

CHAPTER - 5

PROTECTION AGAINST CUSTODIAL TORTURE IN INDIA

CHAPTER 5

PROTECTION AGAINST CUSTODIAL TORTURE IN INDIA

I. CONSTITUTIONAL PROTECTIONS:

The constitution of India did not guarantee to the persons in police custody expressly, the needed effective safeguards to the discretion of the police. The Constitution contained no specific rights against torture, cruel, inhuman treatment and degrading punishment. In a country so familiar with police *raj*, the Court evolved a judicial process more appropriate in a police state than in a welfare state. The police assumed that the criminal process attached greater importance to the end than to the means, to order than to law.¹ The Supreme Court of India in the earlier stage took the same stand and glorified public order at the expense of individual rights.²

In tune with the International human rights instruments against torture, the Constitution of India also emphasizes respects and honour of human dignity and fundamental freedoms. The Preamble, Fundamental rights, Directive principles of State policy and various other provisions stand testimony to the protection of human rights.³ Beginning with the Preamble, the Constitution assures every citizen the dignity of the individual and guarantees to secure justice- social, economic and political, equality of status and opportunity. Torture has not been specifically defined in the Indian Constitution or specifically prohibited in penal laws. However, the Supreme Court has held that the right not to be tortured is enshrined in the right to life guaranteed in Article 21 of the Constitution.⁴ Although the Indian constitution does

¹ Mohammed Ghouse, *State lawlessness of Constitution in comparative Constitution (Mahendra Singh, Ed.1989) at 253; See also Dr. B. Hydervali "Law and Custodial torture in India", Cri.L.J.1999 at 37.*

² *A.K.Gopalan vs. State of Madras*, AIR 1950 SC 27

³ Jitendra Mishra: "Custodial Atrocities, Human Rights and the Judiciary" 47 *JILI* 2005 at 513.

⁴ *Prem Shanker vs. Delhi Administration*, AIR1980 SC 1535; *Sunil Batra vs. Delhi Admin.*, AIR SC 1579; *Kishore Singh vs.State of Rajsthan*, AIR1981 SC625; *Khatri vs. State of Bihar*,

not contain any specific provision on police torture and degrading treatment or punishment of the arrested person it does not mean that arrested person are without any constitutional protections and fundamental freedoms and rights. In *Kharak Singh vs. State of Uttar Pradesh*⁵ "life" was held to cover the right to the possession of each limb and organ of the body and a prohibition was read in Article 21 against any form of physical mutilation or deliberate inflicting of pain or suffering. However protection against illegal and arbitrary arrest is contained in Article 22⁶ of the Constitution. The arrest must be supplied and supported by sufficient ground under Article 22.

(a) FREEDOM FROM TORTURE AS A FUNDAMENTAL RIGHT TO LIFE:

The Constitution of India provides various provisions for the protection against custodial torture. Article 21 of the constitution of India, which guarantees the right to life and personal liberty advances the cause of Article 3 of the Universal Declaration of Human Rights and Article 6 the International Covenant on Civil and Political Rights. Article 21 guarantees the right to life and personal liberty, of which deprivation can only be in accordance with the procedure established by law, which must be just, fair and reasonable. The right to life and personal liberty, as per its expanded meaning, includes the right to live with human dignity and thus, would also include within itself a guarantee against custodial torture and assault by the state or its functionaries.⁷In *National Human Rights Commission vs. State of Arunachal Pradesh*⁸the Supreme Court explained and observed that the State is obliged to protect life and liberty of non-citizens also.

AIR1983SC 1086; *Sheela Barse vs.State of Maharashtra*, AIR1983 SC 376; *Nilbati Behera vs.State of Orrisa*, AIR 1993SC 1960; *State of M.P. vs. Shyam Shunder Trivedi* (1995) 4 SCC 262; *D.K Basu vs. State of West Bengal* AIR 1997 SC 743.

⁵ AIR 1963 SC 1295

⁶ Article 22 of the Constitution which reads: No person shall be deprived of his life or personal liberty except according to procedure established by law.

⁷ *D.K. Basu vs West Bengal* , (1997)1 SCC 416 at.426

⁸ (1996) 1 SCC 742

The Supreme Court of India in series of cases has come down heavily on the police for its atrocities and declared that any form of torture, cruel, inhuman or degrading treatment and custodial deaths to be the violation of right to life and within the inhibitive sweep of Article 21 of the Constitution⁹ Article 21 covers, *inter- alia*, the right against bar fetters, handcuffing, custodial violence and protection against third degree methods by the police¹⁰ Thus the right against custodial torture arises from Article 21 of the Constitution of India. The fundamental rights are all pervasive and do not depend on whether they are so described. When physical harm is wrongfully caused by the State agency it amounts to violation of the right to life and it does not require a label to become such violation. Therefore a mere non-mention to Article 21 in the pleadings will not defect a claim where the facts proved clearly establish that the fundamental right to life is in fact violated.¹¹ This provision is a constitutional command to state to preserve the basic human rights of every person. It lays foundation for a society where rule of law has primacy and not arbitrary or capricious exercise of power. Each expression used in Article 21 enhances human dignity and value. 'Life' means 'state of functional activity and continual change peculiar to organized matter, especially to the protection of it constituting an animal or plant before death, animate existence, being alive.'¹² But used in the Constitution it does not mean mere physical existence but rather denotes something much more than it. It means the right to leave with human dignity and all that goes with it, viz., the basic necessities of the life such as adequate nutrition, clothing, shelter and facilities

⁹ *Prem Shanker vs. Delhi Administration*, AIR1980 SC 1535; *Sunil Batra vs. Delhi Admin.*, AIR SC 1579; *Kishore Singh vs. State of Rajsthan*, AIR1981 SC625; *Khatri vs. State of Bihar*, AIR1983SC 1086; *Sheela Barse vs. State of Maharashtra*, AIR1983 SC 376; *Nilbati Behera vs. State of Orrisa*, AIR 1993SC 1960; *State of M.P. vs. Shyam Shunder Trivedi* (1995) 4 SCC 262; *D.K Basu vs. State of West Bengal* AIR 1997 SC 743.

¹⁰ B.P. Singh Sehgal (Ed): *Human Rights in vs. India*, at 211

¹¹ *State of Gujarat vs. Govindbhai Thakhubhai*, AIR 1999 Gujarat 316 at 323

¹² Quoted in *Kartar Singh vs. State of Punjab*, Cri.L.J. 1994. SC.3154

for reading, writing and expressing oneself,¹³ etc. Since custodial torture is a serious violation of the right to life and personal liberty guaranteed under article 21, it is unfair and illegal under this provision. As a corollary to its protection or immunity from torture has acquired the status of a fundamental right explicit in Article 21 of the Indian Constitution. Liberty is the most cherished possession of a man. Article 21 instead of conferring the right, purposely, uses negative expression. Obviously because the Constitution has recognized the existence of the right in every man, it was not to be guaranteed or created. One inherits it by birth. This absolutism has not been curtailed or eroded. Restriction has been placed on exercise of power by the state using the negative formulation. It is State, which is restrained from interfering with freedom of life and liberty except in accordance with the procedure established by law. Here use of the word 'deprived' is of great significance. According to the dictionary it means, debar from enjoyment; prevent from having normal home life. Since deprivation of right of any person by the State is prohibited except in accordance with procedure established by law, it is to be construed strictly against the State and in favour of the person whose rights are affected.¹⁴ If the Article were construed as empowering the State to make a law and deprive a person as constitution permits, then the entire concept of personal liberty would be frustrated. For this reason the word 'except' is of great significance as it restricts the right of the State by directing it not to fiddle with this guarantee unless it enacts a law which must withstand the test of Article 13. Today it appears well settled that procedure contemplated under Article 21 is 'right, just and fair' and "not arbitrary, fanciful or oppressive,"¹⁵ In other words mere law is not sufficient it must be fair and just law.

Here the term 'law' covers both the substantive and procedural laws. Notwithstanding

¹³ *Francis Coralie Mullin vs. The Administrator, Union territory of Delhi*, A.I.R. 1981 S.C.746

¹⁴ *Kartar Singh vs. State of Punjab*, Cri.L.J. 1994. SC.3154

¹⁵ *Maneka Gandhi vs. Union of India*, AIR 1978 SC 597

this, custodial torture and degrading treatment of suspects by the police continues. In *Niranjan Singh's* case¹⁶ the Court commented that “the police instead of being the protector of law have become the engineer of terror and panic the people into fear.” The Apex court was again deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scare in the minds of common citizen in *Raghubir Singh vs. State of Haryana*,¹⁷ where the violence employed by the police to extract a confession resulted in the death of a person suspected of offence. The apex court observed:¹⁸

“Their lives and liberty are under a new peril when the guardians of the law gore human right to death. The vulnerability of human rights assume a traumatic, torture some poignancy, the violent violation is perpetrated by the police arm of the State whose function is to protect the citizen and not to commit gruesome offences against them as has happened in this case. Police lock-up, if reports in newspapers have a streak of evidence, are becoming more and more awesome cells. This development is disastrous to our human rights awareness and humanist constitutional order.”

The Court has placed the responsibility to remedy the situation on the State. In the words of the court:

“The State, at the highest administrative and political levels, we hope, will organize special strategies to prevent and punish brutality by police methodology. Otherwise the credibility of the rule of law in our Republic *vis-a-vis* the people of the country will deteriorate.”

¹⁶ *Niranjan Singh vs. Prabhaker Rajaram*, AIR 1980 SC 785

¹⁷ AIR 1980 SC 1087

¹⁸ *Ibid*, at 1088

In *Kishore Singh vs. State of Rajasthan*¹⁹ severe strictures were passed by the apex court against the police force for its gruesome act of custodial torture. The court observed:

“Nothing is more cowardly and unconscious than a person in 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.”

The court suggested the police to depend on “its wits and not on fists” and on a “culture and not on torture” for their investigation. It advised the government to “re-educate the police, to weed them out of their sadistic tendencies and inculcate in them the respect for human person and punish those responsible for custodial torture.” The court hoped that the police cruelty would receive the serious attention of the government otherwise “who will police the police.”²⁰

In *Sheela Barse vs. State of Maharashtra*²¹ the Supreme Court gave following directions and suggestions to the State Government to prevent the recurrence of police/ custodial torture; *first*, the State Government should prepare pamphlets in local languages describing the rights of arrested persons which should be placed in each police cell to enable all detainees in police custody to know their rights. *Secondly*, the police should inform the nearest legal Aid Committee immediately of an arrest so that the committee might provide assistance at once at Government expense. *Thirdly*, the police should immediately inform the relatives of the arrested person. *Fourthly*, male detainees should be kept separate from female detainees and a female officer should be present during the interrogation of female detainees. *Fifthly*, District and Session Judge should make unannounced visits to police stations to check on the treatment of

¹⁹ *Kishore Singh vs State of Rajasthan*, AIR1981 SC 625

²⁰ Saini, RS: “Custodial Torture in Law and Practice with reference to India”, 36, *JILI* 1994, at 166-192

²¹ AIR 1983 SC 376

inmates. And *finally*, Magistrates before whom detainees appear must enquire whether they had complaints of police torture, and to inform all detainees that they have a right to a medical examination under section 54 of Cr. P. C.

However, the vast majority of officials, police and Magistrates have not implemented these sensible directives. No wonder cases like that of *Ram Sagar Yadav*²² continued to take place. In the instant case a former was done to death in police custody because he made a complaint against a police constable for demanding bribe. This case brings into sharp focus the reasons responsible for non-conviction of the police officers or for their conviction for lesser offences. Although, on the basis of proved facts the policeman could have been adjudged guilty of murder, the trial judge convicted him of culpable homicide not amounting to murder under the second part of Section 304 of IPC and awarded him 7 years rigorous imprisonment. Later, the High Court set-aside both the conviction and the sentence. The Supreme Court affirmed the conviction and sentence but noted with regret that the trial judge did not find policeman guilty of murder. The judgment throws light on special difficulties involved with the proof of torture by the police personnel and recommended a change in the law of evidence to prevent the escape of the policeman guilty of custodial torture. The Court observed:²³

“Before we close, we would like to impress upon the Government the need to amend the law appropriately so those policemen who commit atrocities on persons who are in their custody are not allowed to escape by reason of paucity or absence of evidence. Police officers alone and none else can give evidence as regards the circumstances in which a person comes to receive

²² *State of U.P. vs. Ram Sagar Yadav*, AIR 1985 SC 421

²³ *Id.*; See also, Banerjee, Nandini G., “In Custody of Death”, *The Hindustan Times*, New Delhi, 29 March, 1995

injuries while in their custody. Bound by ties of a kind of brotherhood, they often prefer to remain silent in such situations and when they choose to speak, they put their own gloss upon facts and pervert the truth. The result is that persons, on whom atrocities are perpetrated by the police in the sanctum sanctorum of the police station, are left without any evidence to prove who the offender is. The law as to burden of proof in such cases may be re-examined by legislatures so that handmaids of law and order do not use their authority and opportunities for oppressing the innocent citizens who look to them for protection.”

The *Gauri Shaker Sharma vs. State of U.P.*,²⁴ is a typical case of a police officer trying to rescue his colleague by giving evidence favourable to the accused policeman. The High Court persuaded itself to believe that the police officer did not give false evidence since by doing so he would have risked losing his job. Consequently, the High Court set-aside the convictions under Section 304 part II and some other provisions of the Indian Penal Code and Prevention of Corruption Act, of the Officer-in – charge of the police station for fatal injuries inflicted to a person suspected of dacoity. Restoring the conviction and sentence of 7 years by the trial court and rejecting the plea for substitution of imprisonment by fine, the Supreme Court rightly observed:

“The offence is of a serious nature aggravated by the fact that it was committed by a person who is supposed to protect the citizens and not misuse his uniform and authority to brutally assault them while in his custody. Death in police custody must be seriously viewed for otherwise we will help take a stride in the direction of police *raj*. It must be curbed with a heavy hand. The

²⁴ AIR 1990 SC 709

punishment should be such as would deter others from indulging in such behaviour. There can be no room for leniency.”²⁵

The Supreme Court has observed in *Citizens for Democracy vs. State of Assam*²⁶ that the police and jail authorities are under a public duty to prevent the escape of prisoners and provide them with safe custody but at the same time the rights of the prisoners guaranteed to them under Articles 14, 19, and 21 of the Constitution of India cannot be infringed. The authorities are justified in taking suitable measures, legally permissible to safeguard the custody of prisoners, but the use of fetters purely at the whims or subjective discretion of the authorities is not permissible. Further it can be emphasised that prison houses are a part of Indian earth and the Indian constitution cannot be held at bay by jail officials dressed in a little, brief authority when a convict invokes part III of the Constitution. Protection of prisoner within his rights is part of the domain of article 21.²⁷ In *Prem Shanker Shukla vs. Delhi Administration*²⁸ the Supreme Court held that the Punjab police rules were violating Article 14, 19, and 21 of the constitution of India and Krishna Iyer, J. delivered the majority judgment that every under-trial who was accused of a non-bailable offence punishable with more than three years jail term, would be hand-cuffed, is violating the said Articles. In the case of *Sunil Batra and Charles Sobhraj*,²⁹ an under-trial prisoner challenged the action of the superintendent of jail putting him into bar fetters and kept him in solitary confinement was an unusual and against the spirit of Constitution and

²⁵ AIR 1990 SC 709 at 717

²⁶ (1995) 3 SCC 743 at 750

²⁷ *Sunil Batra vs. Delhi Administration*, AIR 1980 SC 1579 at 1583

²⁸ AIR 1980 SC 1535

²⁹ AIR 1980 SC 1579

declare it is a violation of right to locomotion.³⁰ After a decade same court held that handcuffing was inhuman and unreasonable in *Sunil Gupta vs. State of M.P.* case.³¹

The constitution of India carries an impressive list of fundamental rights. It includes most of the provisions of the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and various other international instruments. India has ratified as many as 13 international instruments on human rights. But it has not yet ratified the following instrument: Optional Protocol to the International Covenant on civil and Political right second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of death penalty Convention on the right of the Child; Convention against Torture; Convention on Marriage; Convention on the Reduction of Statelessness and Convention on protocol relating to the status of refugees. India can further the cause of human rights and improve its image abroad by not merely setting of a lame- duck NHRC but the ratifying these human rights instruments³²

India is a party to the International Covenant on Civil and political Rights but while the covenant makes as seven fundamental rights as non-derogable even during the state of emergency, under the Indian constitution, there are only two rights³³ which are non - derogable.

(b) FREEDOM FROM ARBITRARY ARREST AND DETENTION:

Arrest under the English law is defined as “the restraining of the liberty of a man’s person in order to compel obedience to the order of the court of justice, or to

³⁰ *K.C.Rawal: “A Human Right Approach to The Prisoners”;* *Cri LJ* 1999 (J) at 34

³¹ (1990) 3 SCC 119

³² .S .Saini; “Custodial torture in Law and Practice with Reference to India,” 36:2 *JILI* 1994 166 at 192

³³ These are protection in respect of conviction for offence (Article 20) and protection of life and personal liberty (Article 21). These two rights were made non- derogable when article 359 of the constitution was amended by Forty-fourth amendment act 1978.

prevent the commission of crime or to ensure that a person charged or suspected of a crime may be forthcoming to answer it. To arrest a person is to restrain him of his liberty by some lawful authority.”³⁴ The new encyclopaedia Britannica states arrest as “... if arrest occurs in the course of criminal procedure the purpose of the restraint is to hold the person for answer to a criminal charge or to prevent him from committing an offence....”³⁵ Similarly in *Corpus Juris Secundum* it is stated that, “in criminal procedure an arrest is the taking of a person into custody in order that he may be held to answer for or be prevented from committing a criminal offence.”³⁶ ‘Arrest’ is not defined in the Code of Criminal Procedure 1973 (hereinafter referred to as the code). It is not an arrest where a person is called to a police station or taken to police station. A person may be under unlawful detention but is not under arrest unless he is formally arrested under the Code. Section 41³⁷ of the code authorizes any police

³⁴ *Earl Jowitt: The Dictionary of English Law*, Vol. I, (1959) at 152

³⁵ 15th edition, Vol. I at 540

³⁶ Vol. VI at 570

³⁷ Article 41 of the Cr. P. C. which reads as under:

When police may arrest without warrant:

- (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person-
 - (a) Who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or
 - (b) Who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking; or
 - (c) Who has been proclaimed as an offender either under this Code or by order of the State Government; or
 - (d) In whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or
 - (e) Who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or
 - (f) Who is reasonable suspected of being a deserter from any of the Armed Forces of the Union; or
 - (g) Who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or
 - (h) Who, being a released convict, commits a breach of any rule made under subsection (5) of section 365; or (i) For whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

officer to arrest any person, without an order from a magistrate or without a warrant, who has been concerned in any cognisable offence or against whom a reasonable complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned. Under the Code the powers with the police are the widest when a person is concerned for suspected to be concerned in any cognisable offence.³⁸ There is no requirement in the Code for guiding the police officer regarding whether or not arrest is necessary for investigation or there is an apprehension that he may not appear before the court or abscond or interfere in the investigation. It is said to note that such a drastic power can be exercised by even the police constable who is a police officer under the Section 41 of the Code. It also shows a complete disregard to the sacrosanctity of liberty in India.

The law of arrest under the Code, which incorporated the then English law, has not been substantially changed in spite of the drastic changes in the English law of arrest. The English Law has been subjected to periodical review to make it responsive to the democratic imperatives of the English society. In this connection the Royal Commission in England suggested restrictions on the power of arrest on the basis of the 'necessity principle'. The two main objectives of this principle are that police can exercise powers only in those cases in which it is genuinely necessary to enable them to execute their duty to prevent the commission of offences and to investigate crimes. The Royal Commission was of the view that such restrictions would diminish the use of arrest and produce more uniform use of powers. The Royal Commission³⁹ Further provided:

(2) Any officer in charge of a police station may, in like manner, arrest or cause to be arrested any person, belonging to one or more of the categories of person specified in section 109 or section 110.

³⁸ *S.N. Sharma vs. Bipan Kumar Tewari*; AIR, 1970, SC 786

³⁹ Sir Cyril Philips at 45 quoted in *Joginder Kumar vs. State of UP* 1994 Cri.L.J.1981 at 1985 (SC)

“We recommend that detention upon arrest of an offence should continue only on one or more of the following criteria: the persons unwillingness to identify himself so that a summons may be served upon him; the need to prevent the continuation or repetition of that offence; the need to protect the arrested person himself or other persons or property; the need to secure or preserve evidence of or relating to that offence or to obtain such evidence from the suspect by questioning him; and the likelihood of the person failing to appear at court to answer any charge made against him.”

In order to regulate the excessive use of power of arrest by police the Royal Commission suggested:

“To help to reduce the use of arrest we would also propose the introduction here of a scheme that is used in Ontario enabling a police officer to issue what is called an appearance notice. The procedure can be used to obtain attendance at the police station without resorting to arrest provided a power to arrest exist for example to be fingerprinted or to participate in an identification parade. It could also be extended to attendance for interview at a time convenient both to the suspect and to the police officer investigating the case...”⁴⁰

In India, though wide powers are given to the police under the Code yet in a democratic society governed by the rule of law, the powers of the police are to be exercised with utmost restraint. Under our laws and Constitution, decency of state behaviour has been assured even by arming the accused with a number of basic human rights, but they can never be preserved, for less upheld, unless we have in this country an honest, human and unbrutalised police force whose members are

⁴⁰ Id. at 46 quoted in *Joginder Kumar vs. State of UP* 1994 Cri.L.J.1981 at 1985 (SC)

determined to act fairly and within bounds of law.⁴¹ The reality is that the rights to life and personal liberty, to protection against self-incrimination and to protection from arbitrary arrest has been expressly recognized under the Constitution with the sole aim of protecting the life, dignity and respect of the persons suspected of the commission of any offence. Arrests should be made only in the case of grave offences. The National Police Commission in its third report referring to the quality of arrest in India mentioned power to arrest by police in India as one of the main source of corruption in the police. The report suggested that by and large, nearly 60 percent of the arrest were either unnecessary or unjustified and such unjustified police action accounted for 43.2 per cent of the expenditure of the jails⁴²

Article 21 of the constitution of India assures that no person shall be deprived of his life and liberty except by procedure established by law and any procedure meant for deprivation of such liberty must be fair, just and reasonable and not arbitrary, fanciful or oppressive.⁴³ The apex court in *Joginder kumar vs. State of UP*⁴⁴ explained the power of the police to arrest an accused. It laid down that no arrest can be made because it is lawful to for the police officer to do so. The existence of power to arrest is one thing. The justification for exercise of of it is quite another. The police officer must be able to justify the arrest apart from the power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest shall be made without a

⁴¹ R. Deb, "Notes to eschew Malpractices in Law Enforcement" 34 *JILI* (1992) 416 at 417

⁴² The National Police Commission (1979S-80) third report at 31

⁴³ *Maneka Gandhi vs. Union of India* AIR 1978 SC 597

⁴⁴ 1994 Cri. L.J.1981 (SC)

reasonable satisfaction reached after some investigation as to genuineness and bona fides of a complaint and a reasonable belief both as to person's complicity and even as to the need to effect arrest. Denying a person of his liberty is a serious matter.⁴⁵

The National Police Commission⁴⁶ had clearly laid emphasis on this necessity principle and suggested:

“...An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances:

- 1) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror stricken victims.
- 2) The accused is likely to abscond and evade the processes of law.
- 3) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.
- 4) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again.

It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines....”

The National Police Commission report further states clearly that the safeguards and guidelines that it is making are in extension of the already existing powers of individual liberty enshrined in Articles 21 and 22 of the Indian Constitution.

⁴⁵ *Id.* at 1986

⁴⁶ *See, The Third Report of the National Police Commission. (1979-80).*

To quote "The above guidelines are merely the incidents of personal liberty guaranteed under the Constitution of India. No arrest can be made because it is lawful for the Police Officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a Police Officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer affecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave Station without permission would do."

The NPC recommended that some changes be made in law to give teeth to the legal requirement compelling policemen to follow strict procedures regarding arrest, custody and detention to prevent abuse of individual freedoms and personal liberty. This has still not happened.

The Supreme Court in *Joginder Kumar Singh vs. State of U.P.*⁴⁷ by referring to the above guidelines said that these guidelines are merely the incidents of personal liberty guaranteed under the Constitution of India. These reflect the Constitutional concomitants of the fundamental right to personal liberty and freedom. Therefore, a person is not liable to be arrested merely on suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer affecting the arrest that such arrest is necessary and justified. The Supreme Court, in its zeal to prevent the indiscriminate arrests, directed that Director General of Police of all States in India shall issue directions that a police officer making an arrest should also record reasons for making the arrest.⁴⁸

(i) Arrest and Detention of Women:

Whenever a woman is required to be examined as a witness in connection with a case, she should not be summoned to the police station.

Section 160(1) of the Cr. P C allows police to require attendance of witnesses at a police station "provided that no male person under the age of fifteen years or woman shall be required to attend at any place other than the place in which such male person or woman resides. "

Prior to the amendment Act of 26 of 1955 even a child or a woman, if so required by the investigating officer, was bound to attend at the place of the investigation. After the amendment, if officer wants to examine a child below the age of 15 years or a woman (whether pardanashin or not) he must come to their residence. If this provision is violated and the child or woman is kept under restraint in the police station or other place of investigation, the investigating officer may be liable to

⁴⁷ AIR, 1994 SC 1349

⁴⁸ *Id.* at 1987 para 29

punishment under section 341 and 342 of Indian Penal code⁴⁹ This provision is routinely ignored.

In November 1994, the report of a Commission of Inquiry held into the rape of a woman and the death of her husband in custody in Tamil Nadu in June 1992 was made public several recommendations were made in the report including the following:

“Whenever female persons are taken to the Police Station for interrogation, Women Police Constables may be immediately posted to guard them till they are kept in the police station. Whenever there is allegation of rape during custody in Police Station the victim should be immediately sent for medical examination to find out whether rape has been committed on that person. Whenever allegation of rape is made during custody and the same was found true after investigation, the victims may be provided with adequate compensation so provided may be recovered from the culprits.”

This commission of inquiry also recommended that the police personnel against whom there are allegations of rape should be suspended. Six years later, in July 1998, a similar incident occurred in the same state when a woman and her husband were severely tortured, and the man even died as a consequence of the severity of injury.

Police officer vested wide discretionary power to arrest. According to section 46 (1) of the code a police officer making an arrest is required to actually touch the body of the person to be arrested, unless there be a submission to the custody by word or action. But in case of a woman, their submission to the custody should be presumed unless provided otherwise and there should be no occasion for a police

⁴⁹ *Raja Ram vs. State of Haryana*, (1971) 3 SCC 945

officer making arrest of a woman to touch her person. It is also necessary to ensure that except in unavoidable circumstances, no woman should be arrested after sunset and before sunrise. Arrest or search of women should only take place in the presence of women police officers and should not take place at night. However in *State of Maharashtra vs. C.C.W Council of India*,⁵⁰ it was laid down by the Supreme Court that the arresting officer, after recording reasons can arrest female person for lawful reasons at any time of day and night even in absence of lady constable.

Women should be detained separately from men. The effectiveness of this gender-based detention should be monitored by independent mechanisms. The Apex Court gave detailed instructions in the case of *Sheela Barse vs. State of Maharashtra*,⁵¹ to concerned authority for providing security and safety in police lock up and particularly to woman suspects. Female suspects should be kept in separate lock up and not in the same in which male accused are detained and should be guarded by female constables. And the Court further directed the I.G, prison and State Board of Legal Aid Advice Committee to provide legal assistance to the poor and indigent accused (male and female) whether they are under-trials or convicted prisoners.⁵² The practice of detaining, illegally, women relatives of alleged accused, or alleged absconding accused, as a means of forcing surrender of suspects should be clearly identified as illegal and constituting the offence of “wrongful confinement.” Reports of such practices should be investigated promptly and action also taken against those responsible. The Supreme Court⁵³ has issued orders/ directions to various High Courts with regard to the deplorable conditions of mentally ill and insane women and children kept in jails.

⁵⁰ AIR 2004 SC 7

⁵¹ AIR 1983 SC 378

⁵² *Id*

⁵³ *Sheela Barse vs. Union of India*; (1995)5 SCC 654

(ii) Arrest and Detention of Children:

It is the Juvenile Justice Act that governed the treatment meted out to “delinquent” and “neglected” children. Meanwhile, there have been several reports of the ill treatment/death⁵⁴ of children by the police on arrest as well as when in custody of Remand Homes (Juvenile homes), particularly of street children. The Juvenile Justice Act provided that no child could be put in a jail or a lock-up.⁵⁵ However, just as in the procedure of following legal procedures in matters of arresting and detaining adults, there are shocking lapses in the legal safeguards on arrest and custody of children leading to the severe abuse of children who require special protection. The police officials have acted with gross negligence in protecting the rights of children and petitions are filed for their release.⁵⁶

In hearing, India submitted its initial report under the Convention on the Rights of the Child in January 2000, the Committee on the Rights of the Child recommended that the registration of each child taken to a police station be mandatory, including date, time and reasons for detention. That such detention is subject to frequent and mandatory review by a magistrate. The Committee further recommended that sections 53⁵⁷ and 54⁵⁸ of the Criminal Procedure Code be amended

⁵⁴ *SAHELI a Women's Resources Centre vs. Commissioner of Police, Delhi*; AIR 1990 SC 513

⁵⁵ Section 18(2) of the Juvenile Justice Act

⁵⁶ *Afzal and another vs. State of Haryana*; (1994) 1 SCC 425 at 426.

⁵⁷ Article 53 of Cr. P. C. which reads as under:

Examination of accused by medical practitioner at the request of police officer:

- (1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting, at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and -under his direction, to make such all examination of the person arrested as is reasonable necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.
- (2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.
Explanation: In this section and in section 54, "registered medical practitioner means a medical practitioner who possesses any recognized medical qualification as defined in clause (1) of section

so that the medical examination, including age verification, is mandatory at the time of detention and at regular intervals.

In spite of legislative provisions providing protection against indiscriminate arrests under the Code and the Constitution, yet it is difficult to ensure protection of freedom of individuals from the arbitrary exercise of powers by the Police unless there are proper provisions for supervision and accountability for non-conformance to the guarantee of human liberty and dignity. This has been amply demonstrated by frequent intervention of the Supreme Court against arbitrary arrests and its timely directives regarding performance of duty by police while affecting arrest. For instance, in *Sheela Barse vs. State of Maharashtra*,⁵⁹ the Supreme Court has taken serious note of non-disclosure of grounds of arrest; and in order to make the right to be informed of the grounds of arrest effective, it issued directions that, "whenever a person is arrested by the police without warrant he must be immediately informed of the grounds of his arrest and in the case of every arrest, it must be made known to the person arrested that he is entitled to apply for bail. *The Maharashtra State Board of Legal Aid* shall forthwith get a pamphlet prepared setting out the legal right of an arrested person and printed copies of the pamphlet in Marathi, Hindi and English should be affixed in each cell in every police lock up and should be read out to the

2 of the Indian Medical Council Act, 1956 (102 of 1956), and whose name has been entered in a State Medical Register.

⁵⁸ Article 54 of Cr. P. C. which reads as under: Examination of arrested person by medical practitioner at the request of the arrested person: When a person who is arrested, whether on a charge or otherwise, alleges, at the time when he is produced before a Magistrate or at any time during, the period of his detention in custody that the examination of his body will afford evidence which will disprove the commission by him of any offence or which Magistrate shall, if requested by the arrested person so to do direct the examination of the body of Such person by a registered medical practitioner unless the Magistrate considers that the request is made for the purpose of vexation or delay or for defeating the ends of Justice.

⁵⁹ AIR 1983 SC 378

arrested person in any one of the three languages which he understands as soon as he is brought to the police station.⁶⁰

II. LEGAL PROTECTION/SAFEGUARDS FOR DETAINEES IN CUSTODY:

Indian law provides certain right to the prisoners/ suspects/ accused persons while in the custody. These rights are so fundamental that no one can lawfully violate them. Unlike the International Covenant on Civil and Political Rights, the Indian Constitution does not specially provide any rights against custodial torture. However certain fundamental rights enumerated in part III of the constitution are also available to them. These rights are mainly contained in Articles 19, 20,21,22,32 and 226 of the constitution. Besides these constitutional rights, they enjoy certain other legal rights under the Indian Penal Code, The Criminal Procedure Code and the Indian Evidence Act 1872. Various police and, prison Acts and manuals what's more carry certain rules and regulations against custodial torture. The human rights conscious Indian Supreme Court in a number of cases has not only acknowledge these rights but expanded their scope through the process of judicial activism giving new and liberal interpretation.

(a) NOTIFICATION OF PERSON IN CUSTODY:

Human rights of persons in custody are being refurbished and further additions are being made. For instance, England's Criminal Law Act of 1977 provides that without delay or more delay than is necessary for procuring of just apprehension of other offenders or prevention of crime, a person held in police custody is entitled to have one person, reasonably named by him, informed of his whereabouts. It is said considerable police efforts and time is consequently involved in this new right which

⁶⁰ *Id.* at 382

even applies to terrorists ⁶¹A similar duty has been cast by the Supreme court on police in India in *Sheela Barse's* case⁶² where it has directed that as soon as a person is arrested the police immediately obtain from him the name of any relation or friend whom he would like to be informed about his arrest and the police should get in touch with such relative or friend and inform about his arrest.⁶³ These directions are valuable safeguards for protection of the human rights of the arrested persons if, these safeguards are honoured by the police in letter and spirit. However, unscrupulous attitude of the police is not unknown as sometimes accused are “picked up” and taken to undisclosed places for interrogation and their whereabouts are not disclosed to the relatives or friends even on their persistent enquiries.

The existing statutory Indian Law, if viewed in proper prospective, does provide for notification of the arrested person, i.e. there are some special circumstances where there is a statutory duty of the police to notify the arrest. These circumstances are given in Section 19(a) of the Juvenile Justice Act 1986,⁶⁴ Section 58 of the Code of Criminal Procedure, 1973⁶⁵ and Rule 229 of the Procedure and Conduct of Business in Lok Sabha.⁶⁶

⁶¹ Anderson John, “Human Rights in Criminal Procedure- A Police View”, in John A Andrew (Ed.) *Human Rights in Criminal Procedure*, at 345 (1982),

⁶² AIR 1983, SC 378

⁶³ *Id.*, at 382

⁶⁴ Section 19(a) of The Juvenile Justice Act, 1986: The Parent or guardian of the child, if he can be found of such arrest and direct him to be present at the children’s court before which the child will appear.

⁶⁵ Section 58 of The Code of Criminal Procedure 1973, states, that officers in-charge of police station shall report to the District Magistrate or if he so directs, to the Sub-Divisional Magistrates, the cases of all persons arrested without warrant within the limit of their respective stations whether such persons have been admitted to bail or otherwise.

⁶⁶ When a member is arrested on criminal charge or is detained under an executive order of the magistrate, the executive authority must inform without delay such fact to the speaker. As soon as the arrest, detention, conviction or release is affected, intimation should invariably be sent to the Government concerned concurrently with the information sent to the Speaker/ Chairman of the Legislative Assembly/Council /Lok Sabha/Rajya Sabha. This should be sent by telegrams and also by posts.

The Supreme Court in *Joginder Kumar Singh vs. State of U.P.*⁶⁷ held that whenever a public servant is arrested that matter should be intimated to the superior officers, if possible, before the arrest and in any case immediately after the arrest. In case of members of Armed Forces, Army, Navy and Air Force, intimation should be sent to the Officer Commanding the Unit to which the member belongs. It should be done immediately after the arrest is affected. The court also laid down guidelines regarding notification of arrest by the police. In *Joginder Kumar vs. State of U.P.*,⁶⁸ the court further laid down "that the detainee has inherent right to have some one informed. These rights are inherent in Article 21 and 22 (1) and required to be recognised and scrupulously protected for effective enforcement of fundamental rights, the court issued following guidelines:

1. An arrested person being held in custody is entitled, if he so requests to have one friend relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where he is being detained.
2. The Police Officer shall inform the arrested person when he is brought to the police station of this right.
3. An entry shall be required to be made in the Diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly.

It shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these requirements have been complied with. The above requirements shall be followed in all cases of arrest till legal provisions are

⁶⁷ 1994 Cri. L.J. 1981 at 1984-85.

⁶⁸ AIR 1994 SC 1349 at 1354

made in this behalf. These requirements shall be in addition to the rights of the arrested persons found in the various Police Manuals. These requirements are not exhaustive. The Directors General of Police of all the States in India shall issue necessary instructions requiring due observance of these requirements. In addition, departmental instruction shall also be issued that a police officer making an arrest should also record in the case diary, the reasons for making the arrest.”

The bare perusal of the judgement in *Joginder Kumar's* case and the above guidelines shows the concern of the apex court about appalling situation of violation of human rights by the police in India. Though the Supreme Court has taken appropriate and much needed steps to protect the individuals against indiscriminate arrests yet there is need for taking concrete steps for proper implementation of these rights in actual practice. Such beneficial rights can only be secured by strictly and practically respecting the human rights of arrested persons and humanising the attitude and functioning of the police. This highlights the imperatives of integrating of the human rights course into the compulsory training course of police personnel.

(b) RIGHT AGAINST SELF INCRIMINATION:

Protection against self- incrimination is an important human right recognized in the Covenant on Civil and Political Rights⁶⁹ and the Universal Declaration of Human Rights. This right empowers a suspected offender to deny being witness against himself and to refuse to answer self- incriminating questions. This rule is inextricably linked to the principles of presumption of innocence and the inadmissibility of custodial confession as evidence in the criminal proceedings.

As the motive behind the use of torture is to extract self-incriminating statements from the accused, the recognition of freedom against self- incrimination as

⁶⁹ Article 14 (2)

a fundamental right under Article 20(3)⁷⁰ of the Indian Constitution provides a significant safeguard to the suspects from the high-handedness of the police and security forces.

The Supreme Court has widely elaborated this right in its various judgements. The compulsion is held by the apex court to have taken place if the accused “is beaten, or starved or tortured in any way”⁷¹ during the course of investigation by the police. In *Nandini Sathpathi vs. P.L. Dani*⁷² the Supreme Court speaking through Krishna Iyer J. laid down a few propositions intended to act as concrete guidelines to provide protection to an accused person in police custody. It upheld the right against self-incrimination and right to silence of the accused. It held that if there is any mode of pressure subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the police in obtaining information from the accused. It renders compelled testimony as violation of the right against self-incrimination.⁷³ The Court also held that compulsion may be presumed in the case of custodial interrogation by the police “unless certain safeguards erasing duress or adhered to.” It further observed that the police ought to permit a lawyer to assist the accused if he can afford one. However, it did not hold that the State is under an obligation to provide a lawyer to the accused if he is not poor. It also acknowledges the right to silence against self-incrimination, but he does not have a right to complete silence. In other words, non-incriminatory questions can be asked and the accused is “bound to answer where there is no clear tendency to criminate.”⁷⁴

⁷⁰ Article 20(3) of the Indian Constitution reads as follows: “No person accused of any offence shall be compelled to be a witness against himself.”

⁷¹ *Yusuf Ali vs. State of Maharashtra*, AIR 1968 SC 150

⁷² AIR 1978 SC 1025

⁷³ *Id.*

⁷⁴ *Ibid.* AIR 1978 SC 1025 at 1076

Although the right against self-incrimination is guaranteed under the international as well as municipal law, the sad fact is that it is widely violated by the police in most of the third world countries including India. Once captured, the police considers even an innocent person a criminal and every technique of torture is used to extract confession for the alleged crime, though the involuntary confession made before the police is inadmissible in the court of law.⁷⁵

(c) RIGHT TO BE INFORMED OF THE GROUND FOR ARREST:

In addition to the right to life and personal liberty and the freedom from self-incrimination Article 22 of the Constitution recognises several other fundamental rights of the accused with the avowed objective of protecting the dignity of human beings. These include informing detainees of the nature of their offence, the grounds for their arrest, the right to consult a legal practitioner and the right to be brought before the magistrate within 24 hours of arrest. The purpose of these procedural safeguards is to protect the accused from human rights abuses including torture and cruel or degrading treatment by the law enforcing agencies. This right is laid down under Article 22 (1)⁷⁶ of the Constitution.

In *Hansmukh vs. State of Gujarat*⁷⁷ the Supreme Court declared that information about grounds of arrest was mandatory under Article 22 clause (1). The Supreme Court in many cases opined that though it is not obligatory on the part of the authorities to furnish full details of the alleged offence, sufficient particulars must be furnished to enable the arrested person to understand why he has been arrested. Similarly, the words "as soon as may be," according to the court means as early as is reasonable in the circumstances of the particular case. No definite period of time can

⁷⁵ See Article 25 of Indian Evidence Act.

⁷⁶ Article 22 (1) of the Constitution, which reads, *inter- alia*: "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds of such arrest."

⁷⁷ AIR 1999 SC 3051

be laid down as reasonable in all cases, the Apex Court opines. But it will be possible for the court in a proceeding for habeas corpus to pronounce whether arresting authorities has communicated the grounds of arrest "as early as reasonable in circumstances" and if it finds that reasonable time has already passed and the arrested person has not yet been informed the grounds of his arrest, the court would order his immediate release.⁷⁸

This right give the arrested person an opportunity to apply for bail or file a writ petition for his release, or to prepare any other defence in time. Section 50⁷⁹ of the Code incorporates the right of arrested person to know the grounds of his arrest and to be released on bail in case of arrest for bailable offences. A duty is cast upon a police officer, arresting a person without warrant, to forthwith communicate him full particulars of the offence and other grounds for such arrest. In bailable offences police officer is required to inform the person arrested that he is entitled to be released on bail.

Similarly, when a person is to be arrested under a warrant, section 75 of the Code requires that the police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and , if so required shall show him the warrant. The same requirement to notify the grounds of arrest is provided under Section 55 of the Code where a police officer deposes any officer subordinate to him to arrest a person. The right to be informed of the grounds of arrest is a precious right of the accused. Timely information of the grounds of arrest serves

⁷⁸ D. D. Basu, *Shorter Constitution of India*, at 156-57 (1979)

⁷⁹ Article 50 of Cr. P. C. which reads as under:

Person arrested to be informed of grounds of arrest and of right to bail.

- (1) Every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.
- (2) Where a police officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.

him in many ways. It enables him to approach the court for bail or in appropriate circumstances for the writ petition of habeas corpus or make the expeditious arrangements for his defence.⁸⁰ This also highlights the significance of liberty of a person in a democratic Republic and judicial remedies provided for safeguarding of his human rights in all cases subject to reasonable restrictions.

In spite of legislative provisions providing protection against indiscriminate arrest under the Code and the Constitution, yet it is difficult to ensure protection of freedom of individuals from the arbitrary exercise of powers by the police unless there are proper provisions for supervision and accountability for non-conformance to the guarantee of human liberty and dignity. This has been amply demonstrated by frequent intervention of the Supreme Court against arbitrary arrests and its timely directives regarding performance of duty by police while affecting arrest. For instance in *Sheela Bares vs. State of Maharashtra*⁸¹ the Supreme Court has taken serious note of non-disclosure of grounds of arrest; and in order to make the right to be informed of the grounds of arrest effective, it issued directions that “whenever a person is arrested by the police without warrant he must be immediately informed of the grounds of his arrest and in case of every arrest, it must be made known to the person arrested that he is entitled to apply for bail. The Maharashtra State Board of legal Aid shall forthwith get a pamphlet prepared setting out the legal rights of an arrested person and printed copies of the pamphlet in Marathi, Hindi and English should be affixed in each cell in every police lock-up and should be read out to the arrested person in any one of the three languages which he understands as soon as he is brought to the police station.”⁸²

⁸⁰ R. V. Kelkar, *Outlines of Criminal Procedure* (1984) at 25

⁸¹ AIR 1983 SC 378

⁸² *Id* at 382

A strict compliance of these requirements is of utmost necessity being a prime need of the time as it is essential for protecting the human rights and affording early opportunity to accused to secure his release by having recourse to legal remedies. This is more demanding in India where overwhelming majority of the arrested persons are not aware of their rights and the police are yet to humanise themselves by adapting to the civilised standards of modern system of criminal justice of a democratic country.

(d) RIGHT TO CONSULT A LEGAL PRACTITIONER AND LEGAL AID:

Article 22 (1) of the constitution of India confers on the arrested person the rights to consult legal practitioner of his own choice and to be defended by him. "No person who is arrested shall ... be denied the right to consult and to be defended by a legal practitioner of his choice." The International Covenant on Civil and Political Rights also provides the same rights to the accused person under Article 14 (3) (b). This right begins as soon as he is taken in to police custody in relation to criminal or quasi-criminal proceedings. Later the Supreme Court in one of its rulings extended the operation this right, "to any accused person under circumstances of near custodial interrogation."⁸³ The court held that while undergoing interrogation in the police custody he has right to have his lawyer by his side. But there is no specific fundamental right in the Indian constitution, which provides the rights to free legal aid to the accused person. There is, of course, directive principle of state policy contained in Article 39(a), which require the State to provide legal aid by suitable legislation or schemes so that opportunities for securing justice were not denied to a citizen on account of his economic or other disabilities. However, a directive principle of State policy is not enforceable on a court of law and therefore it does not confer a Constitutional right on the accused person to secure free legal assistance at the cost of

⁸³ AIR 1978 SC 1025

the State. The Supreme Court later filled up this constitutional gape through the creative judicial interpretation of Article 21 in a number of cases.⁸⁴ Moreover in *Sheela Barse vs. State of Maharashtra*,⁸⁵ it was laid down that legal assistance to a poor or indigent accused who is arrested and put in jeopardy of his life or personal liberty is a constitutional imperative mandated not only by Article 39-A but also by Article 14 and 21 of the Constitution. It is necessary to protect the accused from torture or ill treatment or harassment at the hands of his custodian.⁸⁶ In *Sukdas vs. Union Territory of Arunachal Pradesh*⁸⁷ the Court has held that failure to provide free legal aid to an accused at the state cost, unless refused by the accused, would vitiate the trial. He need not apply for the same. Free legal aid at the state cost is a fundamental right of a person accused of an offence and this right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21. This right cannot be denied to him on the ground that he has failed to apply for it. The magistrate is under an obligation to inform the accused of this right and inquire that he wishes to be represented at state's cost, unless he refuses to take advantage of it. It is therefore absolutely essential that legal assistance must be made available to prisoners in jails whether they are under trial or convicted prisoners. After that the Parliament enacted State Legal services Authority Act 1987 to provide legal aid at the cost of the State to certain eligible persons.⁸⁸

⁸⁴ *Hussainara Khatoon vs. State of Bihar*, AIR 1979 SC 1819; *M. H. Hoskot vs. State of Maharashtra*, AIR 1978 SC 1548; *Khatri vs. State of Bihar* (1981) 1 SCC 627; *State of Madhya Pradesh vs. Sobharam*, AIR 1981 SC 28

⁸⁵ AIR 1983 SC 378 at 380

⁸⁶ *Id.*

⁸⁷ (1986) 2 SCC 401

⁸⁸ Section 12 of Legal Services Authority Act provides that: Every person who has to file or defend a case shall be entitled to legal services under this Act if that person, is-

- (a) A member of a Scheduled Caste or Scheduled Tribe;
- (b) A victim of trafficking in human beings or beggar as referred to in Article 23 of the Constitution;
- (c) A women or a child;
- (d) A mentally ill or otherwise disabled person;

However, in spite of these constitutional and legal provisions and the rulings of the apex court, the police usually refuse to allow a lawyer to meet and interview the accused person in custody unless the court intervenes on his behalf.

(e) RIGHT TO BE PRODUCED BEFORE MAGISTRATE WITHIN 24 HOURS OF ARREST:

This is also a very important and valuable right of the arrested person constitutionally guaranteed under Article 22 of the Constitution of India.

Section 57 along with Section 167 of the criminal Procedure code 1973 also requires the police to produce a suspect/accused person before the nearest magistrate within 24 hours of his arrest. The magistrate can either order release on bail or remand to the police custody to facilitate the further investigation of the case. The maximum period for the police remand length is 15 days. Thus every arrested person must be produced before the nearest magistrate within 24 hours of his arrest and he must not be detained in custody beyond 24 hours without the permission of the magistrate. This right of the accused person is of great importance as it ensures that the police cannot arbitrarily keep the accused person indefinitely. Detention beyond 24 hours without being produced to an authorized by magistrate is illegal. If the arrested person has

-
- (e) A person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or
 - (f) An industrial workman; or
 - (g) In custody, including custody in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act, 1956 (104 of 1956), or in a juvenile home within the meaning of clause (j) of section 2 of the Juvenile Justice Act, 1986 (53 of 1986), or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987 (14 of 1987); or
 - (h) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court.
- Further Section 13 provides the Entitlement to Legal Services by :
- (1) Person who satisfy all or any of the criteria specified in section 12 shall be entitled to receive legal services provided that the concerned Authority is satisfied that such person has a prima facie case to prosecute or to defend.
 - (2) An affidavit made by a person as to his income may be regarded as sufficient for making him eligible to the entitlement of legal services under this Act unless the concerned Authority has reason to disbelieve such affidavit.

spent 24 hours in the police custody without being produced before a magistrate he is entitled to be released forthwith.

This right has been recognized with threefold objective in mind: (a) to prevent arrest and detention for the purpose of extracting confession or as a measure of compelling people to give information; (b) to afford an early recourse to a judicial officer independent of the police on all questions of bail or discharge and (c) to prevent police stations being used as though they were prisons.⁸⁹

The procedure that has to be followed after the arrest of a person without warrant is provided in Section 56 and 57 of the Code. Section 56 of the Code states that a person arrested without warrant should be taken before a magistrate without unnecessary delay and Section 57 of the Code provides that a person arrested should not be detained in police custody for more than twenty-four hours. A police officer is not justified in detaining a person for one single hour's except upon some reasonable ground justified by the circumstances of the case. Therefore if the police officer considers that the investigation cannot be completed within twenty-four hours he must produce the accused forthwith before a Magistrate and not wait for twenty-four hours.⁹⁰

The Supreme Court has in *Sheela Barse vs. State of Maharashtra*,⁹¹ imposed a duty on the Magistrate before whom the arrested person is produced that he should enquire from him whether he has any complaint of torture or maltreatment in police custody and inform him that he has a right under Section 54 of the Code to be medically examined. Earlier the Supreme Court in *Khatri vs. State of Bihar* opined that provisions prohibiting detention without remand is a very healthy provision which enables the Magistrates to keep check over the police investigation and it is

⁸⁹ *Mohammed Suleman vs. King Emperor*, 30 CWN 1985 at 987

⁹⁰ *State vs. Ram Avtar Chaudhry*, AIR 1955 All 138 at 150

⁹¹ AIR 1983 SC 378

necessary that Magistrate should try to enforce this requirement and where it is found to be disobeyed, come down heavily upon the police.

In *Joginder Kumar vs. State of UP*⁹² the Supreme Court, with the object of enforcing the directions issued by it to the police regarding information to a friend or relative of an arrested person and making of an entry in the diary to this effect, imposed a duty upon the Magistrate also, before whom the arrested person is to be produced, to satisfy himself that these requirements are complied with by the police.

It is the discretion of the magistrate, exercising his judicial mind to either release the accused person on bail or remand him to police custody. While doing so, he was to examine that whether the arrest of the person produced before him is legal and in accordance with the law. But an application of the police for remand should not be treated a matter of routine of little importance. The magistrate should judiciously exercise his discretionary power taking into account full particulars and circumstances of each case. He should ascertain from the accused whether he has been kept in the custody more than 24 hours or not, and whether he has been tortured by the police. If there is evidence of torture, he should refuse to commit him to police remand. If the circumstances of the case do not necessitate the police lock-up, the accused should be sent to the judicial lock-up as most of the acts of torture for extorting confession takes place after getting the accused in police remand.

The requirement of production within 24 hours is a healthy provision, which enables the magistrate to keep check over the police investigation, and the scrupulous observance of this requirement by the police is vital for the protection of human dignity and human rights of the pre-trial detainees. For this obvious reason the Supreme Court also has strongly urged upon the states and its police authorities to

⁹² 1994 Cri.L.J 1981at 185.

ensure the enforcement of this requirement.⁹³ Where it is found disobeyed they should come down heavily upon the erring police personnel. Indeed, as held by the Bombay High Court, if a police officer fails to observe this requirement he shall be held guilty of wrongful detention.⁹⁴

(f) BAR AGAINST HAND-CUFFING:

Suspects/ accused persons in hand cuffs are paraded on the road by the police while taking them to the court or jail. They are made to stand handcuffed in the court for hours waiting for their turn. This makes them feel humiliated and puts them in a lot of inconvenience. A person is to be considered innocent unless proved guilty beyond doubt by the court is an axiom of our legal system. But a person stands punished by this humiliation though the court may subsequently acquit him. The Supreme Court examined the validity of hand cuffing in the light of right of personal liberty in *Prem Shankar Shukla vs Delhi Administration*,⁹⁵ where the court observed:

“Handcuffing is prima-facie inhuman and therefore unreasonable, is over harsh and at the first flush, arbitrary. Absent fair procedure and objective monitoring to inflict ‘irons’ is to resort to zoological strategies repugnant to article 21.”

The court also examined the rules of the Punjab Police Manual 1953 relating to the handcuffing of the prisoners. The manual⁹⁶ states that every individual accused of non- bail able offence, punishable with three year imprisonment, shall be routinely handcuffed. The court declared this rule as unconstitutional, being violation of Articles 14, 19 and 21 of the constitution. It observed that the nature of the accusation of the accused is not criterion for handcuffing. The basis of handcuffing should be the

⁹³ *Khatri vs. State of Bihar*, (1981) 1 SCC 627.

⁹⁴ *Sarifbai vs. Abdul Rajak*, AIR 1961 Bom. 42

⁹⁵ AIR 1980 SC 1535

⁹⁶ See, Punjab Police Manual 1953 at Para 26

clear and present danger of escape and breaking out of the police control. This too must be based upon clear and unambiguous evidence and not mere assumption. The court observed:

“Thus we must critically examine the justification offered by the State for this mode of restraint. Surely, the competing claims of securing the prisoners from fleeing and protecting his personality from barbarity have to be harmonized. To prevent the escape of an under- trial is in public interest, reasonable, just and cannot, by itself be castigated. But to bind a man hand-and- foot fetter his limbs with hoops of steel, shuffle him along in the streets and stand him for hours in the courts is to torture him, defile his dignity, vulgarize society and foul the soil of our constitutional culture.”⁹⁷

The court further observed:

“Even in cases where, in extreme circumstances, hand-cuffs have to be put on the prisoner, the escorting authority must record contemporaneously the reasons for doing so. Otherwise, under Article 21 the procedure will be unfair and bad in law. Nor will mere recording the reasons do, as that can be a mechanical process mindlessly made. The escorting officer, when ever, he hand-cuffs a prisoner produced in court, must show the reasons so recorded to the Presiding Judge and get his approval. Otherwise, there is no control over possible arbitrariness in applying handcuffs and fetters. The minions of the police establishment must make good their security recipes by getting judicial approval. And, once the Court directs that hand- cuffs shall be off no escorting authority can over rule judicial direction. This is implicated in Article 21

⁹⁷ *Prem Shankar Shukla vs Delhi Administration*, AIR 1980 SC 1535 at 1536

which insists upon fairness, reasonableness and justice in the very procedure which authorizes stringent deprivation of life and liberty.”⁹⁸

Further the Supreme Court in *Kishor Singh vs. State of Rajasthan*⁹⁹ laid down that:

“Handcuffing and for binding shall be restricted to cases where a person in custody is of a desperate character, or where there are reasons to believe that he will use violence or attempt to escape or where there are other similar reasons necessitating such a step.”

The same principles were reiterated in *Sunil Gupta vs. State of M.P.*¹⁰⁰ It held as follows:

“Coming to the case on hand, we are satisfied that the petitioners are educated persons and selflessly devoting their service to the public cause. They are not the persons who have got the tendency to escape from the jail custody. In fact, petitioners 1 and 2 even refused to come out on bail, but chose to continue in prison for public cause. The offence for which they are tried to convict under Section 186 of Indian Penal Code is only a bail able offence. Even assuming that they obstructed public servants in discharge of their public function during the *dharna* or raised in slogans inside or outside the court, that would not be sufficient cause to hand-cuff them. Further, there was no reason for handcuffing them while taking them to court from jail on April, 22, 1989. One judicial order by a competent court that person comes within the judicial custody of the court. Therefore the taking of a person from a prison to the court or back from court to the prison by the escort party is only under the judicial orders of the court. Therefore, even if extreme circumstances

⁹⁸ *Id.*, at 1543

⁹⁹ AIR 1981 SC 625 at 630

¹⁰⁰ (1990) 3 SCC 119

necessitate the escort party to bind the prisoners in fetters, the escort party should record the reasons for doing so in writing and approve or dis-approve the action of the escort party and issue necessary directions. it is most painful to note that the petitioners 1 and 2 who staged a *dharna* for a public cause and voluntarily submitted themselves for arrest and who had no tendency to escape had been subjected to humiliation by being hand-cuffed which act of the escort party is against all norms of decency and which is in utter violation of the principles underlying article 21 of the Constitution of India. We strongly condemn this kind of conduct of the escort party arbitrarily and unreasonably humiliating the citizen of the country with obvious motive of pleasing someone.”¹⁰¹

The Court also dealt with the question as to who would decide whether an accused be handcuffed or not. It held that undoubtedly the matter lies within the jurisdiction of escorting authority. But there is a room for the supervision of that authority and undoubtedly the courts can exercise that supervisory jurisdiction. It laid down that where in extreme cases handcuffs have to be put on an accused, the escorting authority must inform the court and record contemporaneously the reasons for doing so. For continuance of handcuffing police must get judicial approval. In case the court does not grant approval, handcuffs must at once be removed. It also directed the Magistrate concerned to require from the accused, as a rule, whether he has been subjected to handcuffs or other “iron” treatment and if he has been, the escorting authority should be asked to explain the action forthwith in the light of this judgment.

¹⁰¹ *Id.*

Guidelines relating to handcuffing had been further elaborated in *Delhi Judicial Service Association's case*¹⁰² where the Supreme Court held that hand-cuffs or other fetters shall not be forced on a prisoner-convicted or under trial while lodged in a jail anywhere in the country while transporting or in transit from one jail to another or from jail to court and back. The Supreme Court made it clear that the police and the jail authorities on the road shall have no authority to direct the handcuffing of any inmate of a jail in the country. It is mandating for them to obtain the Magistrate's prior permission for using handcuffs or fetters on a person. The concern Magistrate can, however, grant permission to handcuff the prisoner in exceptional cases where concrete proof regarding the proneness of the prisoner to violence and his tendency to escape is available. The judges also pointed out that in all the police cases where a person arrested by the police is produced before the Magistrate and remand judicial and non-judicial is given by the Magistrate at the time of remand.

In a recent judgment of *Khedat Mazdoor Chetna Sanghat vs. State of M.P.*¹⁰³ the apex court held that handcuffing of members of an association fighting for rights of tribal was unfair under Art. 21 of the Constitutional and directed a C.B.I inquiry. The court also held that its successive pronouncement condemning practice of handcuffing under-trial prisoners by police constituted law of the land. The Court observed that "If dignity or honour vanishes what remains of life, in these circumstances to uphold human values and to protect the rights guaranteed under the Constitution."¹⁰⁴ It also directed the CBI to investigate and register cases and prosecute the officers however high or low in hierarchy of administration for these serious lapses; with the need to

¹⁰² *Delhi Judicial Service Association vs. State of Gujarat*, AIR 1991 SC 2176

¹⁰³ AIR 1995 SC 32

¹⁰⁴ *Ibid*, at 39

ensure free and trial of the arrest errant officers the court also directed to uphold the trials of such cases place outside the District of *Jhabua at Indore* District and Sessions Court.

It is unfortunate that the apex court's rulings and the home Ministry's instructions ¹⁰⁵with regard to the use of handcuffs and fetters have not percolated down and influenced the working of the police. The handcuffing of a Chief Judicial Magistrate and a Delhi lawyer shows that the police do not spare even persons like them. Therefore the need of hour is to educate the police personnel not only about the various provisions of the India Penal Code and Code of Criminal Procedure but also with constitutional provisions designed to protect fundamental rights of the accused and the rulings of the apex court. It is equally necessary that the Government gives clear message that police personnel responsible for the illegal use of the apex court's verdict depends to a great extent on how the Magistrates exercise their power they should perform their functions diligently and conscientiously.

Serious lapses assaults on basic personal liberties of individuals, representatives of the state have acknowledged especially persons from the marginalized sections in matters of arrest, detention and torture. The police officials have acted with such cruelty that they have done to death poor people just because they demanded their labour charge.¹⁰⁶

Can these lapses be seriously addressed without considering the issue of police reforms that has been demanded by sections within the police, human rights organizations and other bodies?

¹⁰⁵ Notification No. 11017/15/88/G.P.A. -2, 2 Nov.1988, Ministry of Home, Union of India
¹⁰⁶ *Peoples Union for Democratic Rights and another vs. Police Commissioner and others*; (1989)4 SCC730 at 731

The Police are not the only perpetrators of custodial torture.¹⁰⁷ However, the system under which they operate on a day-to-day level facilitates torture and other abuses. The police force resort to illegal abduction and assassination,¹⁰⁸ the Apex Court¹⁰⁹ has in recent times come across for too many instances where the police have acted not to uphold the law and protect the citizen but in aid of private cause and to oppress the citizen.

The National Police Commission published eight comprehensive reports between 1979 and 1981 in which they made numerous practical recommendations¹¹⁰ for reform. Twenty years later no systematic action had been taken to implement them. The Apex Court has in re: *M.P.Dwivedi*¹¹¹ expressed strong dissatisfaction where tribal agitators agitating against construction of a dam were brought handcuffed from jail to court by police where there was no express authorisation as required by rules obtained from the magistrate/Jail officer. Moreover magistrate for removal of their handcuffs did not take immediate action. In *D.K.Basu vs. State of West Bengal*¹¹² the Supreme Court emphasised the need to pay attention to properly develop work culture, training and orientation of police force consistent with human values.

In 1996, a writ petition was filed in the Supreme Court¹¹³ by two retired officers requesting that the Government of India be ordered to implement the recommendations of the NPC. On the basis of the Supreme Court's orders in this

¹⁰⁷ *Arvind Singh Bagga vs. State of U.P.* AIR 1995 117 at 118

¹⁰⁸ *Bhagwan Singh vs. State of Punjab*, AIR 1992 SC 1689

¹⁰⁹ *Inder Singh vs. State of Punjab*, (1995)3 SCC 702 at 705

¹¹⁰ Some major recommendations that sought to insulate the police from illegitimate political and bureaucratic interference included (1) establishing a security commission in each state to see that the government exercises its superintendence over the police in an open manner within the framework of the law, (2) prescribing a selection procedure that would ensure the appointment of the best officers to head the state police force, (3) giving these officers a fixed minimum tenure to reduce their vulnerability, (4) amending rules so that the arbitrary transfer of police officers that were done without the proper authority would become null and void and (5) replacing the Police Act of 1861 with a new law.

¹¹¹ AIR 1996 SC 229

¹¹² AIR 1997 SC 610

¹¹³ *Prakash Singh vs. Union of India* (2006) 8 SCC 1

matter, a Committee on Police Reforms was set up under *J. F. Ribeiro* a retired police officer. The Committee headed by Julio F Ribeiro and comprising Prabha Sankaranarayanan and Arun Bhagat as members finalized its report in October 1998 and submitted it to the government recently.¹¹⁴ The above writ petition was pending for more than a decade and ultimately in order to remove the uncertainty when the police reforms could be introduced the Supreme Court issued directions in this respect¹¹⁵ including the constitution of State Security Commission and National Security Commission¹¹⁶

¹¹⁴ In its report, the panel has said that a security commission should be set up in each state consisting of the state Home Minister as the chairman, leader of the Opposition, state Chief Secretary, a sitting or retired judge nominated by the Chief Justice of the state high court and three other non-political persons of proven merit and integrity as members, who should be chosen by a committee to be set up by the chairman of the NHRC.

The committee has said that the commission will have advisory and recommending powers for the time being and the state's DGP will be its secretary and convener. *See* February 8, 1999 Indian Express Newspapers (Bombay).

¹¹⁵ *Id.*

¹¹⁶ The directions issued by the SC inter alia include:

- (i) The State Governments are directed to constitute State Security Commission in every State (in the manner detailed herein) to insure that the State Government does not exercise unwarranted influence or pressure on the State Police and for laying down the board policy guidelines so that the State Police always acts according to the laws of the land and the Constitution of the country. This watch dog body shall be headed by the Chief Minister or Home Minister as Chairman and have the DGP of the State as its ex-officio Secretary. The other members of the Commission shall be chosen in such manner that it is able to function independent of Government control. The functions of the State security Commission would include laying down the board policies and giving direction for the performance preventive tasks and service – oriented functions of the police, evaluation of the performance of State Police and preparing a report thereon for being placed before the State Legislature. The recommendations of this Commission shall be binding on the State Government.
- (ii) The Director General of Police of the State shall be selected by the State Government from among the three senior most officers of the department who have the empanelled for promotion to that rank by the Union Public Service Commission on the basis of their length of service, very good record and range of experience for heading the police force and once he has been selected for the job, he should have a minimum tenure of at least two years irrespective of his date of superannuation. The DGP may, however, be relieved of his responsibilities by the State Government acting in consultation with the State Security Commission on grounds of conviction, incapacitation, etc.
- (iii) Police officers on operational duties in the field like the IGP in-charge zone. DIGP in-charge Range SP in-charge District and Station House Officer in-charge of a Police Station shall also have a prescribed minimum tenure of two years unless it is found necessary to remove them on grounds of conviction, incapacitation, etc.
- (iv) The investigating police shall be separated from the law and order police to ensure speedier investigation, better expertise and improved rapport with the people. It must, however, ensured that there is full coordination between the two wings. The seperati0on, to start with, may be effected in town/ urban areas which have a population of ten lakhs or more and gradually extended to smaller towns/urban areas also.

For all human rights groups and other organizations concerned with issues of personal liberty, equality before the law, the dignity of life and accountability from institutions of governance and public servants the structure and content of Police Reforms are of critical importance. The Supreme Court in *A.K. Singh vs. Utterakhand Jan Morcha*¹¹⁷ had granted sanction to prosecute Govt. Officials involved in incident of firing on un- armed agitations looting and plundering them. The police have caused death of under- trial prisoners; such officers were prosecuted and sentenced to imprisonment.¹¹⁸

-
- (v) There shall be a Police Establishment Board in each State which shall decide all transfers, postings, promotions, and other service related matters of officers of and below the rank of DSP. The State Government may interfere with the decision of the Board in exceptional cases, only after recording the decisions for doing so. The Board shall also be authorise to make appropriate recommendation to the State Government regarding the postings and transfers of officers of and above the rank of SP and the Government is expected to give due weight to these recommendations and shall normally accept them. It shall also function as a forum of appeal for disposing of representations from the officers of the rank of SP and above regarding their promotions/transfers/disciplinary proceedings or there being subjected to illegal or irregular orders and generally reviewing the functioning of the police in the State.
- (vi) There shall be a Police Complaints Authority at the District level to look into complaints against police officers of and up to the rank of DSP. Similarly, there should be another police complaint authority at the State level to look into the complaints against officers of the rank of SP and above. The District level authority may be headed by a retired District Judge while the State level authority may be headed by a retired Judge of the High Court/ Supreme Court. The State level complaints authority would take cognizance of only allegations of serious mis-conduct by the police personnel, which would include incidence involving death, grievous hurt or rape in police custody. The District level complaints authority would apart from the above cases, also inquire into allegations of extortion, land / house grabbing or any incident involving serious abuse of authority. The recommendations of the complaints authority, both at the district levels and State levels for any action, departmental or criminal, against a delinquent police officer shall be binding on the authority concerned.
- (vii) The Central Government shall also set up a National Security Commission at the Union level to prepare a panel for being placed before the appropriate appointing authority, placement of Chief of the Central Police Organisation who should also be given a minimum tenure of two years. The Commission would also review from time to time measures to upgrade the effectiveness of these forces, improve the service conditions of its personnel, insure that there is proper coordination between them and that the forces are generally utilised for the purposes they were raised for and make a recommendation in that behalf. The National Security Commission could be headed by the Union Home Minister and comprise heads of CPOs and a couple of security experts as members with the Union Home Secretary as its Secretary.

¹¹⁷ AIR 1999 SC 2193

¹¹⁸ *Secretary Halikandi Bar Association vs. State of Assam*, AIR 1996 SC 1925

The Government of India must consult the NHRC, other independent human rights organizations, and members of civil society before instituting police reforms, including training programmes and amendments to laws. The move for reform must be through wide and transparent public debate so that all parts of civil society can influence and have a say in the change that is envisaged. Police reforms should specifically address the problem of human rights violations in custodial situations and structural problems, which have been identified as facilitating torture and abuse of power.

Delays and overload of the courts must be urgently addressed. Lack of appointment of lower and higher members of the judiciary are only one cause. Often judges are extremely pliant and accommodator on matters of repeated adjournments contributing to the delay in completion of trial. Such interminable and often unforgivable delays in dispensing with cases related to serious crimes contribute to justify 'instant punishment' methods by the police among the public and also prevent victims of torture and abuse from obtaining prompt redress. Emphasis must be laid within courts and by judicial magistrates in ensuring that the collection of evidence is by legal means and proper investigation; that torture is not used and sanctioned. The police, lawyers (including those provided through legal aid), prosecutors and judicial officers play a pivotal role in ensuring that such actions do not form part of processes of bringing persons to trial. Cases of public servants being accused of violations of rights including torture and ill treatment must be pursued within the existing court system and not in courts where the aim is to reach compromise.

In *Sheela Barse vs State of Maharashtra*¹¹⁹ the Supreme Court clarified that section 54 of the Cr. P. C. required that "the Magistrate before whom an arrested

¹¹⁹ AIR 1983 SC 378

person is produced shall enquire from the arrested person whether he has any complaint of torture or maltreatment in the police custody and inform him that he has right under section 54 of the Cr. P. C. to be medically examined". Detainees are regularly threatened by the police not to make complaints of torture and brought before Magistrates by the same police who have been responsible for their interrogation and torture. Hence, if they are not placed in a safe environment where they do not fear reprisal, and if not specifically asked by the Magistrate about such misconduct, they may out of fear not make the complaint. However the Supreme Court has laid down in *Santosh De vs. Archana Guha*¹²⁰ that unless a grave irregularity is committed; the superior court should not interfere. One should keep in mind the principle behind Section 465 Cr. P.C. Any and every irregularity or infraction of a procedural provision cannot constitute a ground for interference by a superior court unless such irregularity or infraction has caused irreparable prejudice to the party. Besides the National Police Commission recommendations, in 1997, the historic judgment of the Supreme Court in *D.K. Basu vs. State of West Bengal*¹²¹ and *Ashok K. Johari vs. State of Uttar Pradesh*¹²² provides code of conduct and compels the Indian police force to follow these requirements applicable to all cases of arrest or detention till legal provisions are made in that behalf to prevent custodial violence:

1. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

¹²⁰ (1994) 2 SCC 420 at 423

¹²¹ (1997) 1 SCC 416

¹²² AIR 1997 SC 3017

2. The police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.
3. A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.
4. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organization in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.
5. The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.
6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.
7. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any, present on his/her body, must be recorded at that time.

8. The "Inspection Memo" must be signed both by the arrestee and the police officer affecting the arrest and its copy provided to the arrestee.
9. The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory, Director, Health Services should prepare such a panel for all Tehsils and Districts as well.
10. Copies of all the documents including the memo of arrest, referred to above, should be sent to the concerned Magistrate for his record.
11. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.
12. A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous police board."

Further in *Joginder Kumar Singh vs. State of UP*¹²³ the court laid down that the detainee has inherent right to have someone informed. These rights are inherent in Article 21 and 22 (1) and require to be recognised and scrupulously protected. For effective enforcement of these fundamental rights the court issued guidelines.¹²⁴

¹²³ AIR 1994 SC 1349 at 1354

¹²⁴ the court issued following guidelines:

1. An arrested person being held in custody is entitled, if he so requests to have one friend relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where he is being detained.
2. The Police Officer shall inform the arrested person when he is brought to the police station of this right.
3. An entry shall be required to be made in the Diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly.

Moreover in *Sheela Barse*¹²⁵ case it was laid down that legal assistance to a poor or indigent accused who is arrested and put in jeopardy of his life or personal liberty is a constitutional imperative mandated not only by Article 39-A but also by article 14 and 21 of the Constitution. It is therefore absolutely essential that legal assistance must be made available to prisoners in jail whether they are under-trial or convicted prisoners.

III. IMPLEMENTATION AND APPLICATION OF SAFEGUARDS:

The Supreme Court in *D.K. Basu vs. State of West Bengal*¹²⁶ itself emphasized on implementation and application of the strict guidelines on the laws of arrest as laid down by the Supreme Court. It observed:

“ Failure to comply with the requirements hereinabove mentioned shall apart from rendering the concerned official liable for departmental action, also render him liable to be punished for contempt of Court and the proceedings for contempt of Court may be instituted in any High Court of the country, having territorial jurisdiction over the matter. The requirements, referred to above flow from Articles 21 and 22(1) of the Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies like Directorate of Revenue Intelligence, Directorate of Enforcement, Costal Guard, CRPF, BSF, CISF, the State Armed Police,

It shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these requirements have been complied with. The above requirements shall be followed in all cases of arrest till legal provisions are made in this behalf. These requirements shall be in addition to the rights of the arrested persons found in the various Police Manuals. These requirements are not exhaustive. The Directors General of Police of all the States in India shall issue necessary instructions requiring due observance of these requirements. In addition, departmental instruction shall also be issued that a police officer making an arrest should also record in the case diary, the reasons for making the arrest.”

¹²⁵ AIR 1983 SC 378 at 380; AIR 1978 SC 1025 at 1047

¹²⁶ AIR 1997 SC 610

and Intelligence agencies like the Intelligence Bureau, RAW, CBI, CID, Traffic Police Mounted Police and ITBP.”¹²⁷

The Judgment further addressed the issue of implementation of the Supreme Court guidelines in a de-centralized fashion so that they percolate down to the local police station as also become accessible as information about our basic rights to individual members of civil society who may not have access to legal documents through simple communication means like radio and television. It says:

“The requirements mentioned above shall be forwarded to the Director General of Police and the Home Secretary of every State/Union Territory and it shall be their obligation to circulate the same to every police station under their charge and get the same notified at every police station at a conspicuous place. It would also be useful and serve larger interest to broadcast the requirements on the All India Radio besides being shown on the National Network of Doordarshan and by publishing and distributing pamphlets in the local language containing these requirements for information of the general public. Creating awareness about the rights of the arrestee would in our opinion be a step in the right direction to combat the evil of custodial crime and bring in transparency and accountability. It is hoped that these requirements would help to curb, if not totally eliminate, the use of questionable methods during interrogation and investigation leading to custodial commission of crimes.”¹²⁸

The recent recommendations of the Law Commission of India¹²⁹ were quoted both in the Supreme Court judgments¹³⁰ and in the recommendations of the National

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *See*, report of November 2000

Police Commission extensively. They also lamented that neither the NPC recommendations nor the interpretation of the law as laid down by the Supreme Court were followed in strict application.

N.R. Madhava Menon, leading legal academic in his preface to “Training Manual for Police on Human Rights” published by the National Law School commented:

“Higher standards have been set in police conduct and better safeguards have been developed to ensure observance of human rights. While all these happened in the Constitutional Jurisprudence of the country, it is unfortunate that the police organization and management continued in the century-old framework under the Police Act of 1861”.

The recommendations also clearly states that: “Representatives of registered rights groups and NGOs should be entitled, under law, to visit police stations and examine custodial records.” This is the latest recommendation of the Law Commission of India based on an assessment of police conduct *vis a vis* protection of personal liberties as enshrined within the Indian Constitution. Further what is required is that Government should realise that it is the duty/responsibility of State. It is the responsibility of the Government to give their police a living wage and reasonable means of supporting themselves and their family without resorting to dishonest practices. The policeman should be kept above need by providing good working conditions and emoluments, prescribing higher educational qualifications and by devising scientific selection techniques, which take the psychological, psychiatric, social and cultural factors in to consideration persons having aptitude to work as policemen can be recruited and this would solve half the problem.

¹³⁰ *Munshi Singh Gautam vs. State of M.P.* (2005) 9 SCC 631 at 639

Various facets of welfare like housing, health and medical facilities, education and employment for families; grant of leave; recreation: canteen and store facilities and improved conditions of service have to be provided to the police force so that the feeling of insecurity and inferiority complex existing in them can be removed. Promotions of police personnel should be defined from the number of convictions they could secure. Police recruitment should be in the hands of the police and the politicians should not have any say in it, so also, their transfers.

Imparting in-service training to all ranks police personnel by holding refresher courses systematically would improve the tone administration. The training should focus sensitisation of police functionaries to human relations. Behavioural training on aspects like communication, empathy and effective listening, positive attitude towards the down-trodden and the minorities and sensitivity towards observance of human rights should be given introduction to modern and scientific equipment for investigation, appreciable increase of man power, improvement in communication including radio-communication and motor transport are some of the measures that would ensure great efficiency. Well-developed interrogation rooms with trained persons in techniques of interrogation will reduce the occurrence of custodial deaths.

The plea of the Government at the Centre and in the States that an increase in strength according to the norms of population or crimes is not feasible on account of financial stringency does not; in any way solve the problem. It is an irony in itself that police is a non-plan department in developing country like India. Police should receive due attention of Government including increase in strength and equipment to combat the force of lawlessness and civil disorders. Apathy to this aspect of law and order is bound to result in dangerous consequences.

Police-public relations are another important aspect in police administration. With public co-operation, even a highly efficient police force cannot discharge its primary duty of prevention and detection of crime satisfactorily. The best way to win the good will of the people is thousand efficient discharges of duties, exemplary personnel conduct and sympathetic and courteous approach to the public. The audio-visual media and the press must engage in more constructive, positive and vigorous efforts to foster better relations between the public, media and the police. The malady of custodial violence is multi dimensional and too deep-rooted to be eliminated by reforms directed against the police alone. There has to be a national movement to change the general environment of non-accountability and normlessness, which is afflicting all the social components and institutions.

In *Khatri vs. State of Bihar*,¹³¹ the Supreme Court had tackled the blinding of under trials of police by piercing their eyeballs with needles and pouring acid in them. This case illustrated key aspects of the pattern of torture, the sanction of torture by state and local judicial authorities, the routine concealment of torture, the failure to conduct proper inquiries and the inordinate length of judicial proceedings. The court described the issues involved in this case to be of the greatest constitutional importance involving as they do the exploration of new dimension of right to life and personnel liberty. It was 10 years after the blinding of under trials; the court quashed the charges, against the victims.¹³² In *Anil Yadav vs. State of Bihar*,¹³³ the Supreme Court ordered prosecution of the police officers responsible for the brutal act. Nevertheless several of the police officers allegedly involved were apparently escaped

¹³¹ AIR 1981 SC 928 (1st case)

¹³² *Khatri vs. State of Bihar*, AIR 1981 SC 1068 (2nd case)

¹³³ (1981) 1 SCC 622; AIR 1981 SC 1008

trial, and largest sentence served by Police Officer convicted for deliberately blinding of under trial prisoners, was three year only.

Undaunted by absence of specific right against torture in the Constitution of India, the Supreme Court in *Sunil Batra vs. Delhi Administration*,¹³⁴ held unanimously that Arts.14, 19 and 21 outlawed torture in India. There was a setback to this proposition in *Bachan Singh vs. State of Punjab*,¹³⁵ When the court retired on the absence of a specific right against torture or cruel or unusual punishment to uphold the validity of capital punishment. But in *Sunil Batra (II)*,¹³⁶ the Supreme Court glossed over *Bachan Singh* to reiterate that Article 14, 19 and 21-rendered torture or cruel or unusual punishment unconstitutional. The court opined: To fetter prisoners is an inhumanity and unjustified save where safe custody is otherwise impossible.

In the instant case one prisoner *Premchand* had developed, tear of anus due to forced insertion of stick by someone in jail premise. He required surgical repair and his bleeding was not stopped. He had to go to Hospital immediately. This entry in the Jail hospital records had roused the conscience of the court and said in no uncertain terms that the prisoners do not lose their fundamental rights even inside the jail.” The Court quoting justice Douglas of American Supreme Court said Prisoners are still persons entitled to all constitutional rights unless their liberty constitutionally curtailed by procedures than satisfy the requirements of “due process”.

The Court said that the most important right of a prisoner is the integrity of his physical and mental personality. A correction -cum -orientation course is necessary for the prison staff inculcating the constitutional values, therapeutic approaches and

¹³⁴ AIR 1978 SC 1675 (1st case)

¹³⁵ AIR 1980 SC 898

¹³⁶ AIR 1980 SC 1579(2nd case)

tension free management. The Court in its writ jurisdiction plus contempt of power shall protect the prisoners' rights.

In various cases, the Supreme Court suggested the police to depend on 'wits' and not on 'fist' and on 'culture', not on torture in their investigations. The Court advised the government to re-educate the police force and to weed them out of their sadistic tendencies and inculcate in them the respect for human and punish those responsible for custodial torture.

In 1990 the Apex Court in *Sunil Gupta vs. State of Madhya Pradesh*¹³⁷ condemned the conduct of the escort party who arrested, abused, beaten up the social workers by handcuffing them while to the court. The Court said:

It is painful to note that the petitioners..... who are social workers staged dharma for public cause and voluntarily submitted themselves for arrest and who had no tendency to escape had been subjected to humiliation by being handcuffed which act of the escort party was against all norms of decency which is in utter violation of the principles underlying Article 21 of the Constitution of India.¹³⁸ The observation of the Apex Court further reveals that the petitioners were arrested, imprisoned and handcuffed with malicious or mischievous intention and the act of handcuffing is sadistic, capricious, despotic and had a demoralising effect on human rights movement in India .

One of the most sensational case involving police atrocities on a judicial officer, which drew maximum attention from society was *Delhi Judicial Service Association vs. State of Gujarat*,¹³⁹ In this case the police arrested the Chief Judicial Magistrate of *Nadiad*, assaulted, handcuffed and tied with a thick rope and sent in the

¹³⁷ (1990) 3 SCC 119

¹³⁸ *Id* at 129

¹³⁹ AIR 1991 SC 2176

same condition for medical examination on a charge of having consumed liquor in violation of prohibition law in force in the State of Gujarat. This outrageous conduct of the police seriously undermined the dignity of the Courts and shocked the judges. Judicial officers and magistrates when felt insecure and humiliated at the hands of guardians of law. The Supreme Court found that Chief Judicial Officer had been falsely implicated in prohibition case because of police vendetta and the police had forced him to take liquor for booking a false case against him. The Court found the police officers guilty of interference with the course of justice by their ignominious conduct. It is said that the brutalizing behaviour of police may not have been noticed in this manner had an ordinary citizen been treated in the way the chief magistrate was treated.¹⁴⁰ The Apex Court rightly pointed out in *Raghubir Singh vs. State Haryana*,¹⁴¹ that the....society was deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new peril, when the guardians of law gore human rights, to death..... This development is disastrous to our human rights awareness and humanistic constitutional order.

The Court proceeded to consider “punitive measures” and held it had the power to award monetary compensation to the victim to be “paid by the State”¹⁴² But, surely it has power also to order payment by the official personally that provides a good deterrent.¹⁴³ Commenting on widespread maltreatment of prisoner resulting from practise which can only be described as cruel, inhuman and degrading, the National Human Rights Commission¹⁴⁴ has strongly recommended an early accession

¹⁴⁰ K.N. Singh, *Administrative Law* XX VIII ASIL (1991) at 454

¹⁴¹ AIR 1980 SC 1087

¹⁴² *Rudal Sah vs. State of Bihar*, AIR 1983 SC 1086 SC 1086; *Challa Ramakonda Reddy vs. State of Andhra Pradesh* AIR 1989 AP 235

¹⁴³ *SAHELI vs. Commissioner of police*, AIR 1990 SC 513

¹⁴⁴ See, National Human Rights Commission Annual Report 1996.

by the country to the convention against torture, describing as a necessary major step to proclaiming the impermissibility in our country of custodial torture, deaths and rape and other forms of cruel, inhuman and degrading treatment and punishment.¹⁴⁵ The Commission was deeply gratified by the decision of the Govt. of India, when it announced on 26th June, 1997 to ratify 1984 Convention against Torture and other forms of Cruel Inhuman, Degrading Treatment or Punishment.¹⁴⁶ However, early ratification is still awaited.

It is to be submitted that torturing of suspects in custody is inhuman barbaric and illegal. The policemen did not spare even minor girls from molesting as evident from Matura Rape case¹⁴⁷ Police Stations have become a nightmare for poor suspects and accused. Corruption, irresponsibility, group-ism and snobbery are the building blocks of his crime. Malicious prosecution, institution of false cases and vengeful attitude are other contributing factors. Wrongful detention without formal arrest negligence with regard to medication and food for the suspects while in custody are the main motives of mental torture to persons in custody. The Supreme Court of India in Sixties had taken a narrow view of the meaning of compulsion¹⁴⁸, but in seventies the court clearly said that compulsions comprehend any mode of pressure. Subtle or crude, mental or physical, direct or indirect, but sufficient applied by the police man for obtaining information¹⁴⁹, and widened the scope of compulsion and held that compelled testimony is evidently procured not merely by physical threats or violent but also by psychic torture, atmospheric pressure, environmental coercion tiring interrogative prolixity, over bearing and intimidating methods and like.¹⁵⁰ As the

¹⁴⁵ See *Human Right News Letter*, vol. 4, July 1997.

¹⁴⁶ B. Hadervali, "Law and Custodial Torture in India; *Cri.LJ* 1999 (journal) at 42

¹⁴⁷ *Tuka Ram vs. State of Maharashtra*; AIR 1979 SC 185

¹⁴⁸ *State of Bombay vs. Kathikalu Ordga*; AIR 1961 SC 1888

¹⁴⁹ *Nandini Satpathy vs. P.L Dani*; AIR 1978 SC 1025

¹⁵⁰ *Miranda vs. State of Arizona*; 384 US 436 (1996)

escape goats of the Secret inquisitional process are almost always poor, the weak, the ignorant, powerless the extension of the compulsion to mental or psychological ought to be welcomed. The Court held an accused has a right to consult a lawyer during interrogation and the right not to make self-incriminatory statements should be widely interpreted to cover the pre-trial stage of police investigations. The contention that the equipment available for investigation is inadequate cannot be an argument for torture. The right not be tortured did not –negotiable. It is important to guard people from excesses by the state. If upgrading technique is needed to ensure law and order, it cannot find its solution in degrading human being. Investigating authorities too have to learn to respect the dignity and inviolability of human life.¹⁵¹In many cases non-compliance of the Court order by executive has weakened the authority of the Courts.¹⁵²Although the prohibition of torture in specific terms lacks constitutional authority, Indian Courts have held that Article 21 imply protection against torture and the Sections 330 and 331 of the Indian Penal Code as well as Section 29 of the Indian Police Act 1861 specifically forbid this practise. The Supreme Court on several occasions has made weighty pronouncements decrying and several condemning the conduct of police in torturing, handcuffing the suspect prisoners, under trials, social workers, advocates and even a chief judicial magistrate without any lawful justification. In spite of this, it is unfortunate that the courts have to repeat and re-repeat their disapproval of unjust able handcuffing.¹⁵³From the jurisprudential point of view, the Supreme Court by its progressive interpretation has given us the right against torture, what the constitutional makers and the lawmakers fail to give the Nation. It is write to say that the right against torture or cruel or unusual punishment serves as a bulwark against certain cruel forms of lawlessness in-law enforcement.

¹⁵¹ Usha Rammathanan : *In human torture*, Indian Express Oct. 30 1993 at 8

¹⁵² Joshi K.C.: "Judicial Process and Recent trends" 23 *JILI* 184 (1992)

¹⁵³ *Altemesh Rein vs. Union of India*, AIR 1988 SC 1768

The Apex Courts rulings thus clothed the suspects and accused with rights designed to save them from torture or maltreatment during custodial interrogation. Will these rulings prompt parliament to bestir itself to legislate a law to implement the 113th report of the Law Commission of India and recommendation of the Supreme Court so as to insert Section 114-B in the Indian Evidence Act a provision casting the onus of proof on the police in cases of custodial torture and deaths?

It is submitted that the police should be insulated from political interference in promotions and postings.¹⁵⁴ It is equally important that police take against swift and deterrent action of third degree methods. Besides it would be provident to separate law and order staff from investigating staff in the police. The adoption of such separation will ensure undiluted attention to the detection of crime. Thus person in authority and responsible for the enforcement of law should not use and misuse law for the personnel gain and advantages as depicted in a number of cases decided by Indian Courts.¹⁵⁵ It is that highly central police service was not accountable to the public and better responsiveness requires drastic decentralization even to the extent of occasional relying upon citizen volunteers. Even in U.S.A and Russia existing police structures to some extent reflect public opposition to and concentration of police power. But in spite of India having a wonderful Constitution and having official committed to the charters and covenants of United Nations, violations of human right in myriad form is going on. But then, as Prof. Will Durant said: It is time for all good men to come to the aid of their party, whose name is civilization. The procedural safeguards, therefore, require continued public vigilance and ability of the people to avail of the judiciary to enforce these safeguards must be strengthened. The judiciary

¹⁵⁴ *Prakash Singh vs. Union of India* (2006) 8 SCC 1

¹⁵⁵ *Swarn Singh vs. State of Punjab*, AIR 1957 SC; *Nazir Ahmad vs. Emperor* AIR 1936 PC 253; *Ram Sagar Yadav vs. State of Uttar Pradesh* AIR 1985 SC 416; *State of Maharashtra vs. Ravikanth S. Patil* AIR 1991 SC 513

has, however, tried to initiate action even *suo motu* on the basis of letters of complainants or even newspaper reports. There is no doubt that the Courts have become battlegrounds for interesting and even conflicting ideas and ideologies relating to human rights and their enforcement. In this process, the courts have become even more crowded than before. One is reminded *Emanuel Kant's* categorical imperative, the absolute moral law has to be accepted without question by everybody and said. "In democratic societies, fundamental human rights and freedom are more than paper aspirations. They form part of law. And it is the special provide of judges to see to it that the laws undertaking the realised in the daily life of the people."¹⁵⁶

IV. INVESTIGATIONS INTO TORTURE: PROTECTIONS UNDER CODE OF CRIMINAL PROCEDURE:

The Code of Criminal Procedure, 1973 contains a few provisions which are designed to protect the suspected offenders from torture and cruel or inhuman or degrading treatment. Prominent among them is Section 176, which provides for inquiry in cases of custodial deaths. It imposes a legally mandatory obligation on the state to order magisterial inquiry in all cases of death in police custody.¹⁵⁷ Regrettably

¹⁵⁶ B. Hadervali, "Law and Custodial Torture in India"; Cri. L J 1999 (journal) at 44

¹⁵⁷ Section 176 of the code of Criminal Procedures 1973, reads:

- (1) either instead of , or in addition to, the investigation When any person dies while in the custody of the police or when the case is of the nature referred to in clause (i) or clause (ii) of sub-section(3) of section 174 the nearest Magistrate empowered to held inquests shall, and in any other case mentioned in sub-section (1) of section 174, any magistrate so empowered may hold an inquiry into the cause of death –held by the Police Officer; and if he does so , he shall have in holding an inquiry into an offence.
- (2) The Magistrate holding such on inquiry shall record the evidence taken by him in connection therewith in any manner hereinafter prescribed according to the circumstances of the case.
- (3) Whenever a Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the Magistrate may cause the body to be disinterested an examined.

such inquiries are often not held and whenever they are held their reports are often not accessible to the public. Such inquiries can be held either by an Executive Magistrate or by a Judicial Magistrate. In practice, most inquiries are conducted by executive Magistrates, who have limited powers of investigation and must rely on evidence provided by the police. Moreover they often work under police pressure. For these reasons their inquiries are not commonly perceived as independent and impartial. Public opinion often demands instead a judicial inquiry because such inquiry is widely believed to be the most authoritative, independent and impartial type of investigation. In fact, high percentage of judicial inquiries has effectively established police culpability. However, officials tend to avoid judicial inquiries describing them as time consuming and unnecessary. What usually happens in practice in the name of magisterial inquiry has been vividly depicted in the following editorial:

“The demand for a judicial probe is easily reconciled with the one by an Executive Magistrate. The dependents of the victim soon left alone to make a statement before the inquiring Magistrate. The police and their henchmen remain at liberty to play tricks upon the family distraught by the loss. The political parties conveniently forget that the Magistracy is another arm of the Government that is only too fond of working in tandem with the police. This phenomenon has been laid bare time and again and one never hears of the outcome the protracted magisterial inquiries of into such cases. The guilty

(4) Where an inquiry is to be held under this section, the magistrate shall, wherever practicable, inform the relatives of the deceased whose names and addresses are known, and shall allow them to remain present at the inquiry.

Explanation- In this section, the expression “relative” means parents, children, brothers, sisters and spouse.

policemen are taken as a part of the official fraternity and invariably rejoin the force after spending a few months in oblivion".¹⁵⁸

Section 54 of Criminal Procedure Code is another provision, which may help in protecting suspects from police torture. This section¹⁵⁹ gives the accused the right to have him medically examine to enable him to defend and protect himself properly. This section confers on the arrested person the right to have his medical examination done.¹⁶⁰ It was held in *D.J. Vaghela vs. Kantibai Jethabai*,¹⁶¹ that the Magistrate owes a duty to inform the arrested person about his right to get himself examined in case he has complaints of physical torture or maltreatment in police custody. The Supreme Court has cautioned the lower courts not to adopt a casual approach to custodial torture.¹⁶² In case the Magistrate concerned the request of the accused to be vexations or for defeating the ends of justice, he may refuse it. It has been held in *Mukesh Kumar vs. State*,¹⁶³ that the procedure adopted by the Magistrate to examine the body of the body himself and then dismissing the application with his observation that they were seen in normal posture was wholly unwarranted and erroneous. In The Criminal Procedure Code, the statutory power of the police to investigate is found under sections 154 to 176 of Chapter XII of The Criminal Procedure Code. Section 164¹⁶⁴ of

¹⁵⁸ The Statesman of 4 August, 1989

¹⁵⁹ See, Section 54 of Criminal Procedure Code, It provides:

“ When a person who is arrested, whether on a charge or otherwise, alleges, at the time when he is arrested, produced before a Magistrate or at any time during the period of his detention in custody that the examination of his body will afford evidence which will disapprove the commission by him of any offence or which will establish the commission by any other person of any offence against his body, the Magistrate shall, if requested by the arrested person so to direct the examination of the body of such person by a registered medical practitioner unless the Magistrate considers that the request is made for the purpose of vexation or delay or for defeating the ends of justice.”

¹⁶⁰ *Sheela Barse vs. State of Maharashtra*, AIR 1983 SC 378 at 381

¹⁶¹ 1985 Cri.L.J. 974 (Gujrat)

¹⁶² *Sheela Barse vs State of Maharashtra*, 1983, Cri.L.J.642 (SC)

¹⁶³ 1990 Cri.L.J. 1923 (Delhi)

¹⁶⁴ Section 164 of Cr. P. C. which reads as under:

(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this

the code provides that any Metropolitan Magistrate may record any confession or statement made to him in the course of investigation. The proviso to Section 164(1) provides that no confession shall be recorded by a police officer on which any power of Magistrate has been conferred under any law. Section 164(3) provides that a person who expresses his unwillingness to make a confession shall not be remanded to police custody, which guarantees that police pressure is not brought on the person who is unwilling to make a confession. Section 57¹⁶⁵ of the Code provides that no police officer shall detain a person in custody for more than 24 hours and shall be produced before the court of the nearest Magistrate. It is the duty of the Magistrate under section 54 to inform the arrested person that he has a right to get himself medically examined if he was subjected to physical torture in police custody.

Chapter or under any other law for the time being in force, or at any, time afterwards before the commencement of the inquiry or trial: Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

- (2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is bear, made voluntarily.
- (3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorize the detention of such person in police custody.
- (4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect. "I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B.
Magistrate".

- (5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.
- (6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.

¹⁶⁵ Section 57 of Cr. P. C. reads as under: No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's court.

Medical Examination of Torture Victims

The NHRC has commented, "The local doctor succumbs to police pressure which results in distortion of facts." The availability of medical reports produced by doctors is crucial to ensure justice for the victims of torture. The lack of professionalism and independence among medical personnel required to comment on police cases have invited comment and censure. In June 1996, the Directorate of Health Services in West Bengal issued a direction that in "no circumstances" should post mortem reports be handed over to the "concerned party"... "The Post Mortem reports should be sent to the concerned police authority only and in special circumstances to the courts on demand. This directive is in contravention to all international standards and norms that state that medical reports should be provided to the subject or his or her nominated representative and to the authority responsible for investigating the allegation of torture or ill-treatment."¹⁶⁶

The poor quality of post mortem reports has led to a directive from the NHRC to all state governments stating that all post mortems in custodial death cases should be videoed and cassettes sent to the Commission. However medical experts on forensic medicine have expressed reservations about the efficacy of video taping to show details of injuries.

"Whenever a serious crime like robbery or a major burglary takes place, the area police sweeps on all possible suspects in the vicinity, they are picked from their homes and kept in the police station over several days, not formally in a lock-up, but in some other remote room, to escape detection....As the police is not quite comfortable keeping a man in illegal custody, because of fear of being discovered by the judiciary or magistracy or the media or human rights groups, the tendency is to get

¹⁶⁶ In its 1995-96 annual report,

over with the whole thing quickly by the short-cut method of third-degree. The fact is that confessions do come easily with third –degree, except in a miniscule number of cases involving hardened criminals.”¹⁶⁷

Guidelines such as the “Does and Don’ts”¹⁶⁸ issued to security forces in states of the north-east include instructions such as “do not use torture,” but their effect is weakened by continuing barriers to victims of torture who wish to make complaints about the acts of security forces.

Investigations into deaths in custody are mandatory in India under Section 176 of the Criminal Procedure Code. However usually such investigations are only held in cases where a death in custody leads to a public outcry. Under law, the investigations

¹⁶⁷ See Padmanabiah Committee Report on Police Reforms, 2000.

¹⁶⁸ HRs: do’s and don’ts are as follows:

Do’s

- (1) Do respect every individual as a human being irrespective of his caste, creed, religion, region or nationality.
- (2) Do remember that you are a member of the public and you have been employed to act on their behalf.
- (3) Do always keep the welfare of the police in mind and be sympathetic and considerate towards them.
- (4) Do render all assistance to the needy irrespective of his economic, social or political status particularly children, women, old and infirm persons.
- (5) Do enforce the law firmly and impartially without fear or favour, malice or vindictiveness.
- (6) Do rise above personal prejudices of any kind and promote harmony amongst all people transcending religious, linguistic, regional and sectional diversities.
- (7) Do provide protection to a person in custody even if he is criminal, terrorist or insurgent and ensure that while in custody no physical or mental harm is done to him.
- (8) Do remember that you have a special responsibility to protect the interest of weaker section of society including women and children.
- (9) Do scrupulously respect the privacy of every individual while performing your duties.
- (10) Do remember that honest, courteous, dependable and impartial conduct makes enforcement of law acceptable to the common man and earns their respect, cooperation and trust.

Don’t

- (1) Do not try to achieve results at the cost of human dignity and values.
- (2) Do not usurp the functions of judiciary in any circumstances and punish the guilty to avenge or teach a lesson.
- (3) Do not indulge in molestation of women or any person.
- (4) Do not damage or take away property of any person.
- (5) Do not use more force than what is authorized by law or required for the achievement of task assigned.
- (6) Do not use force in panic to avoid injury to innocent persons specially women and children.
- (7) Do not carry out personal search of women without Mahila constables or responsible women of the area.
- (8) Do not indulge in custodial violence or maltreatment. It is illegal and counterproductive.
- (9) Do not fan hatred, anger and partnership.
- (10) Do not hurt the religious feelings of any person by desecrating any religious place or by showing disrespect to any religion.

can be held by either an executive magistrate, appointed by the state government and therefore under executive control, or by a judicial magistrate, independent of the executive and appointed by the High Court. In a vast majority of the cases investigations into torture are conducted by an executive magistrate, however.

The Convention against Torture requires that “Each State Party shall ensure that its competent authorities proceed to prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”¹⁶⁹

Rights of Torture Victims:

Persistent efforts at the national and international levels were coordinated in the United Nations Declaration on the Basic Principles of justice for victims of Torture, crime and the Abuse of power and this was subsequently adopted by the General Assembly in December 1985. Though it's been more than two decades the Indian courts have yet to awaken and recognize this resolution for in almost all the prosecutions there does not seem to be any role of the victim in the sentencing process. The entire process is in the hand of the court.

“Victims mean persons who, individually or collectively have suffered harm, including physical or mental injury, emotional suffering economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member State, including those laws prescribing criminal abuse of power.”¹⁷⁰

¹⁶⁹ Article 12: Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

¹⁷⁰ R.K.Bag: “Perspectives in victimology in the context of the Criminal Justice System”.(1990) 10 *Cri L J* at 145.

It is often seen that the state takes the role of avenger for the harm done to the victim and uses the victim only as a means of finding the offender and securing prosecution against him. The restitution of the victim does not seem to be a consideration in the eyes of the state. However, if we scrape the surface a bit we shall see that restitution is in fact, no less important than punishing the offender. This is where victim rights move beyond just monetary compensation. Some codes have recognized the importance of restitution, for example the Ethiopian code provides for restitution within the legal process.¹⁷¹ Even under the Indian laws there are a number of statutes, which provide for compensation to the victim's.¹⁷²

Procedural Problems under the Code of Criminal Procedure, 1973

Under the Criminal Procedure Code the accused has the right to choose his counsel for his defense. This right begins at the time of arrest and continues till the day of final sentence. In contrast the victim of crime are the most neglected persons in the criminal justice system as the victim has no effective right to be represented by a private lawyer. This however, does not mean that a private lawyer cannot be engaged. What it means that a private lawyer engaged by the victim under Section 301 (2), Cr P.C would act only under the direction of the Public Prosecutor or Assistant Public Prosecutor as the case may be.¹⁷³ Neither he can examine nor can he cross examine the

¹⁷¹ Subash Chandra Singh: "Compensation and Restitution to the victims of Crime" (1992) *Cri. L. J.* 100-108, at 101

¹⁷² 1. Section 140, 161 and 16 of the Motor Vehicles Act, 1988 entitles a victim of motor accident to prefer a claim of compensation before a duly constituted Motor Accidents Claims Tribunal. Provision has also been made empowering the government to establish and administer a solatium fund out of which compensation can be paid in cases of death or grievous injury resulting in hit and run case where the persons guilty of causing the accident remain untraced.

2. Section 124 and the rules framed under section 129 of the Indian Railways Act, 1989 provides for payment of compensation to the railway accident victims.

3. Under section 5 of the Carriage by Air Act 1972 persons who are carried by aircraft are entitled to claim compensation in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which took place was on board aircraft or in the course of any operations of embarking or disembarking.

¹⁷³ 301. (2) if any such case any private instructs a pleader to prosecute any person in any court, the public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the

witnesses nor even address the court without the permission of the court. Thus a privately engaged lawyer has no independent status of his own. Today the fact cannot be ignored that many hardened criminals go free because the public Prosecutor has cross examined the important defense witness in a systematic manner. Thus Section 301 needs to be suitably modified so as to forgive the victim the right to have and effective representation through a private lawyer with an independent status at levels of criminal proceedings, if the victims so desires.

By Section 337, Cr P.C the right to appeal against the inadequacy of the sentence is given only to State: a private complainant has no right to say in this matter. Although a private complainant has no right to say in the matter of the quantum of sentence, he has a right to invite revision jurisdiction of the High Court under Section 401, Cr P.C as regards the order of acquittal, the right to appeal is available under Section 378 (4).Cr. P.C. only if the case was instituted upon complaint and special leave of the High Court is obtained. If the proceedings are instituted upon complaint, but the police report there can be no appeal by a private party. Apart from this a private party may also come in revision against the order of acquittal in case the concerned officer has failed exercise the right of appeal.¹⁷⁴ Section 401, Cr. P.C. does not seem to be exhaustive, as the court does not normally re-appreciate the value of the evidence by itself and go into the question of credibility of the witness. Unless of course the appreciation of evidence and the finding by the courts below is violated by an error of law or the findings are manifestly perverse.

prosecution and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant, Public, Prosecutor, and may, with the permission of the court, submit written arguments after the evidence is closed in the case.

¹⁷⁴ Kabir Bogra And Poornima Hatti: "Custodial Rape:A Re-Look At The Victim's Rights" *CILQ* 2001at 516

Thus the revisional remedy available is in favor of the accused where the appellate courts can re-appreciate both the question of fact and law.¹⁷⁵

V. INADMISSIBILITY OF CONFESSION: PROTECTION UNDER EVIDENCE ACT:

Section 24,¹⁷⁶ 25¹⁷⁷ and 26¹⁷⁸ of the Indian Evidence Act provides that confessions made to the police officer while in police custody is inadmissible. Section 27¹⁷⁹ of the Act provides as to how much of the information received from an accused may be proved. The main object of these sections is to protect the person charged with an offence from being subjected to torture by the police. The Act makes it a substantial rule of law that confession made to a police officer in the absence of a Magistrate is inadmissible in the Court of law. The effect of the first three provisions is inadmissibility of a confession made by an accused person to the police officer while in police custody in judicial proceedings. But Section 27 of the Indian Evidence Act nullifies whatever protection is afforded by these provisions to an accused person from police coercion, which is a very potent source of police brutality. The section is in the nature of a proviso or an exception to the preceding sections, which deals with confession in police custody and other involuntary confessions. Because of this

¹⁷⁵ *Id.*

¹⁷⁶ Section 24 of Evidence Act provides: "A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by an inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of temporal nature in reference to the proceeding against him".

¹⁷⁷ Section 25 of the Evidence Act provides: "No confession made to a police officer, shall be proved as against a person accused of any offence".

¹⁷⁸ Section 26 of the Evidence Act provides: "No confession made by any person whilst he is in the custody of a police officer, unless it is made in the immediate presence of a Magistrate, shall be proved as against such person....."

¹⁷⁹ Section 27 of Evidence Act provides: "Provided that, when any fact is proved to be discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact that thereby discovered, may be proved".

provision “the finding of articles in consequence of the confession appears to render trustworthy that part which relates to them”¹⁸⁰ and whether such a statement proceeds out of inducements, threats or tortures are absolutely immaterial.¹⁸¹ In *Mohanlal vs. Ajit Singh*¹⁸² the accused was arrested within four days of the fact of murder and robbery. He immediately indicated the place where he had hidden the stolen articles; and a gold ring and currency notes, which bore his finger impressions, were recovered within 6 days. On these facts the Supreme Court observed that it must be concluded that the incriminating articles were acquired by the respondent at on and same time that it was he and no one else who had robbed the deceased of the money and the ring and had hidden them at a place and in a manner which was known to him. Alarming increase in the cases of torture, assault and death in police custody¹⁸³ and non availability of direct evidence to punish culprits in such cases have been a vexed problem indeed as the investigation into such matters is conducted by the custodians themselves or by the members of their fraternity, who try to circumvent the relevant evidences and also try to misguide the courts by their fabricated story. It is, therefore, of utmost necessity that in cases of custodial atrocity, an objective and an independent inquiry should be made. Keeping it in view, the Supreme Court in *Secretary, Hailakandi Bar Association vs. State of Assam*¹⁸⁴ directed the CBI to register and investigate the instant case of custodial death by holding that “it is futile to expect an independent and wholly objective investigation by the state police. Even otherwise, the people will have little confidence in the investigation, no matter how honest and

¹⁸⁰ *Cocke's Cases and Statutes on Evidence*, 199 (2nd ed), by G.D.Nokes, 1970; based on *R vs. Gould* (1840) 9C&P364 : 173 E.R. 870

¹⁸¹ *Ibid.*

¹⁸² AIR1978 SC 1183 at 1196

¹⁸³ For detailed data see...Annual Reports of the National Human Rights Commission, New Delhi and website: <http://nhrc.nic.in>; See also Annual Report of the National Crimes Record Bureau, New Delhi

¹⁸⁴ (1955)Sup (3) SCC 736.

objective the investigation be.¹⁸⁵ Again in *Paramjit Kaur vs. State of Punjab*¹⁸⁶ where serious allegations were levelled against the officers of the police, it was held that it would be better and in the interest of justice to hand over the investigation to an independent authority.

Following the same, the Supreme Court in *Ajab Singh vs. State of UP*¹⁸⁷ where the police explanation of a custodial death was a concocted story, directed the CBI to register the case and conduct an investigation into the circumstances of custodial death. It also directed the CBI to complete the investigation expeditiously and file a copy of the investigation report in the court.

Proving criminal liability of the custodian culprits is another problem in the area as, barring few exceptions, the burden of proof lies on the prosecution. Because of this procedural lacuna, the number of acquittals of custodian offenders has been increasing. For it is the police officer alone who can give evidence regarding the circumstances of the custodial atrocities and police often trying to circumvent the relevant evidence and mislead the Court. Consequently the custodian offenders go Scot free due to paucity of evidence. Taking a serious note on this situation, the Supreme Court in the *State of UP vs. Ramsagar Yadav*¹⁸⁸ observed that:

The law as to the burden of proof in such cases may be examined by the legislature so that handmaids of law and order do not use their authority and opportunities for oppressing the innocent citizens who look to them for protection.

The recommendations of the Supreme Court was subsequently referred to the Law Commission of India which in its 113th report has recommended that Section

¹⁸⁵ *Id.* At 740.

¹⁸⁶ (1999) 2 SCC 131.

¹⁸⁷ (2000) 3 SCC 521 at 524

¹⁸⁸ AIR 1985 SC 416 at 421

114(B) be inserted in the Indian Evidence Act to introduce a presumption that injuries sustained by a person while in police custody are presumed to have been caused by a police officer having custody of that person during that period. Several Supreme Court judgments¹⁸⁹ and NHRC recommendations have pressed the issue; the section still remains to be introduced with the Indian Evidence Act.

In March 1999, the NHRC announced the establishment of Human Rights Cells within the police departments of all states to deal with all complaints related to human rights violations. The question may arise regarding the evidentiary value of dying declaration. It can be said that were the deceased who made a dying declaration about his beating by the police men in police station was in the exclusive custody of police man and it was the policemen in the police station who were in opposition to exert influence over the declarant and no one else had access to him which not only excluded the possibility that he was assaulted by anyone else, it was safe to accept the dying declaration¹⁹⁰ Recently in *Shakila Abdul Gafar's case*¹⁹¹ the Supreme Court has explicitly laid down that amendments are to be made to the Indian Evidence Act so as to provide prosecution of a police officer for an alleged offence of having caused bodily injuries to person while in police custody, if there is evidence that the injury was caused during the period when the person was in police custody.

The exaggerated adherence to and insistence upon proving the guilt of the custodian offenders beyond every reasonable doubt often results in miscarriage of justice and makes the justice delivery system suspect and vulnerable. Ultimately, the society suffers and due to want of punishment, the criminal get s encouraged.¹⁹²

¹⁸⁹ State of MP vs. Shyam Sunder Trivedi, (1995) 4 SCC262; *D.K. Basu vs. State of W.B* (1997) 1 SCC 416; *Shakila Abdul Gafar vs. Vasant Raghunath Dhoble*, AIR 2003 SC 4567 at 4571 and *Munshi Singh Gautam vs. State of M.P.* AIR 2005 SC 402 at 405

¹⁹⁰ *State of U.P. vs. Ram Sagar Yadav*; AIR 1985 SC 416 at 419

¹⁹¹ *Shakila Abdul Gafar vs. Vasant Raghunath Dhoble*, AIR 2003 SC 4567 at 4571

¹⁹² *Munshi Singh Gautam vs. State of M.P.* AIR 2005 SC 402 at 405

Suggesting the subordinate judiciary to change their outlook and attitude regarding the cases of custodial crimes, the apex court held that the court must deal with such cases in a realistic manner and with the sensitivity they deserve so that the truth may be found and the guilty may not escape, otherwise people may tend to gradually lose their faith in the judiciary which will be a sad day.¹⁹³ Speaking for the court in *Zahira Habibulla H Sheikh vs. State of Gujarat*,¹⁹⁴ Arijit Pasayat J. has rightly observed:

When an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or lethargy shown in protecting his rights guaranteed in law will tend to paralyse by such inaction or lethargic action of courts and erode in stages the faith in built in the judicial system ultimately destroying the very justice delivery system of the country itself.¹⁹⁵

VI. LIABILITY OF POLICE FOR CUSTODIAL TORTURE: PROTECTIONS UNDER PENAL LAW:

Torture has been made a punishable offence under Sections 330¹⁹⁶ and 331¹⁹⁷ of the Indian Penal Code. Voluntarily causing hurt to extort confession or information is an offence under section 330 IPC punishable with seven years imprisonment and fine. Voluntarily causing grievous hurt for purpose of extorting

¹⁹³ *Ibid.*

¹⁹⁴ (2004) SCC (Cri) 999

¹⁹⁵ *Id.*

¹⁹⁶ Section 330 of I.P.C.: Voluntarily causing hurt to extort confession, or to compel restoration of property: Whoever voluntarily causes hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, shall also be liable to fine.

¹⁹⁷ 331 of I.P.C. reads as: Voluntarily causing grievous hurt to extort confession, or to compel restoration of property: Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

confession or information is a serious offence under section 331 IPC punishable with ten years imprisonment and fine. The main objects underlying the provisions are to prevent by police during interrogation. The offence under this sections complete when hurt or grievous hurt is caused to the suspects by the police officer to extort a confession or information leading the detection of the stolen property.¹⁹⁸ Section 29¹⁹⁹ of the Police Act, 1861 stipulates that every police officer who inflicts personal violence to any person in his custody shall be liable to a punishment of fine in the form of salary of three months and imprisonment of three months or both. These statutory provisions in their entirety insulate the accused persons against police torture.

These sections aim to control the atrocities committed by police during investigation. These offences can be abetted too. Where a policeman stood by and acquiesced in an assault on a prisoner committed by another policeman for inducing a confession it was held that the former abetted the offence under the above sections.

If a public servant having authority to make arrest, knowingly exercises that authority in contravention of law and affects an illegal arrest he can be prosecuted for an offence under section 200²⁰⁰ of IPC. Apart from this special provision, any person who illegally arrests another is punishable under section 342²⁰¹ of IPC, for wrongful confinement. If the arrest is illegal, it is a sort of false imprisonment and the person

¹⁹⁸ *Sham Kant vs. State of Maharashtra*, AIR 1992 SC 1879

¹⁹⁹ Section 29 of the Police Act, 1861 stipulates that every police officer who inflicts personal violence to any person in his custody shall be liable to a punishment of fine in the form of salary of three months and imprisonment of three months or both.

²⁰⁰ See Section 200 of IPC which reads as: whoever corruptly uses or attempts to use as true any such declaration knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

²⁰¹ Section 342 of IPC: Punishment for wrongful Confinement: Whoever wrongfully confines any person shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

making such arrest exposes himself to a suit for damages in a civil suit.²⁰² It can be mentioned here that the provision regarding arrest cannot be by-passed by alleging that there was no arrest but only informal detention. In formal detention or restraint of any kind by the police is not authorized by law. It is intolerable that the police should pursue the investigation of crime, by defying all the provision, of the law for the protection of the liberty of the subject under the colourable pretension that no actual arrest has been in their custody.²⁰³

Police and security forces as well as jail authorities are entitled to invoke the plea of mistake of fact available under section 76²⁰⁴ and 79²⁰⁵ IPC. Section 76 exempts those acts from criminal liability, which have been done under mistake of fact. The section is meant to excuse a person who had done what by law is an offence, under a mis-conception of facts, leading him to believe in good faith that he was commanded by the law to do it. Order or commands given by a superior to an inferior for illegal acts will not furnish any defence. The maxim respondent superior has no application in criminal law.

Death due to torture in custody is a murder²⁰⁶ for which the maximum punishment is death penalty. However, sometime the police take recourse to the plea of private defence in cases of custodial death. But law does not give any differential treatment to the police in such cases and the concerned member of the police force is required to prove that his case comes within the scope of private defence. Therefore, if the injury inflicted by the policeman is found to be disproportionate to the injury to

²⁰² *Anwar Hussain vs. Ajai Kumar Mukherjee*, AIR 1965 SC 1651.

²⁰³ *Queen vs. Basooram Das*, 19 WR 36.

²⁰⁴ Section 76 of IPC reads: Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.

²⁰⁵ Section 79 of IPC reads: Nothing is an offence which is done by any person who is justified by law, or who reasons of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

²⁰⁶ See Section 300 IPC

be averted he will not be exempted from criminal liability. However, if it is established that a policeman abiding his superior authority for this advancement of public justice has exceeded the power given to him by law and caused death by doing an act, it is not a case of murder but culpable homicide not amounting to murder punishable under section 304²⁰⁷ IPC. In case the police is indicted in the magisterial enquiry, action under appropriate section of Law like, 302²⁰⁸ I.P.C. (Punishment for Murder), section 120-B²⁰⁹ IPC (Punishment for Criminal Conspiracy) section 218²¹⁰ I.P.C.(Punishment for public servant framing incorrect record) section 201²¹¹

²⁰⁷ Section 304IPC reads: Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life ,or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, Or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

²⁰⁸ Section 302IPC reads: Whoever commits murder shall be punished with death or imprisonment for life and shall also be liable to fine.

²⁰⁹ Section 120-B reads as:

(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

²¹⁰ Section 218 IPC reads as : Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or to any person, or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

²¹¹ Section 201 IPC reads as : Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false, If a capital offence shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; If punishable with imprisonment for life and if the offence is punishable with [imprisonment for life], or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; If punishable with less than ten years' imprisonment And if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both.

I.P.C.(Punishment for causing disappearance of evidence of offence), 327²¹² Section 376 (B)²¹³ of Indian Penal Code deals with the sexual intercourse of public servant with woman in his custody, Section 376 (C)²¹⁴ of I.P.C. deals with intercourse of superintendent of jail, remand, hostel, private houses etc, Section 376(D)²¹⁵ of I.P.C. deals with intercourse by any member of the management or staff of a hospital with any woman in that hospital.

Even otherwise also if a prima facie case of custodial death or other brutality is felt by the senior police officers, 'suo-moto' a case against the erring police personnel under appropriate section is registered and as per the process of law, these personnel are arrested, send to jail and dealt with.

It is rightly said that when a policeman indulges in 3rd degree methods, he only degrades himself to the level of a criminal, and perhaps he compares less favourably

²¹² Section 327 IPC reads: Whoever voluntarily causes hurt, for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything which is illegal or which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

²¹³ Section 376 (B) of I.P.C. which reads as under:

Whoever being a public servant, takes advantage of his official position and induces or seduces, any woman, who is in his custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment to either description for a term which may extend to five years and shall also be liable to fine.

²¹⁴ Section 376 (C) of I.P.C. which reads as under: Whoever being the superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution, takes advantage of his official position and induces or seduces, any female inmate of such jail, remand home, place or institution to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment to either description for a term which may extend to five years and shall also be liable to fine.

Explanation 1: "superintendent" in relation to a jail, remand home, or other place of custody or a woman's or children's institution, includes a person holding any other office in such jail, remand home, place or institution by virtue of which he can exercise any authority or control over its inmates.

Explanation 2: The expression 'woman's or children's institution' shall have the same meaning as in Explanation 2, sub section (2) of Section 376

²¹⁵ Section 376 (D) of I.P.C. which reads as under: whoever being on the management of a hospital or being on the staff of a hospital, takes advantage of his position and has sexual intercourse with any woman in that hospital, such sexual intercourse not being an offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

Explanation: the expression "hospital" shall have the same meaning as in explanation 3 to sub-section (2) of Section 376.

with the criminals in his custody. For his crime in trying to obtain a confession by torture methods coming as it does from an educated person and a person charged with the scared duty of upholding the law and constitution, becomes more reprehensible than the misguided act of the criminal.²¹⁶In view of the fact that percentage of inquiries which disclosed actionable material is highest in the case of judicial inquiries, lower in magisterial inquiries and lowest in inquiries conducted by the other agencies, the National Police Commission has rightly recommended that judicial inquiries should be mandatory and held in all cases of “alleged rape of a woman in police custody” and “death or grievous hurt caused while in police custody”.²¹⁷

Unfortunately, this sensible recommendation has not been implemented yet and judicial inquiries are exceptionally held. Many domestic laws are punitive and outdated for example the present police organization, which is still based on the police act of 1861, again hardly be human rights conscious. The Government set-up the National Police Commission but has not yet implemented the reforms suggested in its various reports. Similarly our jail manual still carries many rules and regulation in respect of the treatment of the prisoners which represent the legacy of the colonial period. It is high time to revise these laws, rules and regulations.

²¹⁶ Srivastava V.P: *Human rights and Jurisprudence;* vol I Indian Publishers Distributors, Delhi.(2004)at 701.

²¹⁷ See, *National Police Commission, first report* (1979) at 10.18. and 10.19.