

State Legislative Brief

UTTAR PRADESH

The Uttar Pradesh Recovery of Damages to Public and Private Property Ordinance, 2020

Key Features

- Empowers state government to set up tribunals to decide claims for damage to property.
- Tribunal to be headed by retired District Judge (as Chairperson) and officer of the rank of Additional Commissioner (as member).
- In addition to compensation, tribunal may also seek attachment of the person's properties along with publication of his personal details.

Issues to Consider

- Composition of tribunal may violate SC judgement.
- Reasons for mandatorily requiring attachment of property unclear.
- There may be insufficient opportunity given to the defendant to appear before the tribunal.
- Publication of photograph of the defendant may violate his right to privacy under Article 21.
- No right to appeal provided in the Ordinance.

A petition has been filed before the High Court of Allahabad challenging the Ordinance.

In 2007, the Supreme Court took note of various instances where there was large scale destruction of public and private properties in the name of agitations, bandhs and hartals.¹ The Court appointed two Committees (headed by Justice KT Thomas and Senior Advocate Fali Nariman) to suggest guidelines to be followed in such cases. In 2009, the Court issued guidelines based on these recommendations.¹ It recommended that: (i) High Courts may set up a machinery to investigate the damage caused and award compensation wherever mass destruction of property takes place due to protests, (ii) the rioters be made strictly liable to pay compensation for any damage caused to property once the nexus between the accused person and the incident is established, and (iii) a claims commission headed by a retired judge may be appointed to estimate the damage and investigate liability.

In March 2020, following the Supreme Court's guidelines, the district authorities of Lucknow put up banners displaying the names, photographs and addresses of certain people who were accused of damaging property during protests in the city.² The poster sought compensation from the accused persons and threatened confiscation of their properties if they failed to pay compensation. The Allahabad High Court held that the publication of personal details of people violated Article 21 (right to life) of the Constitution.² The Court noted that the publication of personal details of the accused persons merely to deter them from participating in illegal activities constituted an unwarranted interference in the privacy of the persons. Thereafter, the U.P. Recovery of Damage to Public and Private Property Ordinance, 2020 was promulgated to create a mechanism for recovery of damages during any protest or riots. A petition has been filed before the Allahabad High Court challenging the constitutionality of the Ordinance.³

Key Features

Key features of the Ordinance include:

- **Composition of the claims tribunals:** The state government may constitute one or more claims tribunals to decide compensation claims for damages to any public or private property due to riots, hartals, bandhs, protests, or public processions. The state government will decide the number of members of the tribunal. Where the tribunal consists of two or more members, one of them will be appointed as the Chairman of the tribunal. To be qualified for appointment to the tribunal, a person must be: (i) a retired District Judge (as Chairman); or (ii) an officer of the rank of Additional Commissioner (as a member).
- **Functions and powers of the tribunals:** The functions and powers of the tribunal include: (i) determining the damages caused to properties and award compensation, (ii) appointing a Claims Commissioner (of the rank of at least Additional District Magistrate in the state), if required, to estimate damages and to investigate the case, (iii) appointing an Assessor (from a state government-appointed panel) in every district to assist the Claims Commission in assessing the damage to property, (iv) summoning video or other recordings to assist the Claims Commissioner and Assessor in pinpointing the damage and establishing a

connection with the perpetrators of the damage. The remuneration of the Claims Commissioner and Assessor in every case will be determined by the state government. The Claims Commissioner is required to submit his report within three months or such extended time as may be granted by the Claims Tribunal.

- **Filing of claims for damage to public property:** A petition for compensation may be filed before the tribunal: (i) in the case of damage to public properties, by the head of office exercising control over the property damaged during the riots, or the head of office or Chief Executive (in case of public sector undertakings), or (ii) in the case of damage to private properties, by the owner of the property. The Ordinance states that such petition must preferably be filed within three months of the incident. The manner of filing claim petitions for private properties will be notified through rules.
- The person filing the claim can also list any persons who, to their knowledge, “had exhorted, instigated or committed” the damage to the property.
- **Hearing:** Once the petition is filed, the tribunal will issue notice for the appearance of the opposite side party. After issuing notice, if the party does not appear before the tribunal, the tribunal can proceed to hear the matter in his absence and order the attachment of his properties, along with the publication of his name, address and photograph with a warning to the public not to purchase the property of the person.
- **Award of compensation:** Once the parties are heard, the tribunal is required to give its orders within one year (and preferably within three months) directing the amount of compensation to be paid. The claim will be assessed based on the damage to the property. However, the compensation cannot be less than the market value of the property damaged on the day of the incident. Any amount paid by the central or state government or an insurance company to a person who has suffered the damage to his private property, will be adjusted from the final compensation amount. In addition, the tribunal may also order payment of costs for actions taken by authorities to take preventive action and any other measures in relation to the property.
- The tribunal may also award 'exemplary damages', for reasons recorded in writing, of up to double the amount of compensation liable to be paid. As soon as the order is passed, the Ordinance states that the property of the person will be attached and authorities will be directed to publish his name, address and photograph with a warning to the public at large not to purchase the attached property.
- **Principles for assessing liability:** Once the nexus between the event and the damage is established, the principle of absolute liability will apply. The liability will be borne by the person who committed the crime along with those who instigated or incited its commission.
- **Finality of the decision:** The Ordinance states that all orders passed by the tribunals will be final and cannot be appealed before any court.
- **Review and monitoring:** The District Collector or the Claims Commissioner will review the conduct of claim cases on a quarterly basis and send its report to the government. The Head of Department will monitor the conduct and disposal of claims filed for compensation and give necessary directions to the Head of Office periodically.

Issues for Consideration

We discuss below some key issues in the Ordinance.

Composition of the Tribunal may violate the doctrine of separation of powers

Ordinance:
Clause 7

The Ordinance states that the Claims Tribunals will be headed by a former District Judge (as Chairman) and an officer of the rank of Additional Commissioner (as member). The state government will decide the number of members of the tribunal. If the tribunal is composed of members who are part of the executive, the principle of separation of powers may be violated. Further, there may be conflict of interest if government officials decide cases filed by the government for damage to public property.

The Supreme Court has noted that when jurisdiction is shifted from courts to tribunals and the subject matter does not involve any technical aspects, tribunals should normally have only judicial members, to secure the independence of the judiciary.⁴ It is not clear whether technical expertise is required to decide the question of liability of parties in a case involving damage to property and in deciding the compensation amount. Note that the tribunal can appoint a claims commissioner and assessor to help it in assessing the extent of the damage.

Further, note that for cases filed under the Ordinance, the government is likely to be the primary litigant for damages caused to any public property. Therefore, there may be a conflict of interest if a member of the executive also acts as an adjudicator of the case filed by the government. In other laws such as the Motor

Vehicles Act, 1988, the members of claims tribunals which decide compensation claims in respect of motor vehicle accidents, must be sitting or former High court Judges, District Judges, or be qualified to be either.⁵

Some issues related to the provisions on attachment of property by the tribunal

The Ordinance empowers the claims tribunals to issue notice, hear the parties and pass orders for payment of compensation for any damage caused to public or private property. After issuing notice for appearance, if the person against whom the case is filed (i.e. the defendant), does not appear before the tribunal, it can proceed to hear the matter in his absence and order the attachment of his properties, along with publication of his personal details. Similar orders for attachment can also be passed when the final order for compensation is passed. These provisions raise some issues discussed below.

Provisions on hearing the case in the absence of the opposite side lack certain safeguards

Ordinance: Under the Ordinance, the tribunal will issue notice to the defendant to appear before the tribunal. If he fails to appear on that date, the tribunal will decide the case in his absence and will give orders to attach his property.
Clause 13

The Ordinance states that if it is silent on any *subject of proceeding* before the tribunal, the Code of Civil Procedure, 1908 (CPC) will apply. The Ordinance contains provisions on the *subject* of service of notice but does not clarify what happens if there is a failure to serve notice to the defendant or if he is unable to appear in court for special reasons. The CPC contains certain safeguards to adequately ensure the defendant's right to be heard.⁶ Under CPC, a case may be heard in the absence of the defendant only if it is proved that summons was served to him to appear before the court and the defendant failed to do so. Otherwise, a second summons will be issued to him. If he still does not appear, the case may be heard in his absence. If the defendant appears thereafter in the case and gives good reason to justify his absence, the court may still give him an opportunity to defend himself. The question is whether the detailed safeguards related to service of notice and inability to appear in certain cases in the CPC will also apply to the Ordinance.

Further, the Ordinance requires the tribunal to attach the properties of such a defendant (once it is decided that the case will be decided in his absence). These provisions are similar to the provisions on "Attachment before Judgement" in CPC.⁶ Under CPC, courts may allow the properties of a defendant to be attached in limited circumstances, i.e. if it appears to the court that the defendant might dispose of the property or may remove it from the court's jurisdiction. Alternatively, the court may order the defendant to furnish some other form of security. If the case is dismissed or the defendant furnishes alternative security instead, the court will order the withdrawal of the attachment. In contrast, the Ordinance requires the tribunal to issue orders for attachment of the properties of the defendant without having to show any compelling reason for seeking such attachment. Further, it does not specify when the order of attachment of the properties has to be withdrawn.

Rationale for attachment of property along with order of compensation is unclear

Ordinance: Under the Ordinance, the tribunal may pass an order of compensation against the defendant. Further, it will also pass orders to attach the property of the defendant. It is unclear why orders for attachment of properties are passed without waiting for the defendant to pay the compensation amount.
Clause 19

Note that this differs from the procedure under CPC, 1908 and the Code on Criminal Procedure, 1973, which only allow for attachment of property if the other party refuses to comply with the court's orders. Under the CPC, 1908, the property of a defendant can only be attached if he does not comply with the court's order against him and the other party files a petition against the defendant in court to enforce the order.⁶ The CrPC, 1973, allows for attachment and confiscation of properties of persons who evade a warrant issued against them.⁷ Under the CrPC, 1973, the attached properties may be returned if the absconder appears within two years.

In contrast, under the Ordinance, the property of the defendant will be attached at the same time as ordering the payment of compensation. That is, this provision does not give the defendant an opportunity to comply with the order and pay the amount, before issuing an order for attachment of his property. Further, the Ordinance does not clarify as to what will happen with the property once it is attached.

Order for publication of photograph of the defendant may violate their fundamental right to privacy

Ordinance: Whenever orders for attachment of property are passed under the Ordinance (either before or after the tribunal's judgement), the Ordinance also requires the tribunal to issue directions to authorities to publish the name, address and photograph of the defendant along with a warning to the public to not purchase the property.
Clauses 13 and 19

The publication of the photograph of the defendant may violate their right to privacy. The Supreme Court has interpreted Article 21 to include the right to privacy as a fundamental right.⁸ The right may only be infringed if: (i) there is a law, (ii) the law aims to achieve a public purpose, and (iii) the public purpose is proportionate to the infringement of privacy. The aim of publishing details about the property to be attached is to ensure that the

defendant does not transfer it to a third party. Since the mandatory publication of the defendant's photograph may not serve the purpose of attachment, it may not meet the requirement of proportionality and may violate the defendant's right to privacy. Courts have noted that the only instance where the publication of a person's photograph is allowed is to assist the police in the arrest of a fugitive.² That said, in a recent judgement, a division bench of the Madras High Court permitted photographs of wilful defaulters to a bank to be published.⁹

No right to appeal provided in the Ordinance

Ordinance: The Ordinance states that all orders passed by the tribunals will be final and cannot be appealed before any court. Therefore, there is no provision for judicial appeal under the Ordinance. It may be argued that the only remedy available to a person aggrieved by an order of the tribunal would be to file a writ before the High Courts under Article 226 or the Supreme Court under Article 32 of the Constitution or to file a special appeal under Article 136 of the Constitution. However, it may be noted that these remedies are discretionary, and the court may choose not to interfere in these cases.

Note that appeals are a creation of statute.¹⁰ This implies that a statute may provide for whether an appeal can be filed, and how the right may be exercised. Typically, laws provide a right to appeal and sometimes subject it to certain restrictions. For example, tribunals set up under the Motor Vehicles Act, 1988, prohibit appeals in any matter where the claim amount is less than one lakh rupees.⁵ Certain other laws impose conditions to filing appeals. For example, a 1993 Act governing debt recovery proceedings, requires a debtor to deposit 50% of the order amount with the appellate tribunal before an appeal by the debtor can be entertained.¹¹ The Ordinance places a blanket restriction on the right to appeal against the tribunal's order. This may restrict the ability of the parties to seek easy redressal before a higher court as a matter of right.

Damage to property owned by individuals not included in the Ordinance

Ordinance: The Ordinance specifies provisions for owners of public or private property to claim compensation for any damage to their property. However, the Ordinance defines "private property" to only include private property owned by religious bodies, societies, trusts, waqfs or any "firms" owned by people and does not include properties owned by individuals. It is unclear why the Ordinance excludes claims of individual property owners especially since such properties may also have been damaged during the same protest or riot in which other public or private properties have been damaged.

¹ Destruction of Public and Private Properties vs. State of AP And Ors, AIR 2009 SC 2266.

² In Re Banners placed on roadside in the City of Lucknow vs. State of UP, PIL No. 532 of 2020, High Court of Allahabad, March 9, 2020.

³ "Allahabad High Court terms UP's recover of damages ordinance arbitrary", The Hindu, March 19, 2020, <https://www.thehindu.com/news/national/other-states/allahabad-high-court-terms-ups-recovery-of-damages-ordinance-arbitrary/article31103077.ece>.

⁴ R Gandhi vs Union of India, (2010) 11 SCC 1.

⁵ The Motor Vehicles Act, 1988, <http://legislative.gov.in/sites/default/files/A1988-59.pdf>.

⁶ The Code of Civil Procedure, 1908, <http://legislative.gov.in/sites/default/files/A1908-05.pdf>.

⁷ The Criminal Procedure Code, 1973, <http://legislative.gov.in/sites/default/files/A1974-02.pdf>.

⁸ Justice K. S. Puttaswamy and Ors vs Union of India and Ors, AIR 2017 SC 4161.

⁹ M/s.Mohan Breweries and Distilleries Limited,Vs. The Authorized Officer, Madras High Court W.P.No.8821 of 2014 (27 April, 2018)

¹⁰ Seth Nand Lal and Another vs State of Haryana and Others, 1980 (Supp) SCC 574.

¹¹ The Recovery of Debts Due to Banks and Financial Institutions Act, 1993, http://legislative.gov.in/sites/default/files/A1993-51_0.pdf.

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