

## **CHAPTER-II**

# **ROLE OF THE FUNCTIONARIES IN CRIMINAL JUSTICE SYSTEM IN PROTECTING CUSTODIAL DIGNITY**

Administration of justice is one of the most essential functions of a state. The transformation of the police state into a welfare state has changed the role of the state into both prevention of commission of crime as well as a protector of its subject/people's dignity, life and human rights. The principle of rule of law is the bedrock upon which the constitution of a nation is built. The changing attitude of the society from deterrent and retributive punishment to reformative punishment is a reflection of the changed role of the State. The cumulative effect of such basic transformation of state's attitude towards crime is a society that shuns all forms of atrocities and brutalities and takes a holistic approach to human life and dignity.<sup>52</sup>

Although it is the duty of the functionaries of the criminal justice system to ensure that those who undermine the societal harmony by committing offences of any kind do not go unpunished, they must also protect the human rights of those who come in contact with them. This calls for a fine balancing of individual human rights and social interests while combating crime.<sup>53</sup>

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52. Sujit Biswas, Custodial Violence and Role of Police, A Paper Presented at the National Seminar on "Protection of Human Rights and the Role of law Enforcement Officials, 2001, at Department of Law, University of North Bengal.

53. K.I.Vibhute, Criminal Justice, "A Human Rights Perspective of the Criminal Justice Process in India" J.I.L.I. Vol . 49, 2007.

The criminal justice system is an apparatus that a government employs to enforce standard of conduct required by that government of people subject to its authority. It is consciously contrived and deliberately implemented mechanism of formal control that has been brought into increasing play in attempts to deal with crime paradox. The system represents a continuum of three separate, but interlinked and interdependent subsystems: police, prosecution, courts and corrections, each with their specific tasks, procedures and philosophy. The system undertake law enforcement by launching prosecution of the persons apprehended by the police for violent conduct, adjudicates upon the question of their innocence or guilt, administers punishment if needed, and provide for the correction and rehabilitation of the persons adjudged legally guilty. In its manifold functions the system peruses vigorously the protection and preservation of social interests through the prevention and control of crime and delinquency.<sup>54</sup>

Proper Administration of justice is a must for every democracy to succeed. It is encouraging to see that now a day, stating from politician to common people all are expressing their concern about their proper Administration of justice and the media is also not lagging behind in this respect. But unfortunately no concrete result has yet been achieved.<sup>55</sup>

Human Rights are generally manifested in the individual and collective being of the people with liberty and equality and their concomitant attributes. The contentment of Human Rights obviously came to be developed with the development of society. Particular with respective

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54. S.P. Srivastave, "Criminal Justice Administration in India," Indian Journal of Criminology, Vol.15, 1987(July) P.95

55. Sadhan Kumar Gupta, "Administration of Criminal Justice – Basic Problem that Require Immediate Attention, An article Published in Platinum Jubilee Celebration, 2006, Bar Council of West Bengal. P. 77.

representative governments having constitutional norms for governance consequently, preservation of basic rights of the people became a basic norm of governance.<sup>56</sup> Since it is the state which came to be entrusted with power to govern, the basic fundamental right came to be jealously guarded the state power and the functionaries of the state. The international concern in this respect culminated in the charter of the United Nations as "to reaffirm faith in fundamental human rights and to promote social progress and better standards of life in larger freedom."<sup>57</sup> and in the universal declaration of human rights as "everyone has the right to life, liberty and security of persons".<sup>58</sup> Subsequently, the international covenant, on economic, social and cultural rights and civil and political rights of 1966 provided specific guarantees in their respect. The declaration on the rights to development on the right to development (1986) directing the states to eliminate the violations of human rights and making development as the basis for promotion of human rights broadened their area. There are other documents like the constitution, the protection of human rights Act 1993 etc in this respect.

Maintenance of law and order is a primary task vested with the executive. The state cannot remain aloof from allowing the people to enjoy freedoms absolutely. To maintain order and peace in society and to prevent, detect and control crime, the state provides its law enforcement machinery, particularly the police, with wide ranging powers. If used arbitrarily, these powers could impinge on the dignity and liberty of the individual. To preserve human rights of the citizens, it becomes necessary to build in

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56. Vijay Kumar, "Human Rights and the Criminal Justice System, C.I.L.Q., Vol. XVI, 2003, P.397.

57 .The Preamble of U.N Charter 1945.

58 "Everyone has the right to life, liberty, security or person."

safeguards in the criminal justice Administration. Presently, it is a great question whether the state of the common people at the hand of the police is safe from being frequent violation or not.<sup>59</sup>

However, it is a common perception that administration of criminal justice in our country is deteriorating day by day and laymen are losing faith in the entire system due to obvious reasons. It is therefore; repeatedly felt that there is an urgent need to review the entire criminal justice system, especially investigation of crime by the police and the prosecuting machinery due to which conviction rates are declining at a very rapid pace. This has also been attributed to the lack of continuous and effective co-ordination amongst the law enforcement agencies, i.e. the police, magistracy, judiciary and correctional administration in general, and the police and prosecuting agencies in particular.<sup>60</sup>

The institution of police existed in various form ever since the origin of civilization. It was formed with the purpose of saving the society, from law breakers and to maintain peace in the society. Police has been assigned many roles, to act upon the same so as to promote the public order, investigate crime, to arrest persons accused in the offences and to participate in successive legal proceedings coupled with law, to know the problem and situation which are likely to affect the commission of crime etc.<sup>61</sup>

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59. Dr. S.Subramanian, Human Rights International Challenges, [1st Edition, 2004], Manas Publication, New Delhi, P. 222.

60 K.I. Vibhuti, Criminal Justice, [1st Edition, 2004], Eastern Book Company, Lucknow, P. 142.

61. Prof. K.P.S.Mahalwar, Maintenance of law and order and role of police, paper presented in National Seminar on “protection of human rights and the role of law enforcement officials”2001.At Department of Law, University of North Bengal University.

The police came into existence in a society as the repository of the security and penal functions of the state. In the old tribes and kingdoms the chief, sometimes elected or the king, generally hereditary, exercised these function by protecting the citizens from external aggression and internal disorder through his armies and a network of spies as well as by dealing with wrong doers through a system of rough and ready justice. The birth of police man started emerging from his savage animal hood and using his power of reasoning and thought released the need for self improvement and the benefit of family and corporate life.<sup>62</sup>

The term police, according to oxford dictionary, means "a system of regulation for the preservation of order and enforcement of law: the internal government of a state" viewed from this angle, a police man is "a person paid to perform, as a matter of duty, acts, which, if he were so minded, he might have done voluntarily. The new lexicon Webster's Dictionary of the English language provides inter alia, the meaning of police as "any body of people whose job is to keep order and enforce regulations" as well as, "a department of government responsible for the preservation of public order, detection of crime and enforcement of civil law."<sup>63</sup>

To the modern mind, the term police denote the idea of a body of civil officials charged with suppressing crimes and public disorders, and regulating the use of the high ways. The term police power means the strength of the state, which regulates the moral, sanitation, safety and the public order. Police functions is the Act of doing these things or getting them executed in the prescribed manner and mode.

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62. Dr.Deepa Singh, Human Rights and Police Predicament, [1st Edition, 2002], J. C. Bangia Publication, Delhi, P. 56.

63. Id. P.56.

### **Role of police in Ancient India:**

The concept of the role of law and the administration of justice has been known to exist in India ever since the Vedas came to be recognized as the very epitome of dharma. The Rig Veda makes a specific mention of thieves and robbers. This concept of crime was further developed by Manu. In fact Manu Smiriti was the first exposition of the Indian legal system, and proclaimed the fundamental law governing social relations. Balmiki's Ramayana gives us glimpses of policemen on petrol duty, guards and spies.<sup>64</sup>

In Arthashastra of Kautiliya<sup>65</sup>, which is believed to have been written about 300 BC, there is a detailed and fascinating description of the use of spies in the criminal administration. Kautilaya advised the king to have his spies controlled by reliable and capable ministers. It is possible that no modern CID in any country has never so highly organized as the system of espionage described by Kautilaya.

Between the days of Mourayas and their immediate successors and Mohamadan invasions, we catch practically no glimpses of police in India. Fa Hien and Hiuen Tsiang make no mention of police in their account of their travel in India although he mentions that he was several times robbed by footpaths. Following the break up of the Hindu empire, the Afgan and Mugal rules, who followed in quick succession, introduced their own concepts of police administration in India.<sup>66</sup>

### **Role of Police in Pre and Post British Period:**

The state structure of the criminal justice system connoting the criminal law and its implementing machinery – mainly the police in our country is a legacy of the British and it obviously has the colonial roots. The criminal

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64. Id. P. 59.

65. Ibid.

66. Id. P. 59.

justice system of Muslims rulers' prevalent before British system was in a chaotic state and the British, from the very beginning of their arrival in Surat, tried to develop their own system. They felt a need to have a systematic legal system started the reformatory process through the law commission resulting in the codified laws and the hierarchy of courts. The draft of the penal code prepared by the first Law Commission in 1837 was enacted in 1860. The Criminal Procedure Code came in 1861 and the Evidence Act in 1872 with revision and reenactment of the criminal procedure code the same year. The amending and consolidating process brought forth. Firstly, the Criminal Procedure Code 1882 and ultimately the Criminal Procedure Code 1898 which remained operational for three quarters of a century including two and a half decades even after independence of the country from the British Rule. The code obviously contained colonial norms for prevention, investigation, arrest and trial of offences, bails and bonds, the hierarchy of criminal courts and the appellate procedure etc. The police system is structured through the Police Act, 1861.<sup>67</sup>

### **Role of Police under Indian Constitution and other Statutory framework:**

The achievement of the noble goals of the Indian constitution as reflected in its permeable are almost entrusted to their organization. Their duties are intimately connected with the honor, life and property of the people and to safeguard the unity and integrity of the nation. And thus, the police organization is a key stone in the structure of our government and has successfully proved to be the strongest pillar of our democratic system. For

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67. Vijay Kumar, "Human Rights and the Criminal Justice System in India," C.I.L.Q. 2003, P. 401.

interest of peace loving citizens of the society and to maintain internal peace, the law enforcing agency while acting in good faith at times exceeds its limits and violates human rights. The irony is that police is criticized on both sides, i.e. if the police action is strong, there is criticism of excess use of power and in case of timid action, and there is criticism of the inaction or failure of the agency to control the crime.<sup>68</sup>

The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of criminal law. The horizon of human rights is expanding day by day. At the same time, the crime rate is also increasing. The courts had been receiving complaints about violation of human rights because of indiscriminate Arrests. A realistic approach has been made in this direction by embodying Article 22 of Indian constitution as one of the fundamental rights. It is part of personal liberty that protection is provided to person who are arrested and detained in certain cases by authorities. Moreover, Article 22(1) and 22(2) provides the protection to the individual against the act of the executive or other non judicial authority. The Supreme Court observed, in the case of **Madhu Limaye**,<sup>69</sup> that whenever Article 22(1) is not complied with, the petitioner is entitled to a writ of habeas corpus directing his release. An order of remand cannot cure the constitutional infirmity. In **D.K. Basu v. State of West Bengal**, the Supreme Court took serious note of custodial violence and death in police lock-up. It laid down various guide lines to be followed in all cases of arrest or detention. Moreover, the Supreme Court laid down certain guide lines governing the arrest of a person during investigation in **Joginder Kumar v. State of U.P.**<sup>70</sup> The judgment intended to strike a balance between the need of the police on one hand and on the other the

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68 Polok Basu, Law Relating to Protection on Human Rights, [ 2nd Edition 2007], Modern law Publishers, New Delhi. P. 897.

69. Madhu Limaye v. Ved Murti,, AIR 1971 SC 2481.

70. AIR 1994 SC 1349.

protection of human rights of citizens from oppression and injustice at the hands of the law enforcing agencies.

Another important aspect of the criminal justice is the lack of public support. The criminal justice subsystems operate with little co-operation of the people they serve. There is not a very little evidence of public co-operation being available to the system, nor are there any hopeful signs of getting it in the near future. The lack of public confidence and support is mainly due to public ignorance of the system and its too complicated working. The recent researches in the field of criminal justice system have laid bare the fact that public does not know much about the rationale underlying the operational context of the criminal justice system and the information that public possess borders into rudimentary knowledge of what the police, courts and correctional institutions do in public gaze. The nature of criminal justice machinery is such that it operates under a thick wall of secrecy, and as such the public does not know much about the purpose and significance of all those methods and techniques that the system employs in achieving its desired purposes or goals. The public's ignorance leads to the public insensitivity about many of the serious maladies of the system. The functionaries of the criminal justice system are to be blamed for this state of affairs. Increased with any kind of public criticism and possessed by a short sighted desire to protect the system from a real or imaginary criticism, the system operators have not yet made any significant effort to educate, enlighten or involve the people in many of their programs and activities. Consequently the public looks at the system with a jaundiced eye, disfavoring any meaningful co-operation to the system endeavors.<sup>71</sup>

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71. S.P. Srinivasan, "Criminal Justice Administration in India; Issue and Perspective," *International Journal of Criminology*, 1987, July, Vol. 15, P. 99.

No doubt, guidelines are prescribed by the Code of Criminal Procedure, 1973 and the Police Act 1861 as well as the police manual of various states as to how the police must respond to the call of their duties and how their work culture should reflect the constitutional spirit. In addition to the mandated legal prescriptions, there is also the internationally accepted code of conduct for law enforcement officials, well echoed in the endorsement of the code of conduct adopted by the conference of the Heads of the police organization of various state of India, in 1960. This is the model code of conduct for police man, which inter alia are: -

1. The police must bear faithful allegiance of the constitution of India and respect and uphold the rights of the citizens as guaranteed by it.
2. The police is essentially a law enforcing agency. They should not question the propriety or necessity of any duty enacted law. They should enforce the law firmly and impartially, without fear or favor, malice or vindictiveness.
3. The police should recognize and respect the limitations of their powers and functions. They should not usurp functions of the judiciary and sit in judgment on cases. Nor should they avenge individuals and punish the guilty.
4. In securing the observance of law or in maintaining order, the police should use the methods of persuasion, advice and warning. Should these fail, and the application of force become inevitable, only the absolute minimum force required in the circumstances should be used.
5. Primary duty of the police is to prevent crime and disorder, and the police must recognize that the test of their efficiency is the absence of both and not the visible evidence of police action in dealing with them.

6. The police must recognize that they are members of the public, with the only difference that in the interest of the community and on its behalf they are employed to give full time to duties, which are normally incumbent on every citizen to perform.
7. The police should realize that the efficient performance of their duties will be dependent on the extent of ready cooperation they receive from the public. This, in turn, will depend on their ability to secure public approval of their conduct and actions and to earn and retain public respect and confidence. The extent to which they succeed in obtaining public cooperation will diminish proportionately the necessity of the use of physical force or compulsion in the discharge of their functions.
8. The police should be sympathetic and considerate to all people and should be constantly mindful of their welfare. They should always be ready to offer individual service and friendship and render necessary assistance to all without regard to their wealth and social standing.
9. The police shall always place duty before self, should remain calm and good honoured whatever be the danger or provocation and should be ready to sacrifice their lives in protecting those of others.
10. The police should always be courteous and well- mannered, they should be dependable and unattached; they should possess dignity and courage, and should cultivate character and the trust of the people.
11. Integrity of the highest order is the fundamental basis of the prestige of the, police. Recognizing this, the police must keep their private lives scrupulously clean, develop self-restraint and be truthful and honest in thought and deed, in both personal and official life, so that the public may regard them as exemplary citizens.

12. The police should recognize that they can enhance their utility to the administration and the country only by maintaining a high standard of discipline, unstinted obedience to the superiors and loyalty to the force and by keeping themselves in a state of constant training and preparedness.

13. The duty of a police man in India has been defined in sections 22, 23, 25, 30, 30A and 31 of the Police Act of 1861.

There are many duties performed by the police which are not specifically provided by the Police Act itself, but the maintenance of law and order and the control of traffic along public roads as well as roads leading to such public roads is an essential part of the functions of police. Section 23 provides that it shall be the duty of every police officer promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority, to collect and communicate intelligence affecting public peace, to prevent the commission of offences and public nuisances, to detect and bring offenders to justice, and to apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists, and it shall be lawful for every police officer, for many of the purposes mentioned in this section, without a warrant, to enter and inspect any drinking shop, gaming house or other place of resort or loose and disorderly characters. Section 25 provides that it shall be the duty of every police officer to take charge of all unclaimed property and to furnish an inventory thereof to the magistrate of the district.<sup>72</sup> Section 31 provides that it shall be the duty of the police to keep order on the public roads and all other public places such as public street, Ghats, public resort, places of worship etc.<sup>73</sup>

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72. Section 25 of Police Act, 1861.

73. Id. Section 31.

The national police commission, in its 2<sup>nd</sup> report discussed police role, duties powers and responsibilities. As per the report the basic role of the police is to function as a law enforcement agency and render impartial service to law, in complete independence of mere wishes, indications and desires, expressed by the government as a matter of policy which either come in conflict with or do not confirm to The provision in Indian constitution or laws duly enacted there under.

The National police commission further elaborate function of police in view of the permeable to Indian constitution. Law enforcement by police should cover the following two basic functions:<sup>74</sup>

- a) Upholding the dignity of the Individual by safeguarding his constitutional and legal rights police declare secure this objectives by enforcing laws relating to the protection of life, liberty and property of the people, and
- b) Safeguarding the fabric of society and the unity and integrity of the nation. Police secures the objective by enforcing laws relatable to maintenance of public order.

On attaining freedom in 1947, India undertook to secure for all its citizens social, economic and political justice, liberty of expression, belief, faith and worship, equality of states and of opportunity, and the dignity of the individual, as enshrined in the fundamental rights and directive principle of state policy. Consistent with the provision of the constitution, several laws have been enacted to safe guard basic human rights. Especially the criminal procedure code the Indian Penal Code, the evidence Act, and a host of social welfare laws while the state is a powerful instrument for the protection of human rights of its citizens, the same state while operating through its various

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74. The Report of National Police Commission 1987.

administrative agencies can also tend to become a violator of these rights by being arbitrary indecisions and actions. There are number of cases in which the Supreme Court and high courts have held the state agencies squarely responsible and accountable for their patently criminal and illegal acts.<sup>75</sup>

During the course of performance of their duty the police affect the arrest of many accused or suspects and subject them to thorough interrogations using third degree methods including electric shocks. Many suspects are arrested in connection with criminal investigation and tortured to extract information or confessions. At times, innocent victims make wrong confession to avoid ill treatment and third degree methods in custody. Sometimes, at the behest of powerful or moneyed people false charges are made by time police.<sup>76</sup>

Custodial death is a brutish, barbarous and gruesome act committed by law enforcement agencies. It is perhaps one of the worst crimes in a civilized society by the rule of law. Any use of force, threat, psychological pressure etc..... against the person in custody by the authorities is termed is custodial violence. If one examines the constitution, the international instrument and procedural law, one finds that all presume the innocence of the accused until the contrary is proved in a court of law. The law prohibits the use of custodial violence in unmistakable terms. Still the police, the chief arms of the state in the criminal justice system, does at times indulge in custodial violence, perhaps due to the enormous belief that it is a short cut to success. Custodial violence is common in the sphere of crime investigation to extract information or confessions about crime or to

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75 Dr.D.P. Khanna, *Reforming Human Rights*. [1st Edition 2001] Manas Publication. New Delhi, P. 185.

76. Id. P.186.

recover property.<sup>77</sup> It also occurs in the maintenance of law and order situation, particularly while dealing with political violence such as terrorism and extremisms. In describing the violence of human rights by the police in custody, Justice Krishna Iyer observed

“The first half of our century made India free; the second half of our country must make Indians free! Do you feel the weight of iron on your heels when your brothers and sisters are in chains? One of the blessings of the bourgeoisie is that their moral fiber is vaccinated against fellow-feeling”.<sup>78</sup>

There are number of instances to the contrary throughout the length and breadth of their vast country where policemen have acted in a most revolting unworthy and unlawful fashion which completely undo the good work done by a few.

Law does not permit perversion of police process for the purpose of solving crime either by fear or force or by other means equally objectionable. Despite difficulty, detective process must harmonize with fair and human standards<sup>79</sup>. Regardless of the nature of crime the method adopted for its detection must not be barbarous or fail before permissible civilized norms.

Deprecating police methodology or brutality the Supreme Court in a better tone of anguish observed;

“We are deeply disturbed by the diabolical recurrence of police of torture resulting in a terrible scare in the minds of common citizens that their lives and liberty under a new peril when the guardian of the law gore human rights to death. The vulnerability or human rights assume a traumatic,

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77. Id. P.189

78. V.K. Krishna Iyer, “Human Rights and Inhuman Wrong” , B.R Publising Co. 1990, P. 86.

79.Dr. Deepa Singh, Human Rights and Police Predicament, [1st Edition], 2002, J.C.Bangia Publication, Delhi, P.56.

tortured some poignancy when the violent violation is perpetrated by the police arm of the state whose function is to protect to citizens and not to commit gruesome offences against them as has happened in this case.

Police Lock ups if reports in news papers have a streak of credence are becoming more and more awesome cells. This development is disastrous to our human rights awareness and humanist constitutional order."<sup>80</sup>The incidents or brutal police behavior towards person detained on suspicion of having committed crimes is a routine manner. There has been public outcry from time to time against custodial death. The Amnesty international, Asia watch and our own national police commission have all commented adversely on custodial violence and deaths in India.<sup>81</sup>

The Supreme Court has taken a very positive stand against police atrocities, intimidation, harassment and use of third degree methods to extort confession. The court has characterized all this as being against human dignity.<sup>82</sup> The expression life in Art 21 means right to live with human dignity and this includes guarantee against torture and assault by the state. The supreme court has ruled that it is a well recognized right under Art 21 that a person detained lawfully by the police is entitled to be treated with dignity befitting as human being and that illegal detention does not mean that he could be tortured or broken up. The Supreme Court was of the view that if the police brutality is not checked, the credibility of rule of law in our republic vis-à-vis the people of the country will deteriorate. In *Gouri Shankar Sharma v. state of U.P.*<sup>83</sup>, the supreme court in 1990 sentenced two police officials to various terms for severely beating a suspect to extract a confessional statement and for their deliberate torture for nonpayment of a bribe, resulting in the death of a prisoner in

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80. *Raghubir Singh v. State of Haryana*, 1980 Cr. L.J. 801(SC).

81. Prof. M.P. Jain, *Indian Constitutional Law*, [5th edition, 2007], Wadha & Company, Nagpur P – 1118

82. *Ibid.*

83 AIR 1990 SC 709.

police custody justice Ahamed observed, "Death in police custody must be seriously viewed, for otherwise we will help to take a stride in the direction of police raj. It must be curbed with a heavy hand."<sup>84</sup>In the recent decades several other social service functions are getting added on to the domain of police work in addition to the traditional functions to maintain law and order and prevention and detection of crime etc. there can be hardly any area of police function where values and principle that constitute the core and conduct of human rights can be deemed as significant. However it is pertinent to note here that in the 'pre trial' areas that Human Rights, violation look glaring and cause immense concern in the minds of every right thinking citizens. In this context, a reflection of the legal frame work as well as the procedural regulations concerning the crucial facet or police work should be highlighted. The police officers on condition and guarantees of anonymity listed the following violations in custody.<sup>85</sup>

**Arbitrary Arrest and illegal detention:**

The Criminal Procedure Code, 1973 which provides for norms of arrest, various offences under the Indian penal code and other laws have been divided into cognizable and non cognizable according to their gravity. In the cognizable offence, a police officer is empowered to arrest without warrant while in a non cognizable, he is not so empowered. However, the 1973 code enacted after revision of the Cr. P. C. 1898 basically retains the old provisions particularly relating to arresting and detaining powers of police. The vast discretionary powers of arrest available to a police officer even without a warrant or an order from a magistrate and detention of the arrested persons at the police station for 24 hours are the basic sources of unjustified arrests and detention and human rights violations by the police.

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84. Gouri Shankar Sharma v. State of UP AIR 1990 SC 709.

85. N.R, Madhav Menon, A Training Manual for Police on Human Rights, Human Rights Centre, 1997, N.L.S.I.U. Publication Centre, Banglore, P.46.

Furthermore, under section 41 of the Cr. P. C the police officer has the power to detain a person in custody, and arrest a person on the basis of oral requisition from another police officer.<sup>86</sup> Section 42 further empowers a police officer to arrest a person committing or account of committing non cognizable offence in his presence for refusing to give name and residence or giving false name or residence. A police officer is authorized to arrest without a warrant or an order from magistrate even in cases of breach of peace under section 109 and 110 for taking security from good behavior from suspected persons and habitual offenders. Section 151 of the code authorizing arrest without a warrant and order from a magistrate in order to prevent the commission of cognizable offences is the most abused one in this respect as even in cases for taking security for keeping the peace under section 107 and 116, the provision of section 151 are invariably invoked for effecting arrest of the person in a routine way.<sup>87</sup>

Illegal unrecorded detention is common in all parts of India but especially in areas of armed conflict. It is the principle of law that a person arrested cannot be detained by the police for more than twenty four hours of such arrest. In addition, the discussions on section 49 of the code made earlier are relevant to give a brief description of the manner in which the law provides against arbitrary illegal and unnecessary restraints or detentions of the accused persons. However, the reference of sections 56 and 57 of Cr. P. C. are appropriate. India currently has several laws providing for preventive detention, including the National Security Act (NSA), the Terrorist affected areas (Special Courts) ordinance and the terrorist and

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86 Vijay Kumar, "Human Rights and the Criminal Justice System in India," C.I.L.Q. 2003, Vol. XVI, P. 402

87. Ibid.

disruptive Activities Act. Under these laws detainees may be held for as long as two years without trial.<sup>88</sup>

In some of the more peripheral areas of conflict, police enjoy wide discretion in arresting members of powerless groups, despite the existence of formal legal protections. Threat of such arrests maybe used to extract bribes or enforce social hierarchy. Prisoners arrested for doubtful reasons can sometimes be held for years without trial, sometimes far longer than the maximum prescribed punishment for their supposed offences. The state of Bihar, in particular, at one time held thousands of such long term "under trial" prisoners, and some apparently still remain.

The law does not countenance detentions of the arrested in police custody and even after production before the magistrate, the police custody, if sought to in writing, is to be considered only as per the provisions of section 167 of the code. The obligatory duty prescribed by the code under section 57 will continue to be effective even in cases where the police may not actually arrest a person without a warrant but put him under restraint affecting his movement. A pretense put up to show that there is no actual arrest cannot be accepted as the court will see the reality of the absence of freedom of movement in such cases to treat it as a case of "arrest".<sup>89</sup>

It may be also kept in view that after arrest by the execution of the warrant, the warrant is deemed to be exhausted and therefore, in order to continue detention, if necessary, the arrested will have to be produced before the magistrate for orders under section 167 of the code, the reasons for the action can be: -

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88. Dr. Deepa Singh, Human Rights and Police Predicament, [1st edition, 2004], R.C.Bangia Publication, P.101.

89. N.R, Madhav Menon, A Training Manual for Police on Human Rights, Human Rights Centre, 1997, N.L.S.I.U. Publication Centre, Banglore, P.56.

1. To prevent the arrest and detention with a view to extract confession, or as a means of compelling people to give information.
2. To prevent police station from being used as though they were prisons.
3. To afford an early recourse to a judicial officer independent of the police on all questions of bail and discharge.

While in most areas of India police or security forces detained individuals in recognized places of detention, in areas of armed conflict as well as in some more exceptional situations in other areas, it is common for individuals to at least temporarily be detained in unofficial detention/interrogation centers. Several persons are rounded up supposedly as suspects and detained indefinitely in the lock-up. There are instances where innocent persons fall into the clutches of erratic policemen and not in the lock-up for days and months.<sup>90</sup>

Amnesty International continues to be concerned about the large numbers of people held in illegal detention whose arrests are not recorded despite the fact that Article 21 of the constitution protects the deprivation of personal liberty otherwise than by "procedure established by law. The detention of individual in a police station or unofficial detention centre without recording the fact is a fundamental abuse, which encourages further abuse in the form of torture. The United Nations Commission on the Human Rights has repeatedly stated that prolonged incommunicado detention may facilitate the prevention of torture and can in itself constitute a form of cruel, inhuman or degrading treatment."<sup>91</sup>

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90. Dr. Deepa Singh, *Human Rights and Police Predicament*, [ 1st edition, 2004], R.C.Bangia Publication, Delhi, P. 101.

91. *Ibid.*

Even children are illegally detained in **Afzal v. State of Haryana**<sup>92</sup>, habeas corpus petition was filed for the release of two children alleged to have been taken away by some police officials, and not produced before any magistrate.

**Inder Singh v. state of Punjab**<sup>93</sup> is a representative case of human rights violation by police. In this case seven people ranging in age from 85 to 14 years were abducted by senior police officer. The Supreme Court directed that the enquiry shall be conducted personally by the director of the centers Bureau of investigation. This investigation was to cover, inter alia, the circumstances of abduction of the said seven persons, their whereabouts or the date and circumstances of their liquidation and whether there has been an attempt to cover up the misdoing of police officers and policemen involved in the abduction of the said seven persons and their subsequent incarceration or liquidation.

**Harassment and ill-treatment while under custody during investigation: -**

Another important line of the criminal Justice system is the investigating agency. There can not be any doubt that unless a criminal case is investigated properly, no case reaches its desired final result. It is shocking that in most of the states in our country very little attention is given in properly investigating a criminal case. The investigating officers are not

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92. (1994) 1 SCC 425.

93. (1994) 6 SCC 275.

getting proper training as to collect materials during investigation keeping in conformity with the Indian evidence Act.<sup>94</sup>

The matter of misuse of police authority over persons in legal or ostensibly legal custody is different from abuse of police power over those persons who are ill treated while under illegal or authorized arrests as such detention or custodial actions are *per se* beyond the colors of office and are on the face of it violations of the law by the law enforcers.<sup>95</sup>

The actions to be taken by police in the course of investigation are clearly laid down in the code of criminal procedure code. The Supreme Court has also categorically dictated way back in 1968 that investigation is the exclusive domain of the police who is to form an independent opinion on the result of investigation without any intervention from the executive and the non executive. The principle well settled by the apex court is that the magistrate can not infringe upon the jurisdiction of police by compelling them to change their opinion, viz, to submit a charge sheet instead of a final report. The tendency of some High Court to disclose the content of the case delivers at the time of passing of an interim order during the stage of investigation of criminal cases has been deprecated by the Supreme Court.<sup>96</sup>

The criminal courts have no jurisdiction to direct the investigating agency to submit a charge sheet against a particular person or to arrest a particular person during investigation. Nor can the judges cause prejudice to the investigating agency by disclosing the content of the case dairy

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94 Sadhan Kr. Gupta, "Administration of Criminal Justice – Basic Problem that Require Immediate Attention," Platinum Jubilee Celebration Journal, Bar Council of W.B. P.77.

95. N.R. Madhav Menon, A Training Manual for Police on Human Rights, Human Rights Centre, 1997, N.L.S.I.U. Publication Centre, Banglore, P.63.

96. Dr. S.K. Awasthi & R.P. Kataria, Law Relating to Protection of Human Rights,[ Millenium Edition, 2001], Orient Publishing Co. New Delhi, P.778.

during investigation of criminal cases. The court should refrain from making any comment on the manner in which investigation was being conducted before completion of investigation.<sup>97</sup>

In carrying out investigation the police used to spend a lot of time and district court apparently have not been insisting upon them to promptly submit the report probably under the impression that it is area of police prerogative. This impression, is however, not correct. The general scheme of investigation envisaged in the criminal procedure code seems to make the magistrate the pivot of investigation.<sup>98</sup>

An investigation is defined to include all the proceedings under the Cr. P.C for the collection of evidence, conducted by a police officer or by any person authorized by a magistrate.<sup>99</sup> The investigation of a cognizable offence may be initiated by the police themselves<sup>100</sup>, or by an order of a magistrate<sup>101</sup>, or with the lodging of an F.I.R. the investigation of a non cognizable case cannot be initiated without an order of the magistrate. The

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97. Id. P. 778.

98 K.N.C. Pillai, "Delay in Criminal Justice Administration – A study through case files," J.I.L.I. Vol. 49, Oct Durable, P.526

99 "Investigation" includes all the proceedings under the code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf.

100 "Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to enquire into or try under the provisions of Chapter XIII."

101 "Any Magistrate empowered under section 190 may order such an investigation."

principle agency under law, to carry out the investigations is the police force, upon the completion of an investigation, a report with all of the details of the case must be submitted to a magistrate. The primary elements of an investigation are search, seizure, questioning and interrogation.<sup>102</sup>

### **Role of police during Search:**

Documents on material objects may be required in the course of investigation. Persons who possess the requisite materials must provide them to the police. In the event that they may refuse to do so, a court order authorizing search and seizure can be obtained. Search can be either of a place where the materials may be found or of a person who may have the thing in his or her possession. The court can also be approached to issue summons to a person compelling appearance before the court to either give testimony or produce the material object or document. However, summons cannot be sent to an accused person as the protection against self-incrimination provided under Art 20 (3) of the constitution is available to the accused.<sup>103</sup>

The search warrant is a written authority given to a police officer or other competent official to search for documents or persons wrongfully detained since a search constitutes an invasion of privacy courts have emphasized that the power to issue a search warrant should be exercised with great care and circumstances.

The police may search without a warrant in certain situations such as where the officer believes that the thing may not be obtained if there is undue

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102. "As soon as it is (investigation) completed, the officer in charge of a police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government."

103. Introducing Human Rights, South Asia Human Rights Documentation Center,[ 1st Edition 2006], Oxford University Press, P. 107.

delay or where police are acting under an arrest warrant and believe that the person in question has esteemed a particular place etc. however, it is the condition that the grounds for belief must be recorded in writing along with details in the specific thing to be searched.<sup>104</sup>

**Role of Police during Seizure:**

Along with the power to search, the police have the power to seize and take into their possession items that they have found during the search. The police can also take property they believe to have been stolen or items that give rise to suspicion that an offence may be committed. The police may also conduct search of a person or arrest and take possession of all articles other than clothing, and give a receipt of the articles taken from the person. The seizure must also be reported the magistrate with jurisdiction in the case. The police can enter by force in a case of occupant refuses entry to a search by warrant. An illegal search can however be resisted and the victim of such search can seek constitutional or civil remedy. The courts can be approached to invalidate the search and return the goods seized.<sup>105</sup>

**Role of Police during Questioning/investigation:**

Interrogation is the term used for questioning a person who is in custody of the police whereas the term preliminary questioning refers to the questioning of a witness suspect or accused, who has not been arrested. The police may call for questioning any person who appears to be acquainted with the facts and circumstances of the case. Questioning must generally be conducted within working hours. However, women of any age and men under the age of 15years can not be called to the police station

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104. Id. P. 108.

105.Id. P. 108

and must be questioned in their own homes .A confession made to a police officer can not be admitted as evidence in court. A person is not legally required to sign any statement made to the police. This is in order to prevent the police from forcing or torturing a person during interrogation to sign a statement or confession.

The law of India forbids a police officer to use more than minimum force to deal with a particular situation. The govt. has issued directions to law enforcement personnel to desist upon violations of human rights while enforcing the law.<sup>106</sup>

The laws of the land empower the police to use force, but should be the minimum possible and necessary. Article 3 of UN declaration on Human Rights lays down the principle that "the law enforcement officials may use force only when it is unavoidable and only to the extent it is absolutely necessary. A police officer may use all means necessary to effect the arrest of a person who forcibly resist the endeavor to arrest him or attempt to evade the arrest. Section 49 of the code Cr. p. c. lays down that the person to be arrested should not be subjected to more restraint than is necessary to prevent his escape. Section 47 of Cr. P. C. is about search of a place entered by a person sought to be arrested. According to G.C. Singhvi, a retired senior police officer, it is a sort of violence of the law order. He writes, "Beating a citizen because a policemen intoxicated by his power and authority has for any reason got annoyed with them", is indeed violating human rights and showing disregard to human dignity.

Section 129 of the code empowers executive magistrates and also police officers to disperse an unlawful Assembly by the use of force which is adequate, necessary and reasonable. But what is the scale to decide upon

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106 Dr. D. P. Khanna, Reforming Human Rights,[ 1st edition 2001], Manas Publications, New Delhi, P. 194.

the adequate, necessary and reasonable force is something to be decided by the individual police officer on duty.<sup>107</sup>

It is very common in our society that the police personnel are using indecent language and they are not feeling any shame to themselves when shouting at others in filthy language. The subculture in police entertains this expression while the dominant culture of the society does not. Hence there exist a conflict between the society's dominant norms and the departments sub cultural patterns of behavior. Further more, slapping by a police to a person in police lock up has become routine work. During interrogation police usually slapped without any justification or necessity. A question was asked to people interviewed during the course of study whether

Police slap people in custody or not. Majority prisoners interviewed disclosed that they were slapped by police. A few policemen accepted that police do resort to slapping people in their custody.<sup>108</sup>

The greatest single factor which has tarnished the image of the police in India is the practice of third degree method in the investigation of cases. Such a practice only aliments the police from the public, and people dread the police, and do all they can to avoid any connection with a police investigation. Whatever may be the wrongs which an individual might have been accused of committing, it is not for the police to punish him, for law does not give him any such power, may, it condemn such actions as serious offences punishable under section 330 and 331 of Indian Penal Code. When a policemen indulges in third degree methods be not only

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107. Dr. Deepa Singh, Human rights and Police Predicament,[1st edition 2004], J.C. Bangia Publication,Delhi. P. 136.

108. Dr. Deepa Singh, Human rights and Police Predicament, [1st Edition 2004], J.C. Bangia Publication, P. 136.

brutalities himself but also degrades himself to the level of a criminal, may be compared even less favorably than the criminal in his custody. For, his crime in trying to obtain a confession by tortures method, coming as it does from an educated person and a person charged with the sacred duty of upholding the law and the constitution, becomes more reprehensible than the misguided act of an ordinary criminal. Section 29 of the police Act 1861 and Article 20(3) of the constitution of India clearly forbid it.<sup>109</sup>

The effect of 'third degree' or the subjugation and harassment of a person under custody causing physical and mental harm to such a person, directly affects his fundamental right of freedom and is also a gross violation of Article 21 of the constitution of India. The post Maneka interpretation of the scope and extent of Art 21, the protective sweep of procedure established by law, which necessarily was required to be reasonable, fair and just, frowned upon the misuse and abuse of custodial power.<sup>110</sup> Cautioning the ranks that a perverted sense of police solidarity should not induce them to hide such crimes, the apex court pointed that condign action quickly taken surer guarantee of community credence than, braying about that "all is well with the police, the critics are always wrong. Nothing is more cowardly and unconscionable than a person in the police custody being beaten up and nothing inflicts a deeper wound on our constitutional culture than a state official running berserk regardless of human rights. Article 21 with its profound concern for the life and limb will become dysfunctional unless a niches of the law in the police and prison establishments have sympathy for the humanist creed of that article. In **Kishore Singh v. State of**

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109. R. Deb, *Criminal Justice*, 1st Edition, 1998, the Law Book Company Pvt. Ltd. Allahabad, P. 51.

110. N.R. Madhav Menon, *A Training Manual for Police on Human Rights*, Human Rights Centre, 1997, N.L.S.I.U. Publication Centre, Bangalore, P.67.

**Rajasthan.**<sup>111</sup> the application of 'third degree' to person under custody is a clear violation of the procedure established by law under Article 21 of the constitution of India. Thereof of police officers in giving third degree treatment to an accused person while in their custody and thus killing him are not referable to and based on the delegation of the sovereign powers of the state to such police officers to enable them to claim Sovereign Immunity. The Bombay High Court in the case of **Mrs. Sevrina Rivera Carshino v. Union of India**<sup>112</sup>, very correctly refused to countenance the plea of sovereign function by the erring police officers who caused custodial homicide. **Saheli**<sup>113</sup> confirmed that the plea of immunity state is of no longer available and that the state will have to answer action for damages for bodily harm which includes battery, assault, false imprisonment, physical injuries and death. The Supreme Court felt deeply disturbed by the diabolical recurrence police torture which results in a terrible scare in the minds of the common citizens that their lives and liberty are under a new peril when the guardians of law gets human rights to death. The arguments for shifting the burden of proof in custodial deaths stemmed from the incident of **RamSagar Yadab v. State of U.P.**<sup>114</sup> where a person is found dead due to torture in the police custody. The Supreme Court restored the order of Sessions Court on appeal and pointed out that the Session Court had been unduly lenient to punish the accused only under section 304 of the Indian Penal Court and not for murder. Further, as police officer alone in such circumstances are able to give evidence in which a person in their custody dies due to police torture, often there is reluctance on the part of the colleagues to give evidence and they prefer to keep silent about the incident when in fact they should speak. Thus no evidence is left of

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111. AIR 1981 SC 625.

112. 1990(1) Crimes, 11.

113.1990(1) SCJ 390.

114. (1986)Cr.L.J.836

incidence done in the sanctum sanctorum of the police station, the lock up death cases should raise a rebuttable presumption for it and the burden of proof must be shifted on to the concerned custodians. Citing a similar technique employed in dowry death cases, the Supreme Court called for suitable reforms in the appropriate laws.<sup>115</sup>

The crisis of "third degree" is perhaps one of the most difficult challenges that have to be met by the police leadership, especially at the police station levels. There is a great need to imbibe a firm commitment to the Constitutional culture which can help the personnel in abjuring the unjustified violence that gets perpetrated in the name of detection of a case or due to several other reasons.<sup>116</sup>

To combat organized crime, its detection investigation and prevention methods have to be employed synchronously. If criminals can use technology as a shield, it will render law enforcement agencies powerless to deal with them if the latter is also not made technology oriented in a suitable manner. Therefore, in the context of changing organized crime scenario, one must ponder over the validity of the scientific test that may be used in answer or effective tools to combat the organized modern criminal who is taking shelter behind and making full use of technology.<sup>117</sup>

The police also do not have the power under law to compel a person to take the polygraph or lie detector test unless the person freely volunteers without any police prompting to clear his or her own name. The national human rights commission has laid down guide lines for taking a polygraph test. As per the guide lines, the test can be conducted only with the

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115. Ramsagar Yadav v. State of U.P., (1986)Cr.L.J.836

116. N.R. Madhav Menon, A Training Manual for Police on Human Rights, Human Rights Centre, 1997, N.L.S.I.U. Publication Centre, Bangalore, P.71.

117. A.S.Dalal and Anuvaba Mukherjee, Constitutional and Evidentiary Validity of New Scientific Tests. J.I.L 1 Vol. 49, Oct – Dec, 2007, P. 529.

informed consent of the accused person and such consent must be expressed and recorded before a judicial magistrate in the presence of the Advocate of the accused.<sup>118</sup>

### **Scientific Tests for criminal investigation**

Polygraph – It is commonly known as the lie detector, this test is an examination, which is conducted by various probes attached to the body of the person who is interrogated by an expert. The variations in the pulse rate, the heart rate, the skin conductance, the blood pressure etc. are measured. The underlying theory of this test is that when people lie they also get measurably nervous about lying. The heart beat increases, blood pressure goes up, breathing rhythm changes, perspiration increases, and so on and so forth. In the very beginning, a baseline for these physiological characteristics is established by asking questions whose answers the investigators know. Deviation from this predetermined baseline for truthfulness, measured by the lie detector, is taken as a sign of lie. It is to be noted that this test does not involve any direct invasion of the body. The test basically produces a graph of multiple physiological parameters and hence the name polygraph. In this test the polygraph taken gives the reading of a deviation of the physiological parameters from the baseline for truthfulness, which is determined by the neutral question asked at the very beginning. The graph that is produced after the interrogation with target questions, aimed to make a possible liar uneasy in his physiological reactions, is examined by an expert who would then explain these reactions

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118. Introducing Human Rights, South Asia Human Rights Documentation Center, [1st Publishing 2006], Oxford University Press, New Delhi, P.113.

in the court and also to the law enforcement officers to aid them in their investigation.<sup>119</sup>

**Narcoanalysis**: This test is the most controversial of the trio and is better known as the truth serum test. The test is conducted by injecting 3 grams of sodium pentathol dissolved in 3000 ml of distilled water and the solution is administered intravenously along with 10% of dextrose over a period of three hours with the help of a qualified anesthetist. It is a barbiturate (thiopental sodium), making the neutral membrane more permeable to chloride ions, resulting in general inhibition, starting with the cortex and working down to the lower brain regions with increasing biological effect. At an appropriate dosage, there is just enough neural inhibitory effect to create an alcohol-like 'disinhibition' of normal behavioral restraints. A higher dosage, but not high enough to cause unconsciousness, may create a stupor and inhibit independent thought and action to a greater extent. The result is that one becomes mere.

In today's world of science and technology, man has found various tools that the law enforcement agencies can use to battle crime. The question is whether the use of such tools will lead to violation of constitution. It is to be noted that only an accused avail protection of Article 20(3) and that too if, and only if, he is compelled to be witness against himself. Every civilized society guarantees the right against self incrimination as a fundamental principle of fair trial in a criminal offence.

In this test the person to whom it is administered does need to make statements and it can lead to self- incrimination if the person in question is really involved in a crime. However, even if something comes out, it will not be admissible as evidence although it can help in investigation of crime.

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119. A.S.Dalal and Anuvaba Mukherjee, Constitutional and Evidentiary Validity of New Scientific Tests. J.I.L 1 Vol. 49, Oct – Dec, 2007, P. 535.

V.G. palshikar and P.V. Kakade JJ dismissing the prayer for a certificate of fitness in the case of **Ramchandra Ram Reddy v. State of Maharashtra**,<sup>120</sup> very lucidly deliberated upon the issue of the constitutional validity of the test. The line of reasoning is very apt. In Narcoanalysis the person to whom it is administered does make a statement. The question which falls for consideration therefore, is whether such statement can not be forcibly taken from the accused by requiring him to undergo the test against his will. It will be seen that such statements will attract the bar of article 20(3) only if it is inculcating or incriminating the person making it. Whether it is so or not can be ascertained only after the test is administered and not before. Therefore, there is no reason to prevent administration of this test. Also there are enough protections available under the Indian Evidence Act, under Criminal Procedure Code and under the Constitution [article 20(3)] to prevent inclusion of any incriminating statement.<sup>121</sup>

Prevention of crime is a sole prerogative of the state and the punishment for crime, if proved, is also the duty of the state. Fetters on these duties can be put only in extreme cases. However, courts may refuse to admit the findings of a Narcoanalysis as in **State v. Pitts**,<sup>122</sup> which disallowed the results of a sodium amytal interview, ruling that it is not valid scientific technique. However, the technology has developed now and come a long way. Courts have held that a statement means something that is stated. It may be written or oral communication though it need not, in the literal sense, be communication to someone. It will thus be seen that what is required to be made under compulsion by an accused is a statement. Furthermore, in the judgment in **State of Bombay v. Kathi Kalu**

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120. Cr.W.P.NO. 1924 OF 2003 decided on 05-03-2004.

121. A.S.Dalal and Anuvaba Mukherjee, Constitutional and Evidentiary Validity of New Scientific Tests. J.I.L 1. Vol. 49, Oct – Dec, 2007, P. 535.

122 . 116, NJ 580.

**Oghad**,<sup>123</sup> which was also followed in **Nandini Satpathy v. P.L.Dani and Anr.**<sup>124</sup>, it was held that compulsion is a physical objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore, extorted. It can be argued that a Narcoanalysis test takes a person to a hypnotic stage and it is, therefore, conditioning of the mind extraneously and the subject makes the statement under influence of the drug involuntarily. However, the test only remove inhibition and reduces resistance to the interrogator, who then has to frame questions and evoke responses in a way likely to produce accurate answers. However, sodium pentathol adversely affects health and improper dosage can even lead to coma. Therefore, the courts should grant permission for conducting Narcoanalysis only in exceptional circumstances and the test must be properly conducted in the presence of qualified experts.<sup>125</sup>

As regards Narcoanalysis, there have been various orders of various high courts upholding its validity. Majage J of Karnataka High court in the case of **Selvi Murugesan v. State of Karnataka**<sup>126</sup> adjudged on whether the procedure of Narcoanalysis amounted to compulsion. After reviewing the available evidence Majage J made a reference to section 53(1) of Cr. P.C, which permitted use of reasonable force in order to ascertain those facts which may afford any evidence. Narcoanalysis, he suggested, came under the purview of this section and conducting the test in a proper manner was justified. He also said, "this examination has to be carried out by a registered medical practitioner. It can, therefore, be said that merely

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123 . AIR 1961 SC 1552.

124 AIR 1978 SC 1025 at 1032.

125. Id, P .535.

126. Unreported

because some discomfort is caused, such a procedure should not be permitted".<sup>127</sup>

Section 73 of the Indian Evidence Act, 1872 has been repeatedly held to be valid by the Supreme Court and in **S v. Paliram**<sup>128</sup> it ruled that both civil and criminal courts are competent to obtain the specimen of handwriting. Furthermore, in *Kathi Kalu Oghad* the court upheld the judgment delivered by Ansari CJ in **State of Kerala v. K.K.Sankaran Nair**<sup>129</sup> (wherein the judgment of the Supreme Court in **sharma's**<sup>130</sup> case was followed) and it was ruled that giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification is constitutionally valid. It was further stated that "though they (the constitution framers) may have intended to protect an accused person from the hazards of self – incrimination in the light of the English law on the subject – they could nor have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice". The court also said that crime and of bringing criminals to justice". The court also said that the mere fact that the accused was in police custody does not by itself imply that compulsion was used for obtaining the specimen handwritings. "Even if the compulsion, it does not amount to testimonial compulsion".<sup>131</sup>

#### **D.N.A.**

The DNA technology is going to play a vital role in legal system in both the fields, i.e. in criminal justice system and in civil matters. The matters involving murder, homicide, rape, other sexual offences and assault etc the DNA finger printing can provide a vital clue in fixing the identity of the

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127 .Id. P. 536.

128 . AIR 1979 SC 14.

129 . AIR 1960 Ker 392.

130 . M.P. Sharma v. Satish Chandra, AIR 1954 SC 300.

131. Id. P. 537

suspect. With the help of this latest scientific technology, the chances of wrongful convictions would be minimized and real Justice may be done. DNA technology has been proved to be a boon for innocent suspects, investigating agencies and judges and bane for real culprit whether alive or dead. DNA evidence is also known as Justice through advance defence, because biological evidence cannot be tampered and it can never tell lie.<sup>132</sup>

DNA is an abbreviated form of Deoxy Ribo Nucliec Acid. It is a basic genetic material present in all nucleated cells of the body, and provides the genetic blue print of all life, meaning thereby, it stores all hereditary characters of an individual which he inherits from his parents.<sup>133</sup>

DNA can be found in blood and blood stains, Semen and Semen stains, saliva, Skin cells, Urine, Sputum, Finger nails, tissues and human organs, hair and hair roots, bone and bone marrow, tooth and other biological fluids. The true character or the legislation has to be ascertained when a provision of law is important on the ground that it is ultravires, the power of the legislature which enacted it or that it is violative of the rights guaranteed by the constitutions, having regards to the nature of enactment as a whole to its objects. The fact that DNA evidence has been accepted universally proves that this evidence is very much aoristic, reliable and accurate than any other evidence.<sup>134</sup>

The latest position in India is that there is no specific law on the subject of DNA evidence but DNA testing has got legal validity in 1989. In India

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132. Yashpal Singh and Mohd. Hussain Zaide, DNA Tests in Criminal Investigation, Trial and Paternity Disputes, [1st Edition, 2006], Asia law Agency, Allahabad, P.33.

133. B.S. Nabar, Forensic Science in Criminal Investigation, 3rd Edition. 2007, Asian law House, Hyderabad, P.348.

134. Yashpal Singh and Mohd. Hussain Zaide, DNA Tests in Criminal Investigation, Trial and Paternity Disputes,[ 1st Edition, 2006], Asia Law Agency, Allahabad, P. 33.

**kunniraman v. Manoj's**<sup>135</sup> case was the first paternity dispute required DNA testing and court are had accepted the DNA evidence. The courts are taking DNA evidences as an experts opinion like other forensic experts.<sup>136</sup> In India However this new technology, i.e. DNA profiting has not found its place in Indian evidence Act, although witnesses are expected to speak truth but often they do lie. In such cases DNA testing is necessary. Section 45 of Indian Evidence Act admits expert evidence. But there is a confusion in legal circles whether a suspect or a party can be asked to provide sample for DNA testing. The uncertainty is due to Article 20(3) of the constitution which prohibits from providing self incriminating evidence. So far giving of sample for DNA testing has been a voluntary act. It was held in **Goutam Kundu v. State of west Bengal**,<sup>137</sup> the court can not order Blood test as a matter of course and in a case for deciding rights of a child the court must consider whether it will have the effect of branding the child illegitimate and mother as of easy virtue.

It is settled principles of law that nobody can be compelled without his consent to submit to DNA test. A direction can be issued. Such direction should not be done in the ordinary course, in routine or as a roving enquiry. A strong prima facie case should be made out.<sup>138</sup>

The Court has ample power to direct the parties to undergo medical test, or give sample of blood for DNA test. But in a case Hon'ble Supreme Court has held that: -

- 1) The courts in India can not order blood test as a matter of course.
- 2) Whether the applications are made for such prayers in order to have roving enquiry, the prayer for blood test cannot be entertained.

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135 . (1991)3 Crimes 860 (Ker).

136. Id. P.33.

137. AIR 1993 SC 2295.

138. Mr. X .v. Mr. Z, AIR 2002 Del. 217.

- 3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under section 112 of the Indian evidence Act.
- 4) The court must carefully examine as to what would be the consequence of ordering the blood test, whether it will have the effect of branding a child as bastard and the mother as an unchaste woman.<sup>139</sup>

**Remand of police custody: -**

It is very common practice that police is trying to bring the accused in custody on remand without any lawful justification. They are using this method irrespective of pitty on heinous offences in investigating procedure. It is rather unfortunate that in this country the investigating police still feel that a case in hand is solved as soon as they manage to get confession from the accused and hence is the tendency to extort a confession by adopting tortures methods of investigation. They fail to understand that a confession made under pressure is not at all admissible in evidence under section 27 of the Evidence Act even if it leads to the discovery or a fact in view of the guarantee against testimonial compulsion embodied in Art 20(3) of the constitution. Such a confession under pressure even if judicially recorded is often false, often unverifiable and is often retracted in court. And once such a confession is retracted, it is of no value to the prosecution without substantial corroboration from other important sources.<sup>140</sup>

As most of the torture for extorting confession takes place after getting the accused in police remand, whether it would not be desirable to completely

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139. Goutam Kundu v. State of West Bengal, AIR 1993 SC 2248.

140. R.DeB, Criminal Justice, [1st edition, 1998], the Law Book Company Pvt. Limited, Allahabad, at 53-54.

do away with the present system of remanding the accused to police custody under section 167 or the Cr. P. C. after his initial production in court by the police.<sup>141</sup>

A question may arise whether abolition of police remand will hamper investigation of case or stand in the way of bringing offenders to book. Thus where the accused has already furnished some clue which calls for further interrogation of the accused on which requires further clarification by him a denial of police remand would mean a denial of opportunity to complete the investigation. This certainly need not be so. By a suitable amendment of the law the magistrate could be empowered to grant the investigating police a further opportunity to examine the accused in jail custody. If as a result of such further examination the accused makes a confessional statement, the magistrate could then be moved to record such confessional statement judicially.<sup>142</sup>

In **Jaya Deesh's** case<sup>143</sup>, the Kerala High Court has held that no remand on accused to police custody for the purpose of securing a confession is to aid the police to being pressure on the accused for extracting information which he voluntarily is not prepared to give or bound to give such a prayer for police remand has got to be rejected.

In accordance with the common law principle of it being a duty of a subject to bring offenders to justice our criminal procedure code too has enjoined on the citizen the duty to bring offenders to book, especially in serious cases, and elaborate provisions have, therefore been made in section 39

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141. Dr. Deepa Singh, Human Rights and Police Predicament, [1st edition, 2002]. J.C. Bangia Publication, P. 122.

142. R. Deb, criminal justice, [1st edition, 1998], the Law Book Company Pvt. Limited, at 53-54.

143. T.N Jayadeesh v. State of kerala, 1980 Cr.L.J, 56.

and 40, Cr. P.C in this behalf. In tune with the spirit of these sections, section 154 Cr. P. C. makes it obligatory for the police to register a cognizable case and section 190(1)(b) Cr. P. C. as interpreted judicially in **Sub-divisional magistrate, Delhi v. Ramkali**,<sup>144</sup> has similarly made it obligatory on the magistrate to take cognizable offence which is brought to his notice. But something different is happening in practice in regard to non registration of a case by the police under the law the information should be given to the officer in charge of the police station. It must be written, either by the complainant or the police officer and must be signed by the complainant. Under the existing law the officer in charge of the police station has to register a case if the allegation, oral or in writing, make out a cognizable case. If the allegations turn out to be false, provision of section 182, 211 I.P.C and section 250 Cr. P. C. may be attracted but there is no option to register or not to register a case.

All over the country, however police officers being haunted by the ghost of statistic are conveniently forgetting this mandatory rule of law and using every means in their power either not to register cases or minimize offences in devious ways. Indeed law itself is cognizant of this truth as it would appear from section 154(3), Cr. P. C. itself.

F.I.R. does not only constitute substantive evidence, but can be used as previous statement to corroborate and contradict its maker under section 157 or 145 of Indian Evidence Act. It can also be used as dying declaration or for recovery or as parts of informant's conduct u/s 32, 27 and 8 respectively of the Indian Evidence Act

From the police point of view, its importance lies in that it is the only statement that can be produced during trial to support the informant's testimony. However, as the FIR forms the basis of a criminal case and as the courts in India give great importance to it, the investigating officers

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144. AIR 1968 SC 1.

also herd to attach undue importance to it on the mistaken notion that a successful investigation and prosecution cannot be ensured if the first information report is not well established, often the investigating officers go a step further and start padding and concoction at the FIR stage itself, particularly in serious crimes, by way of introducing the names of eye witness, facts pertaining to motive names of suspects or the accused and other particulars. There are also instances of police officers distorting the first information report for ulterior motives. Such manipulation is done either to create evidence against the accused or to implicate some innocent person or to show favour to the accused. All these practices, needless to say, against the spirit of law, and to more often than not, can be expressed easily at the trial stage to the detriment of prosecution. Another prevailing tendency among the police officers is to conceal crime by not registering it at all. This may be mainly due to the 'tyranny or satisfaction arising out of undue emphasis on statistics and the system or evaluating efficiency with reference to it.<sup>145</sup>

**Degrading treatment to Woman by Police:** The discriminatory attitude of many law enforcement officials to women in India continues to place them in a vulnerable position. Women are particularly at risk of human violations at the hands of police as criminal suspects taken into custody for questioning and to female relatives of criminal suspects wanted by police. Women approaching the police for redress have also been subjected to ill treatment in the form of violation of their personal integrity which range from beating to extreme verbal insults including sexual Assault.<sup>146</sup>

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145. N.R. Madhav Menon, A Training Manual for Police on Human Rights, Human Rights Centre, 1997, N.L.S.I.U. Publication, Bangalore, P.64.

146. Dr. Deepa Singh, Human Rights and Police Predicament,[1st Edition , 2002], J.C. Bangia Publication, P.110.

Women if accused by a crime, and found guilty by a competent court of law and subject to the same degree of punishment as is applicable to male accused. The procedure for investigation and trial are indeed equal and similar. However, the laws has prescribed certain minimum standards to ensure dignity and decency of womanhood, particularly, with regard to action such as during the arrest of a female with or without a warrant and so also while executing a lawful search warrant or even when acting under the authority of law under specified circumstances without a warrant or search.<sup>147</sup>

The Code of Criminal procedure 1973 Provides that whenever it is necessary to cause a female to be searched, the search shall be made another female with strict regard to decency.<sup>148</sup> Section 100(3) of the code of criminal procedure in relation to searches of women under a warrant, provides that : "whenever any person in or about such place is reasonably suspected to concealing about his person any article for which search should be made, such person may be searched and if such person is women, the search shall be made by another female with strict regard to decency."<sup>149</sup>

Generally, under section 160 a police officers is authorizes to summon the witness concerned to appear before him and it is obligatory on the person so required to appear before the investigating officer to give information as known to him. According to sub clause of this section, law has provided

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147. N.R. Madhav Menon, A Training Manual for Police on Human Rights, Human Rights Centre, 1997, N.L.S.I.U. Publication, Banglore, P.64.

148. " Whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency."

149. " Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another women with strict regard to decency."

that no male person under the age of 15 years and women shall be required to attend anyplace other than the police in which such male person or women resides.<sup>150</sup>

In Cr. p. c. there is express prohibition on seeking the women to give information by coming to the police station to give information by coming to the police station or before investigating officer and the supreme court has clearly and categorically deprecated such unjustified and illegal practices. A magistrate cannot also issue a process compelling any one (female) to give evidence in police investigation.

The scope of the proviso to section 160(1) of the code of Cr. P. C. 1973 got a clear enunciation by the supreme court of India in **Nardini Sathpathy**<sup>151</sup> where the supreme court held that accused will be obliged to truthfully answer questions put to them by the investigating officer in so far as they do not inculcate him and may refuse to answer those which have a tendency to inculcate him.

However, in relation to the refusal of the accused to report before the investigating officer the supreme court has this to say: -

“To serve the end of justice, when a women is commanded into a police station, violating the commandant of section 160 of the code..... the right thing is to quash the prosecution as it stands at present.”<sup>152</sup>

It is no doubt that **Nardini Sathpathy** was more concerned with the question of self incrimination, but its emphatic direction given to the investigation agencies in the country on the need for compliance with the mandatory directions of section 160 of the code of criminal procedure, 1973, can hardly be ignored.

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150. Dr. Deepa Singh. Human Rights and Police Predicament, [1st Edition , 2002], J.C. Bangia Publication, P.111.

151. AIR 1978 SC1025.

152. Nardini Sampathy v. P.L.Dani, AIR 1978 SC 1025.

Another area of contradiction between law and on social system relates to offences against women, especially the offence of rape. Rape and outraging of modesty of a woman in police custody is the most serious charge against the police. The acquittal in the famous **Mathura rape** case,<sup>153</sup> created such a wave of indignation and social protest that a demand for the amendment of the law in this regard was made almost from all sections of the people.

But it appears that the malady is not so much in the substantive law of rape as contained in the provision, section 375, I.P.C. but more in section 155(4) of the Indian Evidence Act and in view of the law some judges had taken in the past to virtually equate the victim of rape with that of an accomplice in total ignorance and disregard of the varying social conditions in India.

In many countries, rape and other sexual violence are common method of torture inflicted on women by state officials. Rape or the threat of Rape may be inflicted for a number of reasons such as to extract confessions or to intimidate humiliation or punish.

Rape always the international infliction of several psychological as well as physical suffering. Rape of women detainees by prison security or military is always torture.

The Supreme Court has held in **Rameshwar v. State of Rajasthan**,<sup>154</sup> **Sedheswar Ganguly v. State of West Bengal**<sup>155</sup>, **Rafiq v. State of U.P.**<sup>156</sup> and **Bharwada Bhoginbhai v. State of Gujrat**,<sup>157</sup> that corroboration may be desirable as a rule of prudence but it is not compulsory in the eye of law. In spite of this change in trend of discussion

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153. *Tukaram v. State of Maharashtra*, (1979) 2 SCC 143.

154. 1952 Cr.L.J. 547.

155. AIR 1958 SC 143.

156. AIR 1981 SC 559.

157. 1983 Cr.ZL.J. 1096 (SC).

in rape higher courts, the percentage of conviction in rape cases in the trial courts is still not satisfactory.

**Degrading treatment to children Accused of offenders by the police:**

The Constitution of India guarantees fundamental Rights to all its citizens including children. The principle of Equality under article 14 is qualified by the special provisions made under article 15 in favor of women and children. Further, Article 39(e) & (f) of the constitution obligates the state to give children the situation that facilitates to develop in a healthy manner and in conditions of freedom and dignity, protecting childhood against exploitation and against moral and material abandonment.<sup>158</sup>

In so far as penal processes are concerned it may be appropriate here to recount the provisions or section 82 of the Indian Penal Code which holds that nothing is an offence which is done by a child under seven years of Age. Further section 83 of the code provides that nothing is an offence which is done by a child above seven years of age and under twelve, who has not attached sufficient maturity of understanding to judge. The nature and consequences if his conduct or occasion.<sup>159</sup>

The probation of offenders Act, 1956 is a social legislation which imposes restrictions on imprisonment of offenders under twenty one years of age and section 6 of that enactment provides that as a normal practice young person below that age are not consigned to prisons after the due process of ascertaining the guilt and unless it is satisfied and that having regard to the nature of the offence and the character of the offender. It would not be desirable to deal with the person under the beneficial provision of that law

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158. Dr. Deepa Singh. Human Rights and police procedures,[ 1st Edition 2002], J.C. Bangia Publication, P.111.

159 . “ Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.”

and record their reasons therefore. This does not alter other provision of the code of Cr. P. C. 1973 but only help in preventing incarceration of the juvenile and young offenders.

The Juvenile Justice Act, 1986 is designed to ensure, inter- alia the effort of the state to conceive a uniform legal frame work for juvenile justice to avoid lodging of children in jails and police lock – ups and to establish norms and standard of juvenile justice board.

“Crimes in India” shows us a phenomenal increase of juvenile delinquency day by day. Now the question arises that what should be the role of the police in combating menace, apart from merely enforcing preventive legislation? The concept of a welfare state is increasingly imposing on the police duties of a nature which they were never before called upon to perform. The police can no longer, consistent with their changed position, take the narrow and pragmatic attitude that their business is only to enforce the laws as they exist and they have nothing to do with laws as they exist and they have nothing to do with the curative aspects of modern correctional methods. It is being increasingly felt in all democratic countries that in addition to special surveillance of places and activities in which youth is particularly exposed to danger, the police should also directly help in the education of the erring juveniles and help them to show up as healthy citizens, for on this alone will depend their future behavior in society.<sup>160</sup>

Ever since the third session of the General Assembly of the international criminal police organization in Berlin in September 1926, the international criminal police organization has been taking a keen interest in the matter of educating policemen and women in the task of handling juvenile

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160. R. Deb, Criminal Justice, [1st Edition, 1998], the Law Book Company Pvt. Limited, Allahabad, P.134.

delinquents. The 1<sup>st</sup> United Nations congress of the prevention of crime in August-September, 1955, too, resolved that in the general organization of the police, the institution of special police service of juvenile should be composed of specially trained police officers.<sup>161</sup>

The police is the Agency that often comes first in contact with a delinquent child. It is also the agency which has a unique advantage of observing life at first hand and detecting any sign of anti social behavior at the earliest opportunity. Moreover, the treatment that the police accord to suspected criminal and juvenile delinquents on their arrest affects their attitude towards conventional society and may to a large extent determine their responsiveness or otherwise to future treatment programmes under taking for their reformation. Universal declaration on Human Rights solemnly declares that "No one shall be subjected to torture or to cruel in human or degrading treatment to torture or to cruel inhuman or degrading treatment or punishment."<sup>162</sup> Similarly Article 25(2) holds that childhood is entitled to special care and assistance. In their Declaration of Delhi in January 1959, the international commission on January laid down that rule of law must necessarily condemn cruel, inhuman or excessive prevention measures or punishment and supports the adoption of reformatory measures wherever possible.

In **Sheela Barse v. Union of India**<sup>163</sup>, the Supreme Court of India admitted a writ under Article 32 and held that among other action, the state must:

1. Ensure strict adherence to the safeguard.

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161. R. Deb, Criminal Justice, [1st Edition, 1998], the Law Book Company Pvt. Limited, Allahabad, P. 135.

162. Article 5 of U.D.H.R. 1948.

163. AIR 1986 SC 1773.

2. Of the jails manuals so that children are not abused.
3. Take precautions that children below 16 years of age are kept in jail.
4. Ensure that trial of children should take place only in juvenile courts and not in criminal courts.
5. Ensure that if a first information report is lodged against a child below 10 years of age for an offence punishable with imprisonment of not more than seven years, then the case must be disposed off in three months.

The Supreme Court further pointed out that by ignoring the non custodial alternatives prescribed by law and exposing the delinquent child to the trauma of custodial cruelty, the state and the society runs the risk of sending the child to the criminal clan. The court cautioned that this is no more a matter of concession to the child but its constitutional and statutory right.<sup>164</sup>

#### **Torture By the Police in Custody:**

The Indian constitution does not expectedly prohibit torture or mistreatment, although there are laws prohibiting torture by the police and army and case law prohibiting the use of forcibly extracted confessions. Torture and mistreatment of detainees, including both political and criminal suspects, are widely reported in India, although it is impossible to state precisely how relevant practices are. Torture does not always result from government policy to torture suspects.<sup>165</sup>

The main reason why torture continues to be practiced on such a wide scale throughout India is that the police feel themselves to be immune they are fully aware but they will not be held accountable, even if they will the victim and even if the truth is revealed.

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164. Sheela Barse v. Union of India, AIR 1986, SC 1773.

165 Jagmohan Mohanty, Teaching of Human Rights. New Trends and Innovations, [1st edition, 2005], Deep and Deep Publications, New Delhi, P.302.

In situational factors which contribute to the persistence of torture include the negative public image, and bad working conditions of the police, the inadequate training and facilities available to them, the high degree of political involvement in directing their activities and the failure of the government to accept responsibility for ensuring that the police operate within the limits of law.<sup>166</sup>

Uperdra Baxi<sup>167</sup>, Vice chancellor of Delhi University and a noted analyst of police behaviour states that the police remain an "exploited, neglected and deprived minority" who are denied the most basic minimum working conditions and who are subservient to the rulers rather than responsive to the people". The police are poorly paid, suffer difficult working conditions, lack adequate housing and have little job security. The police have no right of association under the police forces (Restriction of Rights) Act 1966.

These conditions led to a police secret in Haryana State in mid 1991. a leader of the unofficial Haryana police Association said, "we are the lowest paid among the government employees, measured by politicians and officials alike, run around of twenty four hours and earn finally not two square meals but a bad name from the public." After conducting a series of interviews of senior police officials in June 1988. the statesman reported "undoubtedly many of the excesses committed by the police are due to a tremendous degree of frustration in the lower rungs of the force."<sup>168</sup>

**Arvinder Singh Bagga v. State of U.P.**<sup>169</sup> is a case of police atrocities where police officers were guilty of illegal arrest and torture in police station. They subjected a married woman to physical mental and

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166. Torture, Rape & Death in Custody, Amnesty International India, 1992, Amnesty International Publications, [1st Edition], Easton Street London. P. 76.

167. Dr. Deepa Singh. Human Rights and Police Procedures, [1st Edition 2002], J.C. Bangia Publication, P.107.

168. Id 77.

169. AIR 1995 SC 117.

physiological torture calculated to create fright to make her submit to the demands of the police and abandon her legal marriage. The court held that the new concept of personal liberty of the police officials, committing police atrocities leading to human rights violation, depicts the judicial wisdom in such cases and is a welcoming feature of the Indian judiciary. This will definitely have some deterrent effects of the police officials committing police atrocities and violating human rights.

In **Ram Sagar Yadav's**<sup>170</sup> case, the supreme court of India observed that the custodian of law and order do use their position for oppressing innocent citizens who look to them for protection.

The torture commission of India 1884 received a total of 79 complaints against police and 198 complaints against Revenue were found to be true by the commission. The methods of torture were described by the commission: -

"Among the principal tortures in vogue in police cases we tend the following: - twisting a rope tightly around the entire arm or by so as to impede circulation, lifting up by the moustache, suspending by arms while tied behind the back, searing with the iron, placing stretching insects such as the carpenter battle, on the naval, scrotum and other sensitive parts, dipping in wells and rivers, till the party is half suffocated, squeezing the tactical, beating with sticks, prevention of sleep, keeping in fish with pincers, putting pepper or red chillies in the eye or introducing them in the private parts of men and women; these cruelties occasionally preserved until death sooner or later ensues."<sup>171</sup>

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170. Ram Sagar Yadav v. State 1985, 2SCR 621.

171. Dr. Deepa Singh. Human Rights and Police Procedures, [1st Edition , 2002], J.C. Bangia Publication, P.107.

Torture involves dehumanizing the victim and the dehumanization is made ea if the victims come from a disadvantaged social, political or ethic group. Methods of torture include: strengthening of body on a ladder, suspension from the wrists, electric shocks, pulling out the finger nails, dripping acid on the face, the insertion of broken bottle into the anus, and prolonged flogging.

Torture cannot be defined by a list of prohibited practices. It is equally impossible to draw a clear dividing like between torture and other cruel, inhuman or degrading treatment or punishment. Whether an act of ill – treatment constitute torture depends on a number of factors including the nature and severity of the abuse.

The term torture and ill-treatment are used here to refer to acts involving the infliction of pain of suffering by state agents, or similar acts by private individuals for whom the state bears responsibility through consent, acquisition or inaction Torture and ill treatment also refers to similar acts inflicted by members of armed political groups.<sup>172</sup>

The human rights savior Supreme Court has made several attempts to protect the prisoners from all type of torture. The court has rightly observed in **Sunil Batra (II)**:<sup>173</sup>

“The humane thread of jail jurisprudence that their through is that no prison authority enjoys amnesty for unconstitutionally, and forced fare well to fundamental rights is an institutional outrage in our system where stone and iron bars shall bow before the rule of law.”<sup>174</sup>

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172. Id. 109.

173. Sunil Batra(II) v. Delhi Administration, AIR 1980 SC 1579.

174 .Sunil Batra (II)v. Delhi Administration Air 1980, SC at 1713.

In **Kishore Singh v State of Rajasthan**<sup>175</sup>, the supreme court brought home the keep concern for human rights by observing against police cruelty in the following words: -

"Nothing is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts a deeper wound on our constitution culture than the state officials running berserk regardless of human rights."<sup>176</sup>

Methods of torture range from electric shocks to suspension from ceilings to severe beating with lathis and kicking. In many areas of India beating are not reported or torture or ill treatment because they are so much a part of the arrest and detention process.

The Terrorist and Disruptive Activities (Prevention) Act (TADA) 1987 which lapsed in 1995 was found to have led to widespread use of torture by law enforcement officials. As well as withdrawing safeguards under Art 22 of the constitution for those suspected or broadly defined offences of 'disruptive activities' and terrorist acts" it withdraw further safeguards and thereby facilitated the use of torture.

Section 15(1) of the TADA made confessions to a police officer of the rank of superintendent of police and above admissible evidence. In its majority upholding the constitutional validity of TADA, the Supreme Court observed: "whatever may be said for or against the submission with regard to the admissibility of a confession before a police officer, we cannot avoid but saying that we have frequently deals with cases of atrocity and brutality protected by some zealous police officers resorting to inhuman, barbaric, archaic and drastic method of treating the suspects in their anxiety to

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175 .AIR1981SC at 625.

176 .Kishore Singh v. State of Rajasthan, AIR 1981 SC at 625.

collect evidence by hook or crook and wrenching a decision in their favour".<sup>177</sup>

The Indian constitution is perhaps one of the rare constitutions of the world which reflects the human rights approach to environment protection through various Constitutional mandates.<sup>178</sup> In India the concern for environment protection has not only been raised to the status of fundamental law of the land, but it is also wedded with the human rights approach and it is how well settled that it is the basic human rights of every individual to live in pollution free environment with full human dignity.

Article 21 of the Constitution guarantees a fundamental right to life, a life of dignity, to be lived in a proper environment, free of danger of diseases and infection. The talk of human rights and maintaining the dignity of every person would become meaningless unless they are served with the minimum livable environment. The judicial grammar of interpretation has made "right to live in healthy environment" as the sanctum sanctorum of human rights.

In the Bandra court at Bombay, a garage serves as the lock up rooms for women. Leave alone bathrooms and toilets, it does not even have windows. Women in the lock – up have no option but to use the floor as the toilet.

Another area of human rights violation are judicial and police lock – ups. There is no exaggeration to say that even a cowshed is better than many of such lock –ups which lack in providing the barest minimum facilities to the accused and their condition in such lock – up is more deplorable. In west Bengal also many police lock – ups are in a more deplorable condition due to over crowding and not providing the bare necessities of life. The provision of food, drink, smoke etc can be taken care of and similarly

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177. Kartar Singh v. State of Punjab. 1994(2) SC 423.

178. Article 14, 21, 47, 48- A and 51A (a) of the Constitution of India.

provision of toilet, etc should not be neglected. These petty things are likely to charge the mental response of the subject. As a rule all the facilities which an ordinary man is entitled should be given to the subject, if he is in police custody.

The Prevention of Torture Bill, 2008 being brought by the Government of India is a shame. The Bill contains only three operative paragraphs relating to definition of torture, punishment for torture and limitations for cognizance of offences falls.

The Prevention of Torture Bill 2008, fall far short of obligation that the states ratifying CAT must undertake. It provides narrow and destructive definition of torture with no reference to death as a result of torture. It provides for lenient punishment for torture contrary to the punishment provided under the Indian Penal Code for similar offences. Further, the six month bar for taking cognizance of offence under the proposed bill is contrary to the Cr.P.C.1973.<sup>179</sup>

### **Terrorism, Police encounter and Human Rights:**

In recent times India has experienced several acts of terrorism and still the threat persists in this country. Different strategies are being adopted in order to counter the terrorism which of course should follow the norms of protecting human rights, since human rights is considered to be an essential element of individuals rights promoted by the state. The necessity to safeguard the human rights should be the primary objectives of an effective counter terrorism effort.<sup>180</sup> It is also necessary to strengthen democracy and uphold the rule of law. Without respecting human rights any measure undertaken to fight terrorism may prove futile. Though the so called global war on terror is undermining and marginalizing human rights,

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179 . Prevention of Torture Bill, 2008.

180. "Combating Terrorism....Through Human Rights", Ekta Prakash, <http://ibnlive.in.com/cfs/blog/53733/1541>, visited on 25-03-2010.

yet it should be emphasized that the best and the only strategies to isolate and defeat terrorism in practicing human rights.

The process of dealing with terrorism is quite sensitive as it includes the hopes and aspirations of the common people. Human Rights of citizens which are alienable and guaranteed by the Constitution cannot be allowed to be sacrificed under any circumstances. The menace of terrorism should be tackled with iron hands. Article 21<sup>181</sup> (protection of life and personal liberty or Right <sup>182</sup> to life), Article 20 (Protection in respect of conviction for offences, or Protection against testimonial compulsion) of the constitution cannot remain suspended even during an emergency.

However, many countries are enacting restrictive and repressive anti-terrorism laws in the name of combating terrorism. It has been noticed that in most of the cases, these laws are undermining the norms of human rights. State should enact with all efforts to protect and promote human rights of its people.

Unfortunately, in many counter-terrorism warfare, the consideration of human rights is often denied. Resulting to it, the victims of warfare get motivated to revolt against the perpetrators of such war through terrorism. But most alarmingly, in the name of combating terrorism, the state itself violates the human rights. It encourages the issue of state repression. People from large section get alienated and unwittingly help the terrorist.

Human Rights violations by the state and its agencies occur in various settings: during cordon and search operations, during encounters-sometimes genuine and at other times fake- or opening fire in crowded areas, during detention and interrogation.

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181. "Protection of life and personal Liberty"

182 "Protection in respect of conviction for offence"

A number of factors are responsible for such violations. These include: lack of transparency and accountability, inadequate training and education among security personnel in observing human rights, lack of scientific investigation skills and tools among the police, deficient information to, and investigation by, the police, high levels of stress factor caused by extended tour of duty in conflict theatres under treacherous and taxing conditions, and moribund judicial system.<sup>183</sup>

It is therefore important to note that exercising counter-terrorism efforts, the state should not undermine the human rights. It is also essential to train and educate the security forces, police, Para-military and the army about the importance of observing the human rights of the people. In the institution of police training, human rights should be an integral part of the syllabus. In addition, speedy trial is an important objective to ensure for the guilty and proper justice for the innocent. It is to be remembered that any act of injustice may lead a person to the way of violence and terrorism.

On many occasions, concerned citizens from different walks of life have disapproved, and unequivocally condemned, the agencies of the state employing terrorism as a tool. In this context, the Supreme Court of India noted in **D.K.Basu v. State of West Bengal**<sup>184</sup> that: "state terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to terrorism; that would only be bad for the state, the community and above all the rule of law. The state must, therefore, ensure that the various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves."

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183. Terrorism and Human Rights , Wilson john and P.V .Ramana, [www.orfonline.org/](http://www.orfonline.org/) February 2007. visited on 27-03-2021.

184. AIR 1997 SC 610.

The solution cannot be forced wishing away the problem. The solution lies in striking the right balance between the need for an effective criminal justice system with the ideals of liberal democracy some compromise will have to be made at least for some years till the ground situation improves by amending some of our laws and procedure. The recommendation for striking balance between terrorism and human rights are:

1. Torture in whatever form should never be allowed.
  2. Anonymous statements and sources of information should, when used as testimony in a criminal law procedure in a court, be tested on origin and reliability by a judge.
  3. The right to be fair trial with an independent and impartial judge should also be respected in the context of the fight against terrorism.
  4. Detention without intervention by a judge is unacceptable. The new and far going method of coercion, created for the purpose of combating terrorism, should be put under supervision of a judge.
1. Restriction to human rights for the purpose of combating terrorism should fulfill the requirements of proportionally and subsidiary and the requirement of legality.
  2. Special human rights officers should be deputed to army, paramilitary and police units deployed in conflict zones.<sup>185</sup>
  3. Strengthening of criminal law is important that terrorist suspects are brought to trial. Security detention is problematic over a longer period of time. Therefore, we have to adapt our criminal laws in order not to allow loopholes for terrorist.

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185. Combating Terrorism.....Through Human Rights, Ekta Prakash, <http://ibnlive.in.com/cfs/blog/53733/1541>. visited on 25-03-2010.

4. The input of an independent National Human Rights Committee is indispensable for finding a balance between the interest of combating terrorism and human rights.
5. Weapons to be used should be such that which creates minimum collateral damage to the general environment of the defense location.
6. Training is the key vehicle to deliver institutional transformation to organizational praxis.
7. A comprehensive and inclusive detention of "Terrorist " acts, disruptive activities and organized crime be provided in the Indian Penal Code 1860, so that no legal vacuum in dealing with terrorist, underworld criminal send their activities after special laws are permitted lapse as in the case of TADA 1987.<sup>186</sup>
8. Possession of prohibited automatic and semi automatic weapon like AK-47,AK-56 Rifles, machine Guns, etc. and lethal explosive and devices such as RDX, Landmines, detonators, time devices and such other components should be made punishable with imprisonment of up to 10 years.
9. Power of Search and Seizure be vested in the intelligence agencies in the areas declared as Disturbed Areas under the relevant laws.<sup>187</sup>
10. The sunset provision of POTA 2002 must be examined in the light of experiences gained since its enactment and necessary

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186. <http://www.pucl.org/Topics/Law/2003/Mallimath-recommendations.htm>. visited on 10-6-2009.

187. <http://www.pucl.org/Topics/Law/2003/Mallimath-recommendations.htm>. visited on 10-6-2009.

amendments carried out to maintain Human Rights and Civil liberties.<sup>188</sup>

Effective counter terrorism measures and the protection of human rights are not conflicting but complementary and mutually reinforced goals and any shortcut around human rights makes the people weaker. We must not fall in the trap that terrorists have set as they want us to over-react, so of torture or cruel, inhuman and degrading treatment is abhorrent and shatters peoples legitimacy as torture would hurt, not help, in the fight against terrorism.

### **Role of police Special reference to West Bengal:**

This is a matter of great concern that the police department often gets influenced by the ruling government of a state. For instance, in West Bengal political patronage and partisan police force have helped to increase the influence of land mafias in Kolkata and its neighboring areas. The politician-criminal nexus working in several places of Bengal has been revealed in the Rajarhat land fiasco. Despite having the thorough knowledge of the activity of the unscrupulous promoters of the Vedic Village the local police did not take any step against them and rather kept silence. In the incidents of Singur, Nandigram, and Rajarhat land fiasco the weakness and inefficiency of the police department had led the ruling government amidst great trouble. These instances have proved that the police department itself violates the human right.

Human right organizations have accused Bengal police for human right violation. Amnesty International, West Bengal Human Rights Commission (WBHRC), National Human Rights Commission (NRC) and other human

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188. <http://www.pucl.org/Topics/Law/2003/Mallimath-recommendations.htm>. visited on 10-6-2009.

right organizations like APDR repeatedly raised grievance against Calcutta police and West Bengal police for torture and ill-treatment of people in the police custody. Amnesty International has received a large number of reports of torture, death and illegal detention by the police in West Bengal. It has stated in its report that West Bengal has the highest number of deaths in police custody in India. Amnesty International alleged that the victim of torture had been illegally for several days in the police custody in violation of section 167 of the Code of Criminal Procedure(Cr.P.C) which provides to all detainees should be brought before a magistrate within 24 hours and also violates the article 9(3) of the International Covenant on Civil and Political Rights(ICCPR). In recent years, police custodial deaths, torture in West Bengal have declined slightly. Much highlighted human right violation case where Bhikari Paswan was picked up by the police from his residence on the night of Oct.13, 1993 at about 12-30 hrs. His whereabouts since then are not known. According to human rights organizations, Bhikari, a jute mill worker, was abducted by the then additional superintendent of police of the district Hoogly police Harman Preet Singh and there other poicemen. He was reportedly taken to a police outpost in Telinipara, Hoogly, where he was tortured to death. But his body has not yet been found. This disappearance of Bhikari Paswan is still a mystery.<sup>189</sup>

The NHRC registered deaths of 64 persons in judicial custody in West Bengal during 2004-2005. Those who were killed in judicial custody in the state during 2005 included Prajit Das of Alipurduar Special Correctional Home who died on the way to the hospital on 8 march, 2005<sup>190</sup>, Arunodoy

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189. <http://www.groundreport.com/Business/Human-Right-organisations-often-accused-Bengal-Police>, visited on 4-7-2010.

190.2004-2005 Annual Report of NHRC.

Bannerjee who died at the district hospital in Jalpaiguri on 8 July 2005<sup>191</sup> and Bhagat Rajbanshi who died in Raiganj district jail in North Dinajpur district on 11 July 2005<sup>192</sup> Bhagat Rajbanshi fell ill while eating lunch. It was alleged that Bhagat was taken to the hospital only an hour after he choked while eating food. He was reportedly taken to hospital on a cycle rickshaw although the jail had an ambulance<sup>193</sup>.

According to the State Government, West Bengal 19,348 prisoners against the sanctioned capacity of 19,722 prisoners as of December 2005. Of the total prisoners, 74.6% were under-trial prisoners (14,445). The publication of female prisoners was 1,598 including 1,048 undertrials.

The State Government of West Bengal sought to paint a rosy picture of the state of affairs of the jail in the state by renaming them as "Correctional Homes" with effect from 14 April 2000. In the website of West Bengal prison, the state government claims-"All prisoners shall have three meals a day the early morning meal before the hour of labour, a mid day meal, and an evening meal before they are locked up for the night. Normally the prisoners are served adequate quantity of rice, lentil and vegetables in the lunch and chapatti, vegetables and lentil in the supper. Mutton and fish are served to them once every week. Tea is served twice daily".<sup>194</sup>

Following his visit to Krohagar district jail in Nadia, on 2 February 2005, West Bengal State Human Rights Commission chairman Shyamal Sen criticized the Nadia administration for the "pathetic state" of the jail and the jail hospital. He found extreme overcrowding condition in the jail which housed 600 inmates in space insufficient for even 500. The inmates of the

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191. ' Inmate Death,' The Telegraph, 10<sup>th</sup> March.

192. Ibid.

193. ' Prisoner Chokes on Food,' The Telegraph , 12<sup>th</sup> July 2005.

194. Citizens Charter in Prisons of West Bengal, <http://www.Westbengalprisons.org/rightsprisons.html>, visited on 20-7-2009.

jail were being served "foul-smelling food" and they lived in "congested surroundings". In the hospital, 14 patients, including infants, were sharing four beds. The jail hospital had a capacity of about 200 patients but the number of patients was three times higher. Sen described the Krishnagar district jail as the worst of all jails in the state.<sup>195</sup>

The security forces were responsible for rape and molestation. On 9<sup>th</sup> January 2005, lance corporal R.C. Garai was arrested in connection with murder of Indira Sharma, wife of a Sikkim Armed Police constable. The victim's body was recovered from the unused septic tank at the defence cantonment at Burtuk on 7<sup>th</sup> January 2005.<sup>196</sup>

On May 2005, a women identified as Kiranbala Das was allegedly shot dead by a jawan of 106<sup>th</sup> Battalion of the BSF identified as Pravin Kumar after arresting her at Ghojadanga near Bashirhat in North 24 Parganas district. The victim was shot in the abdomen and died at R.G. Kar medical college and hospital in Kolkata. According to BSF officials, the victim as arrested when she was running towards the border but was "accidentally" killed when she tried to escape from custody. But the police stated that Pravin Kumar was drunk and tried to rape her when she went to the fields to feed goats. Hundreds of villagers attacked the BSF border out post bordering Bangladesh in protest.

According to the BSF sources, the accused jawan was placed under suspension and a DIG- level enquiry was initiated to probe into the incident.<sup>197</sup>

The police were responsible for indiscriminate use of force against women demonstrators. Male police men were deployed to control female protestors

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195. 'Rights rap on Nadia facilities', The Telegraph, 3rd February, 2005.

196. 'Arrest Ends Jawan's Flight', The Telegraph, and 11th January, 2005.

197. 'BSF Trooper Kills Woman', The Times of India, 5<sup>th</sup> May, 2005.

and they allegedly molested female protestors. On 28<sup>th</sup> July, 2005, at least seven nurses were badly injured in police lathi charge when nurses under the aegis of Calcutta Nurses Action Forum tried to enter the Swastha Bhawan in Salt Lake, Kolkata to submit a memorandum to health department officers against their failure to fill several hundred vacancies for nurses in hospitals across the state. According to the Calcutta Nurses Action Forum Secretary, Rituparna Mahapatra, the male policemen also misbehaved with the nurses.

On 29 July 2005, police resorted to lathicharge on agitating women of Khanpur village, 32 km from Balurghat who were protesting against alleged police action in a molestation case. At least five women were injured, one of them critically.

Many women faced harassment while registering cases of domestic violence. In August 2005, Sakina Bibi lodged a complaint with the North 24 Parganas Superintendent of police alleging that whenever she went to the police station, Sub-Inspector Sukesh Ranjan Pal at Haroa police station asked for sexual favours or bribe in return for police action against her husband.

Witch hunting was common in many tribal dominated areas of West Bengal. In many cases, women were branded witches and killed by relatives to grab their property. The victims who were killed as witches included 60 -year - old aunt, Laxmi Murmu who was hacked to death at Kumodda village in Sagardighi in Murshidabad District on 5 June 2005 on the charges of being a witch; and a tribal couple -Soti Oraon and his wife Mungri- who were dragged to a nearby jungle and hacked to death by some villagers on 12

October 2005 after being suspected as witches for a wave of malarial fever at Mill Bagan tea estate in Darjeeling.<sup>198</sup>

Many innocent women were tortured in the name of "witch hunting ". On 16<sup>th</sup> October 2005, Yoshodhara Devi was reportedly locked up by her neighbour Raj kumar Mallick and his relatives at his residence at kanchanpally in South Port Police Station area in Kolkata after an 'ojha'(witch doctor) held her responsible for the death of Mallick's child. However, Ajay Ranade DC(Port), said that the matter was resolved 'amicably' and no case was filled against the accused<sup>199</sup>.

On December 2005, a widow identified as Lakshmi Marmu was beaten up, locked in a room and tried to be set on fire by a group of villagers led by her uncle Lippo who suspected her of being a witch at Bohar Mandirtala village near Memari, about 90 km from Calcutta. Earlier, an 'Ojha' (witch doctor) had told Lakshmi's uncle Lippo that his daughter Pushpa was suffering from mental illness because of Lakshmi's witchcraft influence.<sup>200</sup>

The rights of the juveniles were blatantly violated by the police. On 27<sup>th</sup> October 2005, the police picked up 10years-old Raja Kabiraj and detained him in singur police station in Hoogly district after they failed to arrest Raja's father Mantu Kabiraj in connection with a robbery case.<sup>201</sup>

On 22 December 2005, a police officer M.B. Khawash picked up Ramesh Tamang (14), a student of class ix of Municipal Boy's High School, Darjeeling, without any cause when he was returning home along with eight others from Chandamari . Ramesh Tamang was taken to the police

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198. 'Witch Hacked', The Telegraph,Kolkata, 7th June 2005.

199. 'Witch Hunting in Kolkata', The Statesman, 17th October, 2005.

200. 'Witch Widow Punished', The Telegraph, 7th December 2005.

201. <http://www.achrweb.org/reports/india/ARO6/WB.htm>. visited on 4-3-2010.

station and beaten up. The boy had to be admitted to Darjeeling Sadar Hospital after he suffered injuries on his leg due to the beating.<sup>202</sup>

On 11<sup>th</sup> March 2005, Calcutta High Court directed the West Bengal Human Rights Commission to visit Liluah Rescue home to investigate into alleged mismanagement and trafficking of girls by the authorities of home for destitute. The direction was issued in response to a public interest litigation filed by advocate Tapash kumar Bhanja, who accused the home employees of trafficking in girls. Tapash kumar Bhanja alleged that some of the inmates had conceived during their stay at the home, but the authority, despite having knowledge of the fact, didn't take any action. He alleged that the state government had not implemented the earlier recommendations of the West Bengal Human Rights Commission submitted in 2000 following a direction from the High Court to submit a report on the state of affairs of the home.

Trafficking was rampant in West Bengal. On 4<sup>th</sup> September 2005, Chief Justice of Calcutta High Court V.S. Sirpurkar and the justice Y.K. Sabharwal of Supreme Court of India expressed concern over the alarming rise in girl trafficking in Murshidabad while hearing the complaints from victim of trafficking and their families at berhampore, where they went as a part of mobile court programme, an initiative to bring justice to the villages. As on 4<sup>th</sup>September 2005, only 23 cases of girl trafficking were recorded by the police in Murshidabad since January 2005, The victims and their family members alleged that the police often refused to register cases.<sup>203</sup>

In West Bengal, security forces are responsible for extrajudicial killings, including in custody, alleged encounters and in indiscriminate firing at

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202. 'Cop assault on Student' , The Telegraph, kolkata, 24th December, 2005.

203. 'Court Glare on Girl Selling and Police Snoring', The Telegraph, 5th September, 2005.

protestors. On 16<sup>th</sup> June 2005, Sunil Roy, a businessman, was found hanging from the ceiling of a Government Railway Police Lock-up at Santragachi railway station with his leather belt tied around the neck. The railway police claimed that the victim was arrested at the Santragachi railway station on charges of pickpockets. But the family members rejected the allegation as "absurd" as the deceased had a flourishing business in the Howrah fish market. A case of unnatural death was registered and a magisterial enquiry was ordered into the death.<sup>204</sup>

The security forces also killed people in alleged encounters. On 9<sup>th</sup> February 2005, an innocent villager Kadir Seikh was killed in an alleged encounter by the personnel of 63<sup>rd</sup> battalion Border Security Force at Sobhapur village under Vaisnabnagar police station in Malda, near the India Bangladesh border. The BSF officials claimed that Kadir was found loitering suspiciously near the international border with a gang of five Bangladeshi smugglers, and that he was killed in retaliatory fire when the gang hurled bombs at the patrolling team. District Superintendent of police Sashi Kant Pujari ordered an enquiry into the incident.<sup>205</sup>

The security forces were also responsible for indiscriminate use of fire arms against the protestors. On 4<sup>th</sup> August 2005, two persons were killed when police opened fire at the protestors near the Sub Divisional Officer office Hemtabad in Rajganj in North Dinajpur district. The protestors were protesting the rape of a minor girl by unknown persons.

On 20 September 2005, two persons were killed in police firing at Khagrabari, near Coochbehar town. The Inspector General of police (North Bengal) K L Meena said police fired when the activists of Greater Cooch

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204. 2004-2005 Annual Report of NHRC.

205. 2005 Annual Report of National Crime Records Bureau.

behar Peoples Association tried to forcibly enter Siliguri town in a procession violating section 144 of Cr. P. C.

Arbitrary arrest, detention and torture were common. On 14 December 2005, Vijay Kumar Jaiswal, son of late Uma Shnakar Jaiswal, was illegally picked up by the police from his house at K.S. Path, Kharda in 24 Paeganas(North) District without any arrest or search warrant. The police had actually come in search of Vijay Kumar Jiaswal's brother but not finding him at home, the police picked up Vijay Kumar Jaiswal and detained him for about 4 days at Kharda Police Station without any charge! He was tortured during illegal detention by Ashis Dutta, Assistant Sub Inspector and other police officers of Kharda Police Station. On 18 December 2005, Vijay Kumar Jaiswal was produced before the sub divisional Magistrate on fabricated charges.<sup>206</sup>

### **Role of Prosecution:**

Today, in India, respect for law and the fear of law enforcing agency are evaporating from the minds of the criminal and day by day the situation is deteriorating to a low level. This is because of the low rate of convictions and the failure of the prosecution to prove the cases beyond reasonable doubt.

Prosecution in our criminal justice ends in failure due to non cooperation of public, reluctance of witness, lack of coordination between the investigating agency, lengthy investigation procedures, and rampant corruption at all levels, in efficiency of investigation and prosecution, interference of politicians, goondas and wealthy people of society.<sup>207</sup>

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206. INDIA: Illegal Detention and Custodial Torture by West Bengal Police, Asia Human Rights Commission Report 2005, 26th December, 2005.

207. P.C. Tripathy, Prosecution System in Criminal Justice in India – An Appraisal of the Drawbacks and Failures, Indian Journal of Criminology, Vol. 22. July, 1994, P. 70.

Criminal justice for its success mainly depends on the ability of the investigating agency which collects evidence of a case and prosecuting agency which places these evidences before the judge. The investigating agency thus stands as a doorway of the criminal justice and strengthens the foundation of the case.<sup>208</sup>

It has been observed that the code of criminal procedure, overhauled in 1973, has widened the gap between two vital units, namely the police and the prosecution of the operational as well as organizational level. This has led to a state of frustration and ambiguity. It has also been considered a sorry state of affairs in the sense that the police and the prosecution are two sides of the same coin as the police functioning has a direct bearing on the success or failure in the prosecution of criminal case in courts.

The police have a vital role in marshalling facts, while the prosecution has a very crucial role in effective presentation of the facts before the courts during trial proceedings.<sup>209</sup>

The public prosecution in a country under the rule of law is an officer of the court and his duty is to help the court in the administration of justice. He does not represent a party but the state. There should not, therefore be an unseemly eagerness for an grasping at conviction. Impartiality of his conduct is a vital as the impartiality of the court. His duty is to put all essential facts before the court so that truth is discovered and justice is done. He has even an imperative duty to produce a hostile witness if the evidence of the witness is essential to the proper unfolding of the narrative on which the prosecution is based. The primary duty of a lawyer engaged in public prosecution is not to convict but to see that justice is done.

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208. Id. P.71.

209. K.I.Vibhute, *Criminal Justice*, [1st Edition, 2004], Easter Book Company, Lucknow, P 142 – 143.

Suppression of facts and the secreting of witness capable of establishing the innocence of the accused is highly reprehensible.<sup>210</sup>

The failure of the prosecution in serious crimes generates a feeling of confidence among the habitual criminals, economic offenders and wealthy criminal to repeat the crime. This is one of the important reasons for the increase of crimes in the society. The evil of the punishment must be made to exceed the advantages of the offences. But the present criminal justice system has failure to provide proper punishment to criminals and the percentage of conviction show a deteriorating feature because of the loopholes of the prosecution system in our country.<sup>211</sup>

In the present system Assistant public prosecutions and public prosecutors are appointed by the state govt. and in some courts by the party in power. Before 1973, the appointment was made by the provision of code of criminal procedure. But since 1973 these appointments have become political appointments efficiency or experience is a secondary consideration while priority is given to affiliation to the political party in power. Some important drawbacks of present prosecution system are as follows<sup>212</sup>:

1. Lack of proper training and knowledge of Apps in police investigation system and lack of experience in prosecution proceedings.<sup>213</sup>
2. Procedural irregularity during prosecution by new Apps and improper study of police records.

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210 .R.Deb, Criminal Justice, [1st Edition, 1998], The law Book Company (P) Ltd., Allahabad, P. 12.

211 P.Ch.Tripathy, Prosecution System in Criminal Justice in India – An Appraisal of the Drawbacks and Failures, Indian Journal of Criminology, Vol .22. July, 1994, P.70

212. Id. P. 73.

213 . Ibid.

3. Examination of unimportant witness and deleting important witness because of lack of experience.
4. The system of training of witness by PP and App for refreshing their memory for the interest of prosecution is not properly followed.
5. Prosecuting agency do not take responsibility of production of materials evidence marked M.O experts during trial which, sometimes as per verdicts of our Apex court, initiate the entire proceedings.
6. Lack of co-ordination of App or PP with investigating officers of cases and with important witness causing prosecuting failures.

It is high time that state should endeavor to take steps in this respect. It will be too much to expect high degree of professional efficiency from themselves the difficulties, as mentioned above, are taken care of.<sup>214</sup>

#### **Role of Witness:**

Any discussion regarding improvement of criminal justice system will be incomplete if the plights of the witness are not discussed. When a criminal case is being tried in a criminal court, witnesses are required to attend the same for the purpose of giving deposition. But in most of the courts, particularly in the sub division, there is no sitting arrangements at all for the witnesses.<sup>215</sup> It is common practice to make the witness on their fact while they give evidence. This is a mistaken demonstration of the majesty of law.<sup>216</sup>

Even the witness are not paid their duly allowances in time, although they may be compelled to attend the court on several dates for various reasons.

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214 . Sadhan Gupta, J, Administration of Criminal Justice Basic Problems that Require Immediate Attention, Platinum Jubilee Celebration, 2006, Published by Bar Council of W.B. P. 77.

215. Id. P.77.

216. Pollock Basu, Law Relating to Protection of Human Rights, [2<sup>nd</sup> Edition 2009], Modern Law Publishing, New Delhi, P.957.

This fact also discourages the witness to attend the court. It is needless to mention that in a sensitive criminal case often the vital witness is treated with dire consequences by the invested criminals and their relatives.<sup>217</sup>

The state has a definite role to play in proceedings the witness, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth become a casualty. As a protection of its citizen the state has to ensure that during a trial in court the witness could safely depose truth without any fear or being haunted by those against whom he has disposed.1 there can not be any denial of the fact that the state agency in most of the cases, are unable to give adequate protection to the witness thereby prompting them to give false evidence in the court, as they were seared about their own safety. If we are to get proper result in the criminal cases, then it is absolutely necessary that the state should provide a machinery for providing adequate security to the witness and for this improvement of the law and order situation is a must.<sup>218</sup>

The Criminal law (Amendment) Bill 2003 was introduced in Rajya Sabha in August 2003 to implement measures designed to prevent the evil of witness turning hostile by inserting new sections, to ensure that evidence of material witness was to be recorded by the magistrate in certain cases, where investigation is an offence, punishable with death or imprisonment for seven years or more. But this provision was not framed by the parliament finally. The problem of witness turning hostile is perhaps because the section 161 Cr. P. C. statement is not signed – so the witness

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217. Id.P.957.

218. Salhan Gupta, “Administration of Criminal Justice Basic Problems that Require Immediate Attention”, Platinum Jubilee Celebration , 2006, Published by Bar Council of W.B. P. 77.

simply refuse to corroborate. There is no obligation on the court to accept all witness. Witness may be reflected by the court and also by the public prosecutor. The problem is when the main witness turns hostile. Although the court has still convict, it is difficult to uphold the conviction.<sup>219</sup>

Another problem is that if the trial takes place after three or four years, the witness may not be in a position to refresh their memory or to explain to the court what exactly happened on that day. It is very easily to prosecute the witness for getting false evidence in a criminal trial. But time has come when we are to ponder as to what was the actual cause for the witness is not disposing truthfully in a court of law. Unless and until this evidence is eradicated, no criminal Justice System will be successful.

### **Recommendation of Mallimath Committee:**

In March 2003, the committee on reforms of the Criminal Justice system (Justice Mallimoth Committee) submitted a comprehensive report with recommendation to improve the Indian Criminal Justice System. The Justice Mallimath Committee was constituted by the Government of India, ministry of Home Affairs by its order dated 24<sup>th</sup> November 2000 and was to examine the fundamental principles of criminal law, particularly with a view to shortening the long delays of criminal trials and to confidence in the Indian Criminal justice system.<sup>220</sup> This included the possibility to review the main governing the criminal justice system in India, namely the Constitution of India of 26<sup>th</sup> November 1949, the Indian penal code, the code of criminal procedure and the Indian prudence act. The committee proceeded to examine several National System of criminal procedure, and especially comparing the (adversal) and inquisitorial systems. It considered in particular the criminal justice system of continental Europe. It also consulted with many acts involved, seeking the opinion of members of the

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219 . K.T.S. Tulsi, Criminal Justice Hals Barkeys Law, Vol. 3, April,09 P.25.

220. Ministry of Home Affairs : Report of the Committee on Reforms of Criminal Justice System, (Government of India, 2003).

civil society through an in depth questionnaire, and with all actors involved in the criminal justice system, such as courts, police departments, state governments, forensic scientists, and legal academics.

**Need for Reforms-** It is the duty of the state to protect fundamental rights of the citizens as well as the right to property. The state has constituted the criminal justice system to protect the right of innocent and punish the guilty. The system divided more than a century back, has become inattentive, a large number of guilty go unpunished in a large number of cases, the system takes years to bring the guilty to justice, and has ceased to detect criminals. Crime is increasing rapidly every day and types of crime are profit rating.

The citizens live in constant fear. It is therefore that the Govt. of India, ministry of Home affairs constituted the committee on reforms of criminal justice system to make a comprehensive examination of all the functionaries of the criminal justice system, the fundamental principles and the relevant laws. The committee, having given its utmost consideration to the gnat problems facing the country, had made its recommendations in its final report, the salient features of which are given below-

**Adversarial system-** The committee has given its anxious consideration to the question as to whether the system is satisfactory or we should consider recommending any other system. The committee examined in particular the inquisitorial system followed in France, Germany and other continental countries. The inquisitorial system is certainly efficient in the sense that the investigation is supervised by the judicial magistrate which results in a high rate of (consider). However, the committee felt that some of the good features of the inquisitorial system can be adopted to strengthen the Adversarial system and to make it more effective. This includes the duty of the court to search for truth, to (arise) a proactive role to the Judges, to give directions to the investigating officers and prosecuting agencies in the

nation of investigation and leading evidence with the object of seeking the truth and focusing or justice to victims.

Accordingly the committee has made the following recommendations:-

a) A preamble shall be added to the Code of Criminal Procedures or the following lines:- "whereas it is (expedient) to constitute a criminal justice system for punishing the guilty and protecting the innocents.

"Whereas it is expedient to preserve the procedures to be followed by it.

'Whereas quest for truth shall be foundation of the criminal justice system,  
"Whereas it shall be the duty of every (functionary) of the criminal justice system and everyone associated with it in the administration of justice, to actively pursue the quest for truth. It is enacted as follows."

b) A provision on the following lines be made and placed immediately alone section 311 of the code.

"Quest for truth shall be the fundamental duty of every court."

c) Section 311 of the code be substantial on the following lines. "Any court shall at any stage of an inquiry, trial or other proceeding under the code, summon any person as a witness or examine any person in attendance though not summoned as witness or recall or re-examine any person already examined as it appears necessary for discovering the truth in the case.

d) Provision similar to section 255 of the code relating to summons trial procedure be made in repeat of trial by warrant and session procedures, empowering such court to take into consideration, the evidence received

under section 311 (new) of the code in addition to the evidence produced by the prosecutor.

e) Section 482 of the code be substituted by a provision on the following lines. "every court shall have the inherent powers to make such order as they be necessary to discover truth or to give effect to any order under this court or otherwise to secure the ends of justice."

f) A provision in the following lines be added immediately bellow section 311 of the Code. Power to issue direction regarding investigation "Any court shall at any stage or inquiry or trial under this code, have such power to issue directions to the investigating officer to take appropriate action for proper or adequate investigation so as to assist the in search for truth."

g) Section 54 of the evidence act be substituted by a provision on the following lines. "In criminal proceeding the fact that the accused has a bad character is relevant." It should be bear in need that a previous conviction is relevant as evidence of bad character.

h) Right of silence Article-20(3)

The right to silence is a fundamental right to the citizen under Article-20(3) of the constitution which says that to person accused of any offence shall be compelled to be citizens against himself. The committee feels that without the accused to any, the court should have the freedom to question the accused to (elicit) the relevant information and if he refuses to answer, to draw adverse inference against the accused. The committee has therefore felt that the accused should be required to file a statement to the prosecution disclosing his stand. For achieving this, the following recommendations are made:-

a) Section 313 of the code may be substituted by section 313A, 313B and 313 in the following lines:-

1. In every trial, the court shall immediately after the witness for the prosecution examined, question the accused generally, to explain personally any circumstance in the evidence against him.

2. a. Without previously warning the accuse, the court may at any stage of trial after examination under section 313A and before he is called on his defense - to him as the court considers necessary with the object of discovering the truth.

b. Accused remains silent as refuses to answer any question () to him by the court compelled by law to answer, the court may draw such appropriate inference including inference as it considers proper in the circumstances.

c. No act shall be administered when the accused is examined under section 313B and the accused shall not be liable to punishment for refusing to answering or by giving false answer to him.

The answer given by the accused may be taken into consideration in such enquiry of trial, and put in evidence for or against him in any other enquiry into, or trial for, any other offence which such answer may tend to show he has committed.

**Reforms in police:**

The machinery of criminal justice system is put into gear when an offence is registered and when investigated. A prompt and quality investigation is therefore the foundation of the effective criminal

justice system. Police are employed to perform multifarious duties and quite often the important work of expeditious investigation gets relegated in priority. A separate wing of investigation with clear mandate that it is accounted only to rule of law is the need of the day. Criminality has undergone change qualitatively. Therefore, the apparatus with or for investigation has to be equipped with the laws and procedure to make it functional in the present context. If the existing challenges of crime are to be met effectively not of the mindset of investigator needs a change but they have to be trained in advance technology, knowledge of changing economy, new dynamics of social engineering, efficacy and use of modern forensics etc. Investigating agency is understated, ill equipped and therefore the gross inadequacies in basic facilities and infrastructure also need attention on priority.<sup>221</sup>

There is need for the law and society to trust the police and the police leadership to ensure improvement in their credibility in the following manner:

- a) The investigating wing should be separated from the law and order wing.
- b) National security commission and the state security commission at the state level should be constituted or recommended by the national police commission.

To improve the quality of investigation the following measures shall be taken.-

- a) The post of an Additional Superintendent of Police may be created exclusively for supervision of a crime.
- b) Another Additional Superintendent of Police in each district should be made responsible for collection and dissemination of criminal

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221 . <http://www.pucl.org/Topics/Law/2003/Mallimath-recommendations.htm>. visited on 10-6-2009.

intelligence, maintenance and analyses of crime data and investigation of important cases.

- c) Each state should have an officer of IGP rank in the state crime branch exclusively to supervise. The functioning of the crime police. The crime branch should have specialized squads for agencies crime and other major crimes.
- d) Grave and sensational crime having interstate and transnational ramification should be investigated by a team of officers and not by a single I.O.
- e) Session cases must be investigated by the senior most police officer posted at the police station.
- f) Fair and transparent mechanisms shall be set up in places where they do not exist and strengthened where they exist, at the district police range and state level for redressal of public grievances.
- g) The existing system of Police Commissioners office which is found to be more efficient in the matter of crime control and management shall be introduced in the urban cities and towns.
- h) Criminal cases should be registered promptly with utmost promptitude by the SHO'S.
- i) Stringent punishment should be provided for false registration of cases and false complaints. Section 182|211 of I.P.C. be suitably amended.
- j) Specialized units or squads should be set up at the state and district level for investigating specified category of crime.
- k) With emphasize on compulsory registration of crime and removal of difference between non-cognizable and cognizable offences, the work load of investigating agencies would increase considerably.

The training infrastructure, both at the level of central govt. and state govt., should be strengthened for imparting state of the Art training to the fresh recruits as also to the in-service personnel.<sup>222</sup>

Law should be amended to the effect that the literate witness sign the statement and illiterate one puts his thumb impression thereon.

Audio/video recording of statements of witness dying declarations and confessions should be authorized by law.

Interrogation centers should be set up at the district head quarters, in each district, where they do not exist, and strengthened where they exist, with facilities like tape recording or video photography etc.

Forensic sciences and modern technology must be used in investigation right from commencement of investigation. Moreover, the network of CFSL's and FSL's needs to be strengthened for providing optimal forensic cover to the investigating officers. Mobile forensic unit should be set up at the district level.

A mechanism for co ordination among investigators, forensic experts and prosecutors at the state and district level for effective investigation and prosecution should be devised.

Preparation of police briefs in all great crimes must be made mandatory.

An apex criminal intelligence bureau should be set up at the national level for collection and dissemination of criminal intelligence. A similar mechanism may be devised at the state, district at police station level.

As the Indian police act 1861 has become outdated, a new police act must be enacted on the pattern of the draft prepared by the national police commission. Moreover some Section that is 167(2) and 167 should be amended.

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222. <http://www.pucl.org/Topics/Law/2003/Mallimath-recommendations.htm>. visited on 10-6-2009.

Section 161 of the Code be amended to provide that the statement made by any person to a police officer should be recorded in the narrative or question and answer form.

In cases of offences, where sentence is more than 7 yrs it may also be taped or video recorded.

Section 162 is amended to require that it should then be read over and signed by the maker of the statement and a copy should be served to him.

Section 162 of the Code should also be amended to provide that such statement can be used for contradicting and corroborating the maker of the statement.

Section 25 of the Evidence Act may be amended on the lines of section 32 of POTA 2002 that a confession recorded by the superintendent of the police or officer above him and simultaneously audio/video is admissible in evidence subject to the condition that the accused was informed of his right to consult a lawyer.

Identification of Prisoners Act 1920, be suitably amended to empower the magistrate to authorize taking from the accused fingerprints ,footprints, photographs, blood sample for DNA, hair, saliva or semen etc. on the lines of section 27 of POTA2002.

A suitable provision to be made on the lines of section 36 to 48 of POTA 2002 for interception of wire, electric or oral communication for prevention or detection of crime.

**Public Prosecutor:** Prosecutors are the officers of the Court whose duty is to assist the court in the search of truth which is the objective of Criminal Justice system. Any amount of good investigation would not result in success unless the institution of prosecution has persons

who are of merit and who are committed with foundation of a well structure professional training.

This important institution of the criminal justice system has been weak and somewhat neglected .Its recruitment, training and professionalism need special attention so as to make it synergetic with other institutions and effective in delivering good results.

The following recommendations are made in this regard:

1. In every state, the post of director of prosecution should be created, if not already created, and should be filled up from among suitable police officers of the rank of DGP in consultation with the Advocate General of the state.
2. The Assistant Public Prosecutors and Prosecutors shall be subject to the administrative and disciplinary control of the director of prosecution.
3. The duties of the director, inter alia, are to facilitate effective co-ordination between the investigation and prosecuting officers and to revive their work and meeting with the Public Prosecutors, Additional Public Prosecutors and Assistant Public Prosecutors from time to time for that purpose.
4. The director must function under the guidance of the Advocate General.
5. All appointments to APP's shall be through competitive examination held by the Public Service Commission having jurisdiction.
6. 50% of the vacancies in the post of Public Prosecutors or Additional Public Prosecutors at District level in each state shall be filled up by selection and promotion of seniority-cum merit from selection of APP's.
7. Remaining 50% of the post of Public Prosecutors or Additional Public Prosecutors shall be filled up by the selection from a panel prepared in consultation with District Magistrate and District Judges.

8. No person as appointed as APP or promoted as Public Prosecutor shall be posted in the Home District to which he belongs or where he was practicing.
9. Assistant Public Prosecutors should be given intensive training, both theoretical and practical. Persons in service should be given periodical in service training.
10. To provide promotional avenues and to use their expertise. Post be created in institutions for training for Prosecutors and Police officers.
11. To ensure accountability, the director must call for reports in all cases that end in acquittal, from the Prosecution who conducted the cases and the Superintendent of police of the District.
12. All prosecutors should work in close co-operation with the police department, and assist in speedy and efficient Prosecution of criminal cases and render advice and assistance from time to time for efficient performance of their duties.
13. The Commissioner of police /Dist. Supdt.of police may be empowered to hold monthly review meetings of PP's/Addl.PP's and APP's for ensuring proper co-ordination and satisfactory functioning.

**Courts and Judges;** There is gross inadequately of judges to cope up the enormous pending and new inflow of cases. The existing judge population ratio in India 10.5:13 per million population as against 50 judges per million population in many parts of the world. The supreme court has given the direction to all the states to increase the judge strength by five times in phased manner within the next few years .The vacancies in the High Courts have remained unfilled for years. This must be remedied quickly. The Commission is also deeply concerned about the deteriorative in the quality of judges appointed to

the Court at all levels. The constitution of National Judicial Commission is being considered at the national level to deal with the appointment of judges to the High Courts and Supreme Court and to deal with complaints of misconduct against them. The Committee realized the need of process to ensure objectivity and transparency in this behalf. This requires laying down the precise qualifications, experience, qualities and attributes that are needed in a good judge and also prescription of objective criteria to apply to overall background of candidate. There are also complaints of serious aberrations in the conduct of the judges. Under Art. 235 of the Constitution, the High Court can exercise supervision and control over the subordinate Courts. There is no such power conferred either on the Chief Justice of the High Court or the Chief Justice of India, or the Supreme Court of India. The provisions for impeachment are quite difficult to implement. The Committee also feel that criminal work is highly specialize and to improve quality of justice only those who have expertise in criminal work should be appointed and posted to Benches to deal exclusively with criminal work. The Committee feels that suitable intensive training including practical programme should be devised and all the judge given training not only at induction time but also in service at frequent intervals. To achieve this objectives, the following important recommendations are:

1. Qualification prescribed for appointment of judges at different levels should be reviewed to ensure that highly competent judges are inducted at different levels
2. Special attention should be paid to enquire into the background and antecedents of the persons appointed to the Judicial Officers to ensure that persons of proven integrity and character are appointed.

3. Intensive training should be imparted in theoretical, practical and in court management to all the judges.
4. In the Supreme Court and High Courts, the respective Chief Justices should constitute a separate criminal division consisting of such number of criminal benches as may be required consisting of judges who have specialized in criminal law.
5. In the subordinate courts where there are more judges of the same cadre at the same place, as far as possible assigning of civil and criminal cases to the same judge everyday should be avoided.
6. In urban areas where there are several trial Courts, some Courts should have lady judges who should be assigned as far as possible criminal cases relating to women.
7. A high power committee should be constituted to lay down the qualification, qualities and attributes regarding character and integrity that the candidate for the High Court Judgeship should possess and specify the evidence or material necessary to satisfy these requirements.
8. The Chief Justice of the High Courts may be empowered on the lines of US Judicial Councils Reforms and Judicial Conduct and Disabilities Act 1980 to do the following:
  - a. Advise the Judges suitably.
  - b. Disable the judge from hearing a particular class of cases.
  - c. Withdrawing judicial work for a specified period.
  - d. Censure the judges.
  - e. Advise the judge to seek voluntary retirement. the Chief Justice of India to advise the Judge or initiate action for impeachment.
  - f. Move the Chief Justice of India to advise the judge or initiate action for impeachment.