminal Court must have a clear jurisdiction. The Court should know and suspects before the Court should know what are the offences it is empowered to inquire into. That cannot be left to inference. Moreover, while the offences the Human Rights Court shall try are at least vaguely defined, there is no indication of the punishments it can impose. How does a Criminal Court try offences when it is not even told what punishment it may impose?

Small wonder that the Human Rights Courts set up in a few States are not functioning at all.

Apart from custodial torture and custodial deaths, a major area of human concern is the practice of what in international law is described as 'extra-judicial execution'. This has been aptly described by the Supreme Court in PUCL vs Union of India, (1997) 3 SCC 433 as 'administrative liquidation'. These are killings committed by the police or other armed forces of the State, usually purportedly in self-defence. This is a very common method of physical elimination of militants of all types, from Maoists to Islamists to ethnic separatists. In these killings, the killers are themselves the jury and judge. There is never any investigation or inquiry into the justification offered by them for having taken life or lives. Such administrative practice is unconstitutional since the taking of life without following a procedure sanctioned by the law is barred by Article 21. Yet literally hundreds of such deaths take place each year, mostly (at present) in Jammu & Kashmir, Andhra Pradesh and the north-eastern States, but also in much of the country.

On a complaint arising from Andhra Pradesh, the National Human Rights Commission (NHRC) conducted an elaborate hearing into such killings and passed an order in Nov 1996 which was communicated by the Commission to all State Governments in March 1997. The order said that when an officer of the police or other armed forces reports that he has killed someone in the course of his duty or in self-defence, his very report shall be sufficient to book an offence of culpable homicide against him. And an independent investigation and inquiry must take place to ascertain the circumstances of the killing, in particular whether the killing is justified in self-defence or in the exercise of force to overcome resistance to arrest or dispersal of a riotous mob. Though this legal position is clear and unambiguous, not a single Government of States where such killings take place has honoured the view of the NHRC, which is nothing but the plain legal position. And even though such killings are regularly reported in the Press and the High Courts and the Supreme Court have the power to suo motu take up inquiry into violations of law, especially the fundamental rights, the Courts have studiously avoided going into these killings.

Violation of Human Rights by the Armed Forces of the Union is an area where the failure of the judicial institutions is most stark. The counter-insurgency in Jammu & Kashmir and the north-eastern States is led by the Armed Forces. Allegations of arbitrary use of force by the armed forces are widespread and remain unanswered except when the Army chooses to respond. The Army never allows the local police to investigate offences committed by its personnel. There is nothing in the law to prevent the police from registering an offence and investigating it, when it receives a complaint of crime committed by personnel of the Armed Forces. Prosecution requires sanction of the Central Government, but not investigation. But the Army never cooperates with any such investigation. If pressed the Army insists on doing its own investigation and inquiring into the crime. The Army Act in Sec.125 allows the Army to unilaterally decide whether offences committed by its personnel will be tried in the normal Courts or in a court-martial. It invariably prefers a court-martial. Even if the presiding Judge of the local Criminal Court believes that the case is within his Court's jurisdiction and not that of the army's Court-martial, he cannot ask for the case to be made over to him. The matter will have to be decided by the Central Government.

Such in-house adjudication is common in disciplinary matters but is anathema to the basic principles of human rights when it is extended to crimes of violence. Trial by an impartial and professional judiciary is the best safeguard for justice to the victim as well as the suspect. The Army Act appears to have been legislated with the supposition that the Army will be acting mainly against aliens. But today, it is acting much more against disaffected citizens of the country than aliens. Yet the unconscionable protection of its own investigation and its own inquiries continues. Perhaps the most notorious instance of injustice resulting from this state of affairs is the killing of Jaleel Ahmed Andrabi, a noted Kashmiri human rights lawyer. He was abducted on 8 March 1996 from a street in Srinagar and his dead body was fished out of the Jhelum river three weeks later, on 27 March. As he was a lawyer of repute practising in the High Court at Srinagar, the Court took the matter seriously and directed a Special Investigation Team to be constituted by the Senior Superintendent of Police, Srinagar. After considerable goading by the Court, the police concluded the investigation and filed a report on 10 April 1997 charging one Major Avtar Singh of 103 Territorial Army with the crime. The Army however, was reluctant to even inform the Court of the current whereabouts of that officer. Perseverance by the Court led the Army to claim that the officer would be tried in a court-martial. When last heard of, nothing had happened.

But the Armed Forces operating in the north-eastern States and Jammu & Kashmir have the extraordinary powers given by the Armed Forces (Special Powers) Act. There are separate Acts, one for Jammu & Kashmir and one for Assam & Manipur, extended to the rest of the troubled States of the north-east, but their provisions are almost identical in substance. Their provisions are extraordinarily draconian. Yet when they were challenged in the Supreme Court, the Court adopted the method of reading some safeguards into the law to save its constitutionality rather than strike down the law and leave it to Parliament to enact a better law. There may not in general be any thing very objectionable about such adjudication if the implementation of the law were in the hands of officers sitting at their desks, who may be expected to heed such reading-into or reading-down, but in the case of a law which is to guide personnel in anti-insurgency operations who may at best heed written law, if at all, such a devise becomes a decorative exercise. For instance the Armed Forces (Special Powers) Act gives extraordinary powers of (among other things) search and seizure to the personnel to the extent of destroying dwellings. The Supreme Court, in Naga Peoples Movement for Human Rights vs Union of India, AIR 1998 SC 431, held that the procedure for search and seizure laid down for the police in the Code of Criminal Procedure must be followed under this Act, too. Since there is no mechanism by which this view of the Court may be expected to percolate down to the jawans, such reading-into provides little practical protection to the people, while it saves the law from being unconstitutional.

A very major area of human rights concern is what is called involuntary or forced disappearances in international law. In Jammu & Kashmir alone, it is estimated that about 8000 persons have disappeared in the last sixteen years. The Government of the State has not seriously disputed the number. In most of the cases the disappeared person was last seen being taken away by personnel of the Armed Forces operating in that State. The Army however says that the disappeared persons may have crossed the border and gone to Pakistan. The law laid down by the Supreme Court in State of West Bengal vs Mir Mohammad Omar, 2000 SCC (Cri) 1516 is that if a person who is missing was last seen being taken away by a certain person then the burden is upon that person to explain the fate of the missing person, failing which the Court will draw an adverse inference. Thus it is for the Army to explain the 8000 disappearances in Jammu & Kashmir. But there appears to be no way of enforcing this burden. In the company of our neighbours, Pakistan and Sri Lanka, we have the dubious distinction of earning for South Asia the sobriquet that it is a major theatre of enforced disappearances, as stated by Amnesty International in its latest report.