CHAPTER - 6

LEGAL AND CONSTITIONAL REMEDIES

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I. CIVIL SUITS AND PRIVATE CRIMINAL COMPLAINTS:

Undoubtedly, the victims of police excesses have the opportunity to bring a civil suit for damages or to initiate criminal complaints. However, civil claims involve such lengthy and costly procedures that very few use them and civil suits against the police are rarely successful. As the Andhra Pradesh High Court has rightly said 'A civil remedy is a case of chasing a mirage.'

Despite, tremendous obstacles some victims or their relatives have pursued such actions. It took 14 years of litigation in a civil suit for the parents of *P.Rajan* to receive Rs.3, 72,000, compensation in 1990. The police had persistently denied *Rajan's* Arrest but the *Kerela* High Court disbelieved the police, accepted evidence from witness to his arrest, and issued a habeas corpus writ after which the police, unable to produce him in court, admitted that Rajan had died in police custody under torture.[1]

Compensation under the criminal law

Section 250.357, 358 and 359 of the Cr. P.C and section 5 of the Probation of Offenders Act, 1958 are some of the provisions relating to the power of the court to award compensation to the victims. Section 250 empowers the court to give compensation for accusation without reasonable cause. Section 357 empowers the court to direct in whole or in part of the fine amount or if no sentence of fine is imposed, then a specified amount as compensation to the victim on conviction of the accused person. section 358 lays down that maximum amount of rupees one hundred as compensation may be ordered to be paid by the magistrate to person who have been

[1] Human Rights in India (the Updated Amnesty International Report),(First Published in 1993)

groundlessly arrested under section 359, the court can order the accused to pay cost of the proceedings in non- cognizable case, if the accused in convicted. Under Section 456, the court has the power to restore possession of immovable property on conviction of the accused for criminal trespass. Under Section 5[2] of the Probation of Offender act, the court has the power to direct the offenders who have been released under the Act to pay compensation to the victims.

Under section 357[3] and 359 of the Cr. P. C and under Section 5 of the Probation of Offenders Act,[4]the victim is entitled to get compensation only in the event of conviction of the offender. Apart from that, it is entirely at the discretion of the Court that a victim is given compensation. These provisions are practically circumscribed by the conditions that the accused person should have been convicted, and the fine amount if imposed is recoverable to or the accused commits probation able offences (??). These provisions do not create any right to claim compensation in favour of the victim. Moreover if the convict is incapable of paying the fine or the compensation as ordered by the Court on grounds of poverty, the victims are deprived of getting it from any other source. However, Compensation under the Cr. P.C is possible only when the act is both a crime and a tort, while such as a requirement is

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2 Section 5 of Probation of the offenders Act 1958 reads as under:
Power of Court to require released offenders to pay compensation and costs.-
(1) The court directing the released of an offender under Section 3 or Section 4, may ,if it thinks fit, make at the same time a further order directing him to pay-
(a) such compensati0on as the Court thinks reasonable for loss or injury caused to any person by the commission of the offence; and
(b) such costs of the proceedings as the court think reasonable.
(2) The amount ordered to be paid under sub- section (1) may be recovered as a fine in accordance with the provisions of Sections 386 and 387 of Code.
(3) A civil court trying any suit, arising out of the same matter for which the offender is prosecuted, shall take into account any amount paid or recovered as compensation under sub-section(1) in awarding damages.

3 In *Hari Kishan & State of Harayana* vs. *Sukhbir Singh,* AIR 1988 SC 2127, the Supreme Court said that "the power of the court to award compensation is not ancillary to other sentences but is in addition thereto"

4 Hereinafter referred to as the POA

absent under the POA[5]Compensation and/or cost some nexus with the loss or injury caused. The Criminal Procedure Code, under Section 357 deals with the aspect of order to pay compensation. Sub-Section three of this section says that "when a court imposes a sentence, of which fine does not form a part, the court, may when passing a judgment, order the accused to play, by the way of compensation, such as amount as may be specified in the order of the person who has suffered any loss or injury by reason of the act of which the accused person has been so sentenced."

Although this provision is very generic in nature it would go a long way if enough emphasis is laid on it especially so in the areas of custodial rape. Just before we consider this as a progressive piece of legislation, the scheme of the section clearly shows that the discourse relating to compensation is way down in the list of priorities of the welfare state[6]. The fine if any collected from the salaries of the officers should go towards the victim would be a strong recommendation on the part of the authors.

Very few criminals' complaints against the police are successful. Wilson, a balloon seller, died in the custody of Delhi police in 1984. A private criminal complaint was brought against the police the same year and in 1987 police officers were summoned to face trials for murder, unlawful detention and torture. Lawyers for the police have repeatedly asked for adjournment and raised legal objections against the prosecutions, eight years later the charges against the accused police officers have still not been drawn up.

Archana Guha, a torture victim, has been struggling to obtain justice and compensation since 1977, but has not yet succeeded. A headmistress of a junior high school in Calcutta, she was arrested in July 1974, in place of her brother who was

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5 K.I Vibhute, Victimology: An International Perspective, (1990) CULR 145, 159.

6 *See* Generally, Qusai Hussain, Savitha Sivanandan, Victim Compensation, 1996 Cr. L.J 141,and; R.K Gauba, "Efficacy of the Existing Laws on Compensation to Victims of crimes", 1995 Cr.L.J 33.

wanted by the police on suspicion of involvement with *naxalites*. She was hung from a pole by her hands and feet, beaten, kicked, burned with cigarettes and threatened with rape at Calcutta police headquarters. Although she was never charged or brought to trial, she remained in jail for three years. The torture she suffered caused paralysis of her legs and she left jail in a wheelchair in May 1977. Soon after her release, *Archana Guha* began court proceedings to bring to justice those guilty of her torture.

Meanwhile the officer in charge charged with her torture got promotion and reportedly sought to use every legal avenue to keep the case out of court. In 1988, the Calcutta High Court quashed the case on the grounds that it had exceeded the time limit on criminal cases, even though *Archana Guha* had yet to give evidence in court. Her appeal against that ruling was allowed, on the grounds that those accused of torturing her had "at every stage" taken "steps which prolonged and intended to frustrate the proceedings".[7]Recently *Archana Guha* got some relief when the accused policemen were found guilty by the lower court and ordered one year simple imprisonment and a fine of two thousand rupees.

II. CRIMINAL ACTIONS AGAINST TORTURE:

Two sections of the Criminal Procedure Code provide protection from criminal action to members of armed forces and public servants from any action, for anything done or purported to be done in the discharge of their official duties except after obtaining the consent of the Government. These are sections 45 and 197 of the Criminal Procedure Code. In the case of section 45, this immunity can be extended to any forces charged with the maintenance of public order if a state government so desires. Forthcoming legislation (especially the Criminal Procedure Code Amendment Bill) proposes to widen the scope of immunity offered by section 45 of the Criminal

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[7] *Ibid*, at p.90

Procedure Code. It proposes amending section 197 of the Criminal Procedure Code to ensure that all "public servants" charged with the maintenance of public order rather than just "members of the Forces" should be protected by ensuring that no court should take cognizance of any offence committed while acting or purporting to act in the discharge of his duty.

In almost all cases of custodial torture and deaths, policemen take recourse to the protection of this provision to prevent further investigation. Allegations of torture or ill treatment should never be considered part of discharge of official duty. Recent rulings of the Supreme Court have also ruled that there should be no time bar in prosecution of cases of torture. Applications for protection from prosecution sought by policemen in cases related to torture or custodial death should not only be summarily dismissed by the Courts but must also invite strict judicial censure.

Although the police, prison and security forces and authorities are as much liable to punishment for committing crimes against the person and property of any person as any other ordinary citizen in practice very few police officers are ever brought into trial and virtually none are convicted for committing crime against ordinary citizens. According to the Amnesty International Report police officers were arrested in only 25 cases of death in custody, which took place since 1985, and criminal charges were brought in only 52 cases. According to the same report the guilty officers had been convicted of murdering people in their custody in only 3 cases. The reason for this sorry state of affairs is not difficult to discern. As the Statesman aptly in August 1989: "The main reason why barbarous third degree methods are still used, despite being illegal, is that the police know fully well that they are (a) protected species and that no harm will come to them if the odd prisoner dies in the lockup." A senior former official has also acknowledged that fact: "In India public

demonstrations and loud protests in legislatures have to be organised before police officers are punished for their illegal acts. Very often the only action is transfer, followed by the hushing up of the case by superior police officers."[8]

Several factors are responsible for the failure to convict the errant policemen. The prominent among them are the legal sanctioned impunity of the police in certain cases. The Armed Forces (Special Powers) Act in force in Assam, Jammu &Kashmir, Punjab, and north east states where armed opposition groups are active, grants the security forces immunity from prosecution for "anything done or purported to be done" under the Act. Section 197 of the Cr. P. C. grants considerable protection to the public servants including police and executive magistrates from prosecution for acts committed while on official duty.[9] They cannot be prosecuted without prior permission from the government, which employ them. The government strengthened this protection in states under President's rule through the Code of Criminal Procedure (Amendment Act) 1991.

In addition to above-mentioned immunities, which the police enjoy under law, they have developed various procedural techniques for evading prosecution for human rights violations. In the first place reports against the police are not lodged in the police stations. They sometimes announce that deaths were caused due to suicide or illness, accident, assaults by others or to injuries sustained when the prisoner tried to escape or resist arrest. They also attribute deaths to armed encounters with police and deny that the victims were in custody at the time of death.

It is very difficult to gather evidence against the accused policeman. As the Supreme Court also commented in *State of U.P. vs. Ram Sagar Yadav* [10] that:

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8 *Ibid* at p.4
9 (2000) 9 SCC 742
10 AIR 1985 SC 421

"Police officers alone and none else can give evidence regarding the circumstances in which a person comes to receive 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 station, are left without any evidence to prove who the offenders are."

In some cases it has been observed that the policeman gives false evidence in support of their colleague during a trial.[11] Senior police, executive magistrates, doctors and state officials very often make all possible efforts to cover up police atrocities and brutalities or shield the police officers responsible from being brought to justice. For this purpose they resort to such questionable methods as falsification on judicial records and manage favourable post-mortem report by influencing doctors or sometimes by having they carried out at police hospitals. They often obstruct inquiries and intimidate witnesses to prevent them from giving evidence. Section 176 of Cr. P. C. makes investigation by a magistrate obligatory in all cases of custodial death only magisterial inquiries are conducted and reports of these inquiries are often withheld because of a close nexus between the senior police and executive magistrate. Such inquiries are mere eyewash and do not in any way deter the police from committing illegal acts. However, where judicial inquiries have been ordered, they have come out with high quality reports. In view of the above-mentioned difficulties, it is almost impossible to convict and punish the policemen responsible for custodial torture or other related offences. No wonder cases like that of *Ram Sagar Yadav*, where a farmer was done to death in police custody because he made complaint against a police for

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[11] *Gouri Shankar Sharma* vs. *State of U.P.* ,AIR 1990 SC 709.

demanding bribe are increasingly taking place notwithstanding and law and policy of the state relating to police torture and custodial death. Particularly disturbing is the fact that even in fewer cases of conviction the accused is not convicted for the offences committed by him but for lesser offence.

III. CONSTITUTIONAL REMEDIES:

Supreme Court and National Human Rights Commission Remedying the Malaise:

In India the Supreme Court and the National Human Rights Commission, the apex human rights observant have played a vital role in combating the custodial torture. The Supreme Court while dispensing justice to torture victims expressed its serious concern towards torture and custodial deaths.[12] In *Kishore Singh vs. State of Rajasthan,*[13] the apex court held that the recourse to third degree methods by the police is violative of Article 21 of the Constitution and directed the Government to take appropriate steps to educate the police so as to inculcate the sense of respect for human person. It further observed that the police which rely on fists than on wits, on torture more than on culture cannot control crime and nothing is more cowardly and unconscionable 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. In *Joginder Singh* vs. *State of U.P.*,[14] the apex court while dealing with the violation of human rights as a result of indiscriminate arrests laid down that except in heinous offences the police should avoid arrest and a mere notice to attend police station and not to leave it without permission would be sufficient. In

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12. *Nandini Satpathi* vs. *P.L. Dani* AIR 1978 SC 1025; *Kishore Singh* vs. *State of Raj.*, AIR 1981 SC 625; *State of U.P.* vs. *Ram Sagar Yadav*, AIR 1985 SC 416; *State of M.P.* vs. *Shyam Sunder Trivedi* (1995) 4 SCC 262.
13. AIR 1981 SC 625
14. AIR 1994 SC 1349

Gauri Shanker Sharma,[15] the court observed that death in police custody must be seriously viewed for otherwise we will be taking a stride in the direction of Police *Raj*. In *Ajab Singh* vs. *State of U.P.,*[16] the court observed that we do not appreciate the death of persons in custody, when such deaths occur, it is not only the public at large that those holding the custody are responsible, they are responsible to the courts under whose orders they hold such custody and directed the State of U.P. to take disciplinary proceedings against those found responsible for *Rishipal's* death. To curb custodial violence the apex court ordered constant checks on police stations and ascertain whether there was a custodial violence or violation of rights of arrested persons.[17]Moreover in *Peramjit Kaur* vs. *State of Punjab*[18]the Supreme Court in exercise of plenitude of its jurisdiction under Article 32 which has the effect of designating the commission as a body sui generis to carry out mandates of the supreme Court and as such the commission will act in accordance with the directions of the supreme Court which shall be binding on all authorities in the country.

The Supreme Court in *D.K. Basu* vs. *State of West Bengal*[19] held:

> "Custodial death is perhaps one of the worst crimes in a civilized society governed by Rule of Law. The right inherent in Article 21 and 22(1) of the Constitution requires to be zealously and scrupulously protected. We cannot whisk away problem. Any form of torture or cruel inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed

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15 AIR 1990 SC 709
16 AIR 2000 SC 3421
17 *See*, " Supreme Court orders regular checks on police", The Times of India, July 20, 2002
18 (1999) 2 SCC 131
19 AIR 1997 SC 610

contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism".

The Supreme Court[20] has laid down detailed guidelines to be followed by Central and State investigating and security agencies in all cases of arrest and detention. Justice *A.S.Anand* (the then) who delivered the judgment on behalf of the court held that, any form of torture or cruel, inhuman or degrading treatment, would fall within the inhibition of Article 21 of the Constitution whether it occurs during investigation, interrogation or otherwise. Detailed guidelines have been laid down by the Court to be followed in all cases of arrest of detention till legislative measures are taken. The court made it clear that failure to comply with the guidelines should, apart from rendering the official concerned liable for departmental action, also render him liable to contempt of the court and the proceedings for contempt may be instituted in any High Courts of the country, having territorial jurisdiction over the mater. These requirements flow from Article 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, Intelligence agencies like the Intelligence Bureau, RAW, CBI, CID, Traffic police Mounted Police and ITBP.

The police are essentially a law enforcement agency but when it comes to treat itself as law unto itself and goes berserk in perpetrating brutality and atrocities against downtrodden and social pariahs then the judiciary is the last hope to bridle the police and rescue the torture victims. The judiciary under constitutional scheme has been performing positive and creative function in securing and promoting human rights to the people. The Apex Court in the exercise of its jurisdiction may pass decree or make

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[20] *Ibid.*

order for doing complete justice.[21] The Supreme Court under Article 32 of the Constitution has the power to issue certain writs, directions, or any order for the enforcement of fundamental rights enshrined in the Constitution.[22] Similarly, High Courts have the power under Article 226 of the Constitution of India to issue certain writs, orders, and directions for the enforcement of fundamental rights or for any other purpose. The judiciary in India has exercised its powers in most creative manner. It has devised new strategies, new tools to ensure the protection of human rights to the people.

1. Monetary Compensation: Judicial Remedy

Growing tend among cases involving police atrocities is to provide the victim compensation for the state atrocity. In countries like New Zealand it is already an accepted practice for the state to provide monetary compensation of any unjustified atrocity committed by it[23] In the case of *D.K Basu* vs. *State of West Bengal*[24] Anand, J. (as he then was) traced the entire development of the process of different countries in the world.

Though the Indian legal system does not recognize a right to compensation of victims of unlawful arrest or detention and custodial torture, however this has now its relevance in view of the law laid by the court in several cases awarding compensation for the infringement *Rudal Shah* vs. *State of Bihar* [25] *Sebestian M. Hongary* vs. *Union of India*[26]Under the Indian Legal Framework, compensation to victim's of crime for any loss or injury caused by the commission of an offence and defraying the cost of the proceedings is basically left to the discretion of the courts. This is not so in foreign

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21 Article142 says: Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.

22 Article 32 says: Remedies for enforcement of rights conferred by this part.

23 Simpson v. Attorney General, 1994 NZLR 667.

24 (1997) SCC 416

25 (1983) 4 SCC 141

26 (1984) 1 SCC 339

jurisdiction, which create a statutory right in favor of an accused who have suffered a loss or injury, or mandate the court to record reasons if compensation is not granted.[27]There is no express provision in the constitution of India.

Earlier, it was the policy of the court that in the exercise of its jurisdiction it could not grant compensation for contravention of a fundamental right. The only remedy was therefore to file a suit to recover damages from the Government. Under this traditional approach the defence of sovereign immunity was applicable in the remedy in private law for damages for the tort committed by a public servant.[28]The court in its earlier decisions took the stand that while it could certainly injunction the state from depriving a person of his life or personal liberty except in accordance with procedure established by law but to award compensation for violation of Article 21 did not come within its power under Article 32. Payments of compensation to the victims of crime for any injury caused to him have not been institutionalized under the Indian penal laws. Nor any legal right to be compensated has been created in favour of the victim. Although in case of irreversible injury, monetary compensation is the sole effective remedy. In India there is neither a comprehensive legislation nor a statutory scheme providing for compensation by State or offender to victims of crime. The State generally makes to the innocent victims of violence and major accident ex-gratia payment, which is not only ad hoc and discretionary, but may also be inadequate.[29] While justice demands the loss or injury must be fully compensated, since it is universally recognized principle that enforceable right to compensation is not alien to the concept of guaranteed human rights.[30]

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27 Vijayendra Pratap Singh and Arjun Lal, "Victim Compensation – Time to right the wrongs: need for a Paradigm Shift", 1 *Soc. Adv.* (2000) 132.

28 *Kasturi Lal Ralia Ram Jain* vs. *State of U.P.*, AIR 1965 SC 1039

29 K.L. Vibhute, "Compensating Victims of Crime in India: An Appraisal" 32 *JILI* 68 (1990).

30 *See*, the International Convent on Civil and Political Rights, 1966 Article 9(5).

The higher judiciary has supplemented the legislative vacuum of a legal right to monetary compensation for violation of human rights by developing a parallel constitutional remedy. The judiciary under constitutional scheme has been performing positive and creative function in securing and promoting human rights to the people. The Apex Court in the exercise of its jurisdiction may pass decree or make order for doing complete justice.[31]The Supreme Court under Article 32 of the Constitution has the power to issue certain writs, directions, or any order for the enforcement of fundamental rights enshrined in the Constitution.[32] Similarly, High Courts have the power under Article 226 of the Constitution of India to issue certain writs, orders, directions for the enforcement of fundamental rights or for any other purpose. The judiciary in India has exercised its powers in most creative manner. It has devised new strategies, new tools to ensure the protection of human rights to the people.

Though illegal detention and custodial torture were recognised as violation of the fundamental rights of life and liberty guaranteed under Article 21, to begin with, only the following relieves were being granted in the writ petitions under Article 32 or 226:

(a) Direction to set at liberty the person detained, if the complaint was one of illegal detention.

(b) Direction to the government concerned to hold an inquiry and take action against the officers responsible for the violation.

(c) If the inquiry or action taken by the department concerned was found to be not satisfactory, to direct an inquiry by an independent agency, usually Central Bureau of Investigation (C.B.I.).

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31 Article142 says: Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.

32 Article32 says: Remedies for enforcement of rights conferred by this part.

But in subsequent years the Supreme Court after realizing the inherent limitations of the remedy in private law and gradually forged new tools and devised new remedies for making appropriate redress readily available to the victims of human rights violations, particularly have-nots within the constitutional scheme itself. Award of compensation as a public law remedy for violation of the fundamental rights enshrined in Article 21 of the Constitution, in addition to the private law remedy under law of torts, was evolved in the last two and half decades. In the case of *Khatri* vs. *State of Bihar*[33]the court held that it was not helpless to give appropriate redress against violation of fundamental freedoms and human rights, wherein *Bhagwati* J. speaking for the Bench, posed the following question while considering the relief that could be given by a court for violation of constitutional rights guaranteed in Article 21 of the Constitution:

> "But if life or personal liberty is violated otherwise than in accordance with such procedure, is the court helpless to grant relief to the person who has suffered such deprivation? Why should the court not be prepared to forge new tools and devise new remedies for the purpose o0f vindicating the most precious of the precious fundamental right to life and personal liberty."

As an interim measure the court ordered the state to meet the expenses of having these men in a blind hem in Delhi. But no reference was made in that case to the liability of the state to pay compensation for contravention of Article 21. The Supreme Court recognized payment of monetary compensation for deprivation of fundamental rights of a person through writ jurisdiction for the first time in *Rudal Sah* vs. *State of Bihar*.[34] *Rudal Sah* being the first decision of its nature made it categorically clear that the higher judiciary has the power to award compensation for

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33 (1981) 1 SCC 627
34 AIR 1983 SC 1086

violation of fundamental rights through the exercise of writ jurisdiction and evolved the principle of compensatory justice in the annals of human rights jurisprudence. The question was expanded in a subsequent order in *Bhagalpur* blinding case *Khatri (IV) vs. State of Bihar*[35] thus:

> " So also if there is any threatened invasion by the State of the fundamental right guaranteed under article 21, the petitioner who is aggrieved can move the court under article 32 for a writ injuncting such threatened invasion and if there is any continuing action of the state which is violative of the fundamental right under Article 21, the petitioner can approach the court under article 32 and asked for a writ striking down the continuance of such action, but where the action taken by the state has already resulted in breach of the fundamental right under Article 21 by deprivation of some limb of the petitioner, would the petitioner have no remedy under Article 32 for breach of the fundamental right guaranteed to him? Would the court permit itself to become helpless spectator of the violation of the fundamental right of the petitioner by the state and tell the petitioner that though the Constitution has guaranteed the fundamental right to him and has also given him the fundamental right of moving the court for enforcement of his fundamental right, the court cannot give him any relief"?

Answering the said question, it was held that when a court trying the writ petition proceeds to inquire into the violation of any right to life or personal liberty, while in police custody, it does so, not for the purpose of adjudicating upon the guilt of any particular officer with a view to punishing him but for the purpose of deciding whether the fundamental right of the petitioner under Article 21 has been violated and

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[35] (1981) 2 SCC 493 at 504

the State is liable to pay compensation to them for such violation. The court further clarified that the nature and object of the inquiry is altogether different from that in a criminal case and any decision arrived at in the writ petition on this issue cannot have any relevance much less any binding effect, in any criminal proceeding which may be taken against a particular police officer. The court further clarified that in a given case, if the investigation is still proceeding, the court may even differ the enquiry before it until the investigation is completed or if the Court considered it necessary in the interest of justice, it may postpone its inquiry until after the prosecution was terminated, but that is a matter entirely for the exercise of the discretion of the court and there is no bar precluding the Court from proceeding with the inquiry before it, even if the investigation or prosecution is pending. The decisions of this court in Rudal Shah[36] and others in that line have however clearly established the principle of compensation for the contravention of fundamental rights. In a precedent setting judgement in *Rudal shah* vs. *State of Bihar*[37] the Supreme Court observed:

> "Article 21, which guarantees the right to life and liberty, will be denuded of its significant content if the power of this court were limited to passing orders of release from illegal detention. One of the telling the way in which the violation of that right can reasonably prevented and due compliance with the mandates of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringement of a fundamental right can not be corrected by any other method open to the judiciary to adopt. The right to compensation in some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If

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36 *Rudal Shah* vs. *State of Bihar*, AIR 1983 SC1068; (1983) 4 SCC 141

37 *Id*

civilisation is not to perish in this country as it has perished in some other to well known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the right of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's right. It may have recourse against those officers."

The above observation may tend to raise a doubt that the remedy under Article 32 could be aimed 'if the claim to compensation was factually controversial' and, therefore, optional, not being a distinct remedy available to the petitioner in addition to the ordinary processes. The later decisions of this court proceed on the assumption that monetary compensation can be awarded for violation of constitutional right under Article 32 or Article 226 of the constitution. Similarly, In *Sebastian M. Hongray* vs. *Union of India*[38] on account of the failure of the Govt. to produce two persons in a habeas corpus petition field by their wives when it is shown that the person detained was last seen alive under the surveillance, control and command of the detaining authority, the apex court awarded exemplary costs of Rs.1 lac to be given to the wife of the each of the detenues on the assumption that they had met their unnatural deaths at the hands of security forces. The award was made apparently following *Rudal Shah*, But without indicating anything more. Carrying *Rudal Sah* and *Hongray* rule further in *Bhim Singh* vs. *State of J&K,*[39] the Supreme Court strengthened the citadel of compensatory justice by directing the State to pay monetary compensation of Rs.50, 000 for the illegal detention of the petitioner. In *people's Union for Democratic Rights* vs. *Police Commissioner, Delhi Police Hqr.,*[40] The Supreme Court directed the State to pay Rs.75, 000 as compensation to the family of the deceased labourer who was taken to the police station for doing some work and on demanding wages he was

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38 AIR 1984 SC 1826
39 AIR 1986 SC 494
40 (1989) 4 SCC 730

severely beaten and subsequently succumbed to the injuries. Further in *State of Maharashtra* vs. *Ravikant S. Patil*[41] the Supreme Court has granted compensation to under trial prisoners who were handcuffed and taken through the streets in a procession by police during investigation.

In *Bhim Singh* vs. *State of J&K*[42] , illegal detention in police custody of the petitioner was held to constitute violation of his rights under Article 21 and 22(2) and the Supreme Court exercising its power to award compensation under Article 32 directed the state to pay monetary compensation to the petitioner for violation of his constitutional right by way of exemplary costs. In *Saheli*[43], the state was held liable to pay compensation payable to the mother of the deceased who died as a result of beating and assault by the police. However, the principle indicated therein was that the State is responsible for the tortuous acts of its employees. In *State of Maharastra* vs. *Ravikant S .Patil*[44] the award of compensation by the High Court for violation of the fundamental right under Article 21 of an under trial prisoner, who was handcuffed and taken through the streets in a procession by the police during investigation, was upheld.

(a) Sovereign Immunity: Constitutional Principle of Tortious Liability:

However, in none of the above mentioned cases the confusion about the precise nature of the remedy of monetary compensation for violation of constitutional rights under Article 32 or 226 of the Constitution had been clarified, none of them spelled out the basis on which compensation can be awarded by the court in a proceeding under Article 32 or Article 226 of the Constitution. In other words, none of

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41 (1991)2 SCC 373

42 *Bhim Singh* vs. *State of Jammu &Kashmir* AIR1986 SC 494; (1985) 4 SCC 677

43 *Saheli* vs. *Commissioner of Police*, AIR 1990 SC 513

44 (1991)2 SCC 373

them spelled out clearly the principle on which the liability of State arises for payment of compensation for violation of fundamental rights and the tortuous liability of the state for the wrongs committed by its servants. There was also a lingering doubt as to whether the plea of sovereign immunity has any application in the sphere of state's liability for contravention of fundamental rights and whether this doctrine can be invoked as defence to the constitutional remedy under Article 32 and 226 of the constitution. The law was crystallised in *Nilabati Behra* vs. *State of Orissa.*[45]This court awarded compensation of Rs.150, 000 to the mother of the deceased and a further sum of Rs.10, 000 as costs to be paid to the Supreme Court legal Aid Committee. The Supreme Court discussed these issues in detail and clarified the confusion in *Nilabati Behra* vs. *State of Orissa,*[46]while granting compensation the Supreme Court made it clears that the defence of sovereign immunity is not available in case of constitutional remedy.

Further in *D.K.Basu* vs. *State of W.B.*[47]the Supreme Court held that, monetary or pecuniary compensation is an appropriate and indeed an effective and some times perhaps the only suitable remedy for redressal of the established infringement of fundamental rights. The state is vicariously liable for the act of its agencies. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which have the right to be indemnified by wrongdoer. Further *Peoples Union for Civil Liberty* vs. *Union of India*[48]the court laid down that the defence of sovereign immunity does not apply in such a case (fake encounter) even though it may be available as a defence in private law in an action based on tort.

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45 (1993)2 SCC 746; In this case, the deceased was arrested by the police, handcuffed and kept in police custody. The next day his dead body was found on a railway track.

46 (1993)2 SCC 746; AIR 1993 SC 1960

47 AIR 1997 SC 610 at 628

48 AIR 1997 SC at 1206

It was held that the award of damages by the Supreme Court or High Court in a writ proceeding is distinct from and in addition to the remedy in private law for damages. It is one mode of enforcing the fundamental rights by this court or High Court.

The Supreme Court[49] has also granted compensation in situation where convict has been killed by co-accused in jail. The compensation was granted to his wife. Speaking for the court *J.S. Varma,* J. observed:

> "A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the constitution is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is distinct from, and in addition to, the remedy in private law for damages for the tort resulting from the contravention of the fundamental Right. The defence of sovereign immunity being in applicable and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the constitution, when that is the only practicable mode of redress available for the contravention made by the state or its servants in the purported exercises of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the constitution by recourse to articles 32 and 226 of the constitution".[50]

Dr. *A.S. Anand,* J., (as he then was) in his concurring judgment elaborated the principle thus:

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[49] *Kewalpati (Smt)* vs. *State of UP and others,* (1995) 3 SCC600

[50] *Id* at 762-63

"Convicts, prisoners or under-trials are not denuded of their fundamental rights under Article 21 it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental rights by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of the citizen to life, except in accordance with law, while the citizen is in its custody.[51]

The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by the supreme court or under Article 226 by the high Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilise public power but also to assure the citizens that they live under a legal system, which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting 'compensation' in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary

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[51] *Id* at 767

damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on torts, through a suit instituted in a court of competent jurisdiction or/ and prosecute the offender under the penal law.[52]

Reiterating the stand taken earlier that the Supreme Court is not helpless and the wide powers given to it by Article 32, which itself is a fundamental right, imposes a constitutional obligation in it to forge new tools, for doing complete justice and enforcing the fundamental rights guaranteed under the Constitution, enables it to award monetary compensation in appropriate cases where that is the only mode of redress available the court expressed the view that any contrary view in this regard would not render the court powerless and the constitutional guarantee mirage, but may, in certain situations be an incentive to extinguish life. The court further observed:

> "This remedy in public law has to be more readily available when invoked by the have notes, who are not possessed of the where withal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention private law remedies, were more appropriate".[53]

Since the epoch making judgement of the Supreme Court in *Nilabati Behera's* case, the Supreme Court and the high courts have awarded monetary compensation for custodial torture in a number of cases. In *T.C.Pathak* vs. *State of U.P.*[54]the supreme court directed the state government to pay a sum of Rs.10,000 to detenue by way of compensation for the denial of his constitutional right under Article 21 of the constitution. The award of this compensation is independent of any remedy which the

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52 *Id* at 768-69
53 Ibid *Nilbati behera* vs. *State of Orissa* (1993)2 SCC746
54 (1995) 6 SCC 357

detainee may have in private law for damages against the persons responsible for his illegal detention and torture. In yet another recent pronouncement the apex court directed the state government to pay compensation to victims who were illegally detained and humiliated for no fault of theirs. Upon such payment it would be open to the state to recover personally the amount of compensation from the concerned police officers.[55] In *Punjab and Haryana High Court Bar Association* vs. *State of Punjab*[56]The Supreme Court directed the Punjab Government to pay compensation of Rs. 10, 00000 (ten lakhs) to the parents of the advocate. The Supreme Court has also laid down that where the petitioner were not satisfied by the amount of compensation they may approach the Civil Court to claim adequate compensation.[57] In *Ajab Singh* vs. *State of UP*,[58] one *Rishipal* was arrested on 27th May, 1996 for his alleged involvement in the death of his wife and on 1st June, 1996 he died in *Meerut* Medical College as a result of police torture. The Supreme Court while rejecting the defence of sovereign immunity directed the State of UP to pay Rs.5lakhs as compensation to the parents of the deceased. The Apex Court has not shied away in granting compensation where army personnel have caused disappearance.[59] The same view has been reiterated in *Sube Singh* vs. *State of Haryana.*[60]The Supreme Court [61]opined that it is thus now well settled that the award of compensation against the state is an appropriate and effective remedy for redress of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation by way of public law remedy will not come in the way of the aggrieved

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55 *Arvinder Bagga* vs. *State of U.P.*, AIR 1995 SC117
56 (1996)4 SCC 742 at 747
57 *Shiv Dev Singh* vs. *Senior Superintendent of Police, Batala and another* (2000)9 SCC 426
58 AIR 2000 SC 3421
59 *P.N. Thokcham* vs. *General Officer Commanding,* AIR 1997 SC 3534
60 (2006) 3 SCC 178
61 *Sube Singh* vs. *State of Haryana,* (2006)3 SCC 196 at 198

person claiming additional compensation in civil court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under section 357 of the Code of Criminal Procedure. The judicial initiative of awarding monetary compensation is a welcome step. But the question is how far such judicial activism can bring relief to the victims when thousands of '*Rudal Sahs*' are goring under the administrative laxity and red-tapism. Nevertheless, such a trend of judicial activism has emerged as beacon light in the otherwise darkened area of custodial lawlessness. But the judicial activism is not the substitute for the executive inefficiency. Our over-burdened judiciary may not sustain the increasing burden of public interest litigations. Moreover; judicial activism is not the panacea for the increasing violation of basic rights. The proper course would be to make monetary compensation for the violation of basic rights like right to life and personal liberty, an enforceable fundamental right as under Article 9(5) of the International Covenant on Civil and Political Rights. But India made reservations in respect of certain rights, right to compensation being one of them, at the time of acceding the Covenant. It is high time to withdraw such reservations. Moreover in *Arvind Singh Bagga's*[62] case the court not only directed the payment of compensation but directed the state government to launch prosecution against erring officers. And in *T.C.Pathak* vs. *State of UP* and others[63] the court laid down that award of compensation is independent of any remedy which detenue may have in private law for damages against the person responsible for his illegal detention and torture.

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62 *Arvind Singh Bagga* vs. *State of UP,* AIR 1995 SC 117

63 (1995) 6 SCC 357

(b) Whether compensation should be awarded for every violation of Article 21 of the Constitution:

The Supreme Court considered another important question as to whether compensation should be awarded under Article 32 or 226 for every violation of Article 21 where illegal detention or custodial violence is alleged. In *M.C. Mehta* vs. *Union of India*[64]a constitutional Bench of the Supreme Court while considering the question whether compensation could be awarded in a petition under Article 32, observed thus:

> "We must, therefore, hold that Article 32 is not powerless to assist a person when he finds that his fundamental right has been violated. He can in that event seek remedial assistance under Article 32. The power of the court to grant such remedial relief may include the power to award compensation in appropriate cases. We are deliberately using the words 'in appropriate cases' because we must make it clear that it is not in every case where there is a breach of a fundamental right committed by the violator that compensation would be awarded by the court in a petition under Article 32. The infringement of the fundamental right must be gross and patent, that is, incontrovertible and ex facie glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons, or it should appear unjust or unduly harsh or oppressive on account of their poverty or disability or socially or economically disadvantaged position to require the person or persons affected by such infringement to initiate and pursue action in the civil courts."[65]

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64 (1987) 1 SCC 395

65 *Id* at 408-09, para 7

In *Nilbati Behera* vs. *State of Orissa*[66] the Supreme Court put in word of caution thus:

> "Of course, relief in exercise of the power under Article 32 or 226 would be granted only once it is established that there has been an infringement of the fundamental rights of the citizen and no other form of appropriate redressal by the court in the facts and circumstances of the case, is possible.... Law is in the process of development and the process necessitates developing separate public law procedures as also public law principles. It may be necessary to identify the situations to which separate proceedings and principles apply and the courts have to act firmly but with certain amount of circumspection and self restraint, lest proceedings under article 32 or 226 are misused as a disguised substitute for civil action in private law."[67]

In *Dhananjay Sharma* vs. *State of Haryana*[68] the Supreme Court went a step ahead and refused compensation where the petitioner had exaggerated the incident and had indulged in falsehood. The Supreme Court held:

> "We would have been, therefore, inclined to direct the State Government of Haryana to compensate *Dhananjay Sharma* and *Sushil Kumar* but since *Sushil Kumar* has indulged in falsehood in this court and Shri *Dhananjay Sharma* has also exaggerated the incident by stating that on 15-01-1994 when he was way laid along with *Sushil Kumar* and *Shri S.C.Puri*, advocate, two employee of the respondents 6 and 7 were also present with the police party, which version has not been found to be correct by CBI, they both have disentitled themselves from receiving any compensation, as monetary amends for the wrong done by

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66 (1993) 2 SCC 746
67 *Id* at769
68 (1995) 3 SCC 757

Respondents 3 to 5, in determining them. We, therefore, do not direct the payment of any compensation to them."[69]

In the *D.K.Basu* vs. *State of W.B.*[70]the Supreme Court repeatedly stressed that monetary compensation should be awarded only for redress of an established infringement of fundamental rights guaranteed under Article 21. The apex Court also drew attention to the following aspect:

"Many hardcore criminals like extremists, terrorists, drug peddlers, smugglers who have organised gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalisation and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such category of hardened criminals by soft peddling interrogation. It is felt in those quarters that if we lay too much of emphasis on the protection of their fundamental rights and human rights, such criminals may go Scot- free without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime. The can not, however, be worse than the disease itself."[71]

In *Shakila Abdul Gafar Khan* vs. *Vasnt Raghunath Dhoble*[72] and *Munshi singh Gautam* vs. *State of M.P.*[73] the Supreme Court warned against non-genuine claims:

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69 *Id* at 782-83,
70 (1997)1SCC 416
71 *Id* at 434
72 (2003) 7 SCC 749

"But at the same time there seems to be a disturbing trend of increase in cases where false accusations of custodial torture are made, trying to take advantage of the serious concern shown and the stern attitude reflected by the courts while dealing with custodial violence. It needs to be carefully examined whether the allegations of custodial vilence are genuine or are sham attempt s to gain undeserved benefit masquerading as victims of custodial violence."[74]

In *Sube Singh* vs. *State of Haryana*[75] the Supreme Court observed:

"Where there is no independent evidence of custodial torture and where there is neither, medical evidence about any injury or disability, resulting from custodial torture, nor any marks/scar, it may not be prudent to accept claims of human rights violation, by persons having criminal records in routine manner for awarding compensation. That may open the floodgates for false claims, either to mulct money from the state or as to prevent or thwart further investigation. The court should therefore, while zealously protecting the fundamental rights of those who are illegally detained or subjected to custodial violence should also stand guard against false, motivated and frivolous claims in the interest of the society and to enable the police to discharge their duties fearlessly and effectively. While custodial torture is not infrequent, it should be borne in mind that every arrest and detention does not lead to custodial torture."

From the aforesaid trend of the judiciary, it appears that the judiciary while awarding compensation made reasonable distinction in cases where compensation should be awarded and where it should be refused. Although any fundamental right is available uniformly to all persons when innocent or guilty, in the matter of right to

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73 (2005) 9 SCC 631

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

75 (2006) 3 SCC 178 at 201

compensation the judiciary curved out exception where the claim of compensation may be refused to the petitioner if he is himself at fault. This trend of the judiciary deserves appreciation for awarding compensation in appropriate cases only and preventing the misuse of this positive right.

The Supreme Court further observed:

> "In cases where custodial death or custodial torture or other violation of the rights guaranteed under Article 21 is established, the court may award compensation in a proceeding under Article 32 or 226. However, before awarding compensation, the court will have to pose to itself the following questions: (a) whether the violation of Article 21 is patent and incontrovertible, (b) whether the violation is gross and of a magnitude to shock the conscience of the court. (c) Whether the custodial torture has resulted in death or whether medical report or visible marks or scars or disability supports custodial torture. Where there is no evidence of custodial torture of a person except his own statement, and where such allegation is not supported by any medical report or other corroborative evidence, or where there are clear indications that the allegations are false or exaggerated fully or in part, the court may not award compensation as a public law remedy under Article 32 or 226, but relegate the aggrieved party to the traditional remedies by way of appropriate civil/ criminal action."[76]

The Apex court made it clear however that it should not be understood as holding that harassment and custodial violence is not serious or worthy of consideration, where there is no medical report or visible marks or independent evidence. We are conscious of the fact that harassment or custodial violence cannot

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[76] *Id* at 201-202.Para 46

always be supported by a medical report or independent evidence or proved by marks or scars. Every illegal detention irrespective of its duration, and custodial violence, irrespective of its degree or magnitude, is outright condemnable and per se actionable. Remedy for such violation is available in civil law and criminal law. The public law remedy is additionally available where the conditions mentioned in the earlier paragraph are satisfied. We may also note that this Court has softened the degree of proof required in criminal prosecution relating to such matters.

In *State of M .P.* vs. *Shyamsunder Trivedi*[77], reiterated in *Abdul Gafar Khan* [78]and *Munshi Singh Guatam*[79], this Court observed:

> "[Rarely] in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel would be available ... Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than prevent the truth to save their colleagues,..... ....The exaggerated adherence to and insistence upon the established of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact situations and the peculiar circumstances of a given case, ..., often results in miscarriage of justice and makes the justice-delivery system suspect. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the courts because it reinforces the beliefs in the mind of the police that no harm would come to them, if an odd prisoner dies in the lock-up, because there would hardly be any evidence available to the prosecution to directly implicate them

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77 (1995) 4 SCC 262

78 *Shakila Abdul Gafar Khan* vs. *Vasant Raghunnath Dhoble*, (2003) 7 SCC 749

79 *Munshi Singh Gautam* vs. *State of M.P.*, (2005)9 SCC 631

with the torture."[80]Custodial violence requires to be tackled from two ends, that is, by taking measures that are remedial and preventive. Award of compensation is one of the remedial measures after the event. Effort should be made to remove the very causes, which lead to custodial violence, so as to prevent such occurrences.

IV. INQUIRY BY THE NATIONAL HUMAN RIGHTS COMMISSION:

Vienna Declaration and Programme of Action adopted by the World Conference on human rights on 25th June 1993 rightly stated that every state should provide an effective frame work of remedies to redress human rights grievances or violations.[81] The Western countries and America criticized India for violation of human rights by armed and security forces especially in the state of Jammu and Kashmir. In order to meet this criticism, apart from the other reasons, India decided to establish a National Commission on Human Rights for the redress of grievances of human rights violations. Later on in this respect the right step was the passing of "the Protection of Human Rights Act, 1993."

The Preamble of the Act says that it is "an Act to provide for the constitution of National Human Rights Commission; Commission in States and Human Rights Courts for better protection of human rights and for matters connected therewith or incidental thereto."[82]The National Human Rights Commission is an important national body entrusted with the task of promotion and protection of human rights. It has power to investigate cases of human rights abuses including custodial torture and recommend appropriate actions to be taken by the Central or State Governments, as the case may be. Although its recommendations are non-binding on Central and State

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80 *Id* (1995) 4 SCC 262 at 272-73
81 Vienna Convention (1993)
82 The Protection of Human Rights Act, 1993

Government it is gratifying to note that they, by and large, implement the recommendations of the commission.

The National Human Rights Commission was initially constituted on 12 October 1993 under the Protection of Human Rights Ordinance of 28 September 1993. Later the ordinance was replaced by the Protection of Human Right Act, 1993(Act No.10 of 1994). The Statement of Objects and Reasons of the concerned bill, while noting that India was a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which were adopted by the United Nations General Assembly on 16 December, 1996, and that the rights embodied in those Covenants stood substantially protected by the Constitution, observed that there had been 'growing concern' in the country and abroad about issues relating to human rights. Having regarded to this and to changing social realities and emerging trends in the nature of crime and violence it was decided that there should be a National Human Rights Commission for better protection of human rights of people.[83]

The functions of the National Human Rights Commission are to:

(a) Inquire, *suo moto* or on a petition presented to it by a victim or any person on his behalf, into complaint of -

i) Violation of human rights or abetment there of; or

ii) Negligence in the prevention of such violation by public servant;

(b) Intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court;

(c) Visit, under intimation to the State Government, any jail or any other institution under the control of the State Government, where persons

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[83] National Human Rights Commission, Annual Report for the Year 1993-94, New Delhi at 5.

are detained or lodged for purposes of treatment; reformation or protection to study the living conditions of the inmates and makes recommendations thereon;

(d) Review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;

(e) Review the factors, including acts of terrorism that inhibit the enjoyment of human rights and recommend appropriate remedial measures;

(f) Study treaties and other international instruments on human rights and make recommendations for their effective implementation;

(g) Undertake and promote research in the field of human rights;

(h) Spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publication, the media, seminars, and the other available means;

(i) Encourage the efforts of non-governmental organisations and institutions working in the field of human rights;

(j) Such other functions as it may consider necessary for the promotion of human rights.[84]

The Act also provides for the establishment of State Human Rights Commission and Human Rights Courts. The National Commission has therefore been advising States, both through letters to their Chief Ministers and through discussions with them to set up State Commissions as envisaged in the Act. At the same time, for

[84] *Ibid,* Report, Part III Concerning Functions of the Commission; *See* Section 12 of the Protection of Human Rights Act which deals with the scope and functions of the National Human Rights Commission.

providing speedy trial of offences arising out of the violation of Human Rights State Governments are also being encouraged, with concurrence of the Chief Justice of the respective High Courts, to specify by notification courts of sessions to serve as Human Rights Courts. These matters are, at present, under the consideration of State Governments and there are indications that some may act on them in the very near future[85]

After the passing of this Act, the National Human Rights Commission and State Human Rights Commission are now working properly. In this respect the job of such machinery is highly fruitful. We the people,[86] have full faith in the working and independence of such commission. And let us hope that it will achieve the purpose for which it has been created.

The idea of having Human Rights Courts for better enforcement of human rights is in vogue in our country for more than a decade and the same was included within the objectives of enacting the Protection of Human Rights Act, 1993. The State cannot avoid the responsibility in this respect, which is also a Constitutional mandate. The National Human Rights Commission in exercise of its powers under section 18(3) of the Protection of Human Rights Act, 1993 has also advanced the cause of compensatory justice to the victims of torture when the law enforcers and armed forces outrage the sanctity and dignity of a person. In one case the Commission directed the State of Maharashtra to pay Rs.2 lakhs as compensation to the window of one *Pinya Hari Kale*, who died in police custody as a result of sever beating.[87]Yet in another case the Commission ordered the State of U.P. to pay Rs.3 lakhs as a compensation to the next of kin of one *Rajan Singh*, who allegedly died by jumping from a moving truck in a bid to escape from the custody but the Commission

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85 *Ibid*, Report 29

86 *See*, Preamble of the Constitution of India.

87 Human Rights News Vol. 2, Feb. 1999.

apprehended that the deceased died as a result of severe beating in the truck.[88] The Commission directed the State of Karnataka to pay Rs.2 lakhs as compensation to the next of kin of one *Thimmaya,* who died in police custody, where it was alleged that he committed suicide by hanging himself from the window bar.[89] Similarly, while taking cognizance of the petition filed by one *Prabhakar L. Mehta* against the Enforcement Directorate Mumbai, wherein its was alleged that he was kept in custody throughout the night, tortured severely and denied food and water, the Commission directed the Directorate to pay Rs.50,000 as interim relief for violation of human rights.[90]

The Commission took cognizance of the complaint from *Jalaun* district and directed the State of U.P. to Rs.10, 000 to each of the farmers detained illegally for 15 days in civil prison for non-payment of arrears of land revenue and were denied proper and adequate food, ignoring the law laid down by the apex court that the imprisonment of a person for recovery of a debt is the utter violation of Article 21 of the Constitution.[91] Viewing seriously the custodial death of one *Parmai* of *Urai* district, the Commission directed the State of U.P. to pay Rs.1 lac as compensation to the next kin of the deceased, who was arrested by the *Tehsildar* on 23rd May, 1998 for non-payment of land revenue and died on 2nd June, 1998 as a result of denial of food and water.[92] Upholding the dignity and sanctity of human person, the commission directed the State of Gujarat to pay Rs.25, 000 to one *Binohare P. Joshi* for his unjustified detention and physical torture.[93] Yet in another case, the Commission directed the State of U.P. to pay Rs.50, 000 as interim relief to one *Tejender Rajaura*

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88 Human Rights News Vol. 8, August, 2000.
89 *Ibid.*
90 Human Rights News Vol. 10, October 2000.
91 Human Rights News, Vol. 11, Nov. 2002.
92 *Ibid.*
93 *Ibid.*

for his torture in custody.[94] Similarly taking suo motu cognizance of the custodial death of one *Madan Lal,* the Commission awarded Rs. 59,000 as interim compensation to the dependents of the deceased after getting the matter investigated through a member of Higher Judicial Service, who concluded that the deceased died as a result of assault.[95] In the Haryana boys case, the NHRC directed the Haryana Government to pay Rs. 1.4 lakh to seven boys from *Balmiki* community, who were picked by *Gurgaon* police and kicked, stripped naked, paraded in streets and were forced to lift the garbage.[96]

Reparation to Victims of Torture:

The NHRC has called for an amendment in the law so that cases relating to violations of human rights and compensation are tried together in the same court with one set of evidence being led. This was in specific response to ground-level realities: victims of torture had to endure two sets of civil proceedings; this often prevented persons from seeking redress.

In January 1999, the then chairperson of the NHRC, *Justice Venkatachaliah* stated that "the very concept of immediate interim relief and the purposes for which it is intended would be defeated if this remedy is intertwined with the fortunes of a criminal trial". The case concerned the death in police custody of a de-notified tribe, in *Maharashtra,* where the state government deferred compensation payment saying that it awaited orders of the court. The NHRC considered that this would lead to unnecessary delay. In October 1995, the NHRC suggested that monetary compensation for victims of police abuse should be taken from those responsible. State Governments are reported to have accepted this proposal.

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94 Human Rights News, Vol. 6, June 2001.

95 NHRC Annual Report for the year 1994-95, quoted in Dr. Paras Diwan, *Human Rights and the Law,* 184.

96 *See, "Haryana Govt. asked to pay compensation to 7 Children"*, The Time of India, July 24, 2001.

The procedure for dealing with complaints is laid down in Section 8 of the National Human Rights Commission (procedure) Regulation,1994.All complaints in whatever form received by the Commission shall be registered and assigned a number and placed for admission before a Bench of two Members constituted for the purpose not later than two weeks to receipt thereof. Ordinarily the Commission does not entertain complaints of the following nature:

(a) In regard to events which happened more than one year before the making of the complaints;

(b) With regard to matters which are *sub-judice*;

(c) Which are vague, anonymous or pseudonymous;

(d) Which are of frivolous nature; or

(e) Those which are outside the preview of the Commission,

(f) No fee is chargeable on complaints.

The Regulations referred above requires that every attempt be made to disclose a complete picture of the matter leading to the complaint and the same may be made in English or Hindi to enable the Commission to take immediate action. To facilitate the filing of the complaints, the commission can, however, entertain complaints in any language included in Eighth Schedule of the Constitution. It is open to the Commissions to ask for further information and affidavits to be filed in support of allegation whenever considered whenever considered necessary.[97]The Commission may, in its discretion, accept telegraphic complaints and complaints conveyed through FAX. The Commission has power to dismiss a complaint in *limini*. Upon admission of a complaint, the chairperson/commission shall direct whether the matter would be set down for inquiry by it or should be investigated into. On every complaint on which

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[97] National Human Rights Commission (Procedure) Regulation, Vide No.A-1103/1/94-NHRC, dated 17 Feb.1994, Section 8

the Chairperson of the Commission takes a decision either hold an inquiry or investigation; the secretariat shall call for reports/comments form the concerned Government/authority giving the latter a reasonable time therefore. Where the inquiry discloses, the commission of violation of human rights or negligence in the prevention of violation of human rights by a public servant, it may recommend to the concerned government or authority the initiation of proceedings for prosecution or such other action as the Commission may deem fit against the concerned person or persons. The Commission may approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court might deem necessary. It may recommend to the concerned Government or authority for the grant of such immediate interim relief to the victim or the members of his family, as Commission may consider necessary.[98]

Torture by armed forces presents several complex legal issues. The Commission therefore adopts a separate procedure while dealing with armed forces. It may, either on its own motion or on receipts of a petition, seek a report from the Central Government. After the receipt of report, it may, either not proceed with the complaint or, as the case may be, make its recommendation to that Government. The Central Government shall inform the Commission of the action taken on the recommendation within three months or such further time as the Commission may allow.[99] With respect to torture by the police the procedure to be adopted by the Commission is as follows:

> Where investigation is undertaken by a team of the Commission or by any other person under its discretion, the report shall be submitted within a week of its completion or such further time as the Commission may allow. The Commission may, in its discretion, direct further investigation in a given case

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98 Section 18 of the Protection of Human Rights Act 1993

99 See Section 19.

if it is of opinion that investigation has not been proper of the matter requires further investigation for ascertaining the truth or enabling it to properly dispose of the matter. On receipt of the report, the Commission on it's down motion, or if moved in the matter, may direct inquiry to be carried by it and receive evidence in course of such inquiry. The Commission or any of its Members when requested by the Chairperson may undertake visits for an on the spot study and where such study is undertaken by one or more members, a report thereon shall be furnished to the Commission as early as possible.[100]

During 1994-95the Commission admitted 1660 particularly grave cases of violence against the human person and other human rights abuses for investigation/inquiry. Of these cases 111 related to death in police custody, 51 to death in judicial custody and 9 to death while in the custody of other State agencies (the Armed Forces or the Forest Department). 497cases related to allegations of various forms of police excesses, including the use of torture or third degree methods in interrogation, while 114 cases alleged illegal detention.[101]

The complaints received by the Commission cover the entire spectrum of human rights problems facing the country. In the paragraphs that follow, the gist is provided of some complaints that are representative of the cases attended by the Commission.

The Commission took, *suo moto*, cognizance of the death of *Madan lal* 22 year of age, in police custody. Upon perusing the reports received from the Government of the National Capital Territory of Delhi, the Commission decided to have investigation. It accordingly appointed Sri K.C. Chopra, a member of the Higher Judicial Service to investigate the matter. Sri Chopra submitted a report on 11 March 1994 concluding

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100 272. Supra, note 22.

101 National Human Right Commission, Annual Report (1994-95) at 31, para 9.6

that *Shri Madan Lall* has died as result of a physical assault on his person, while he was in custody within a police station. Shri Chopra held an Assistant Sub-Inspector and three constables prime facie responsible for the death. The Commission accepted the conclusions and recommendations of the investigating officer and, in turn, made the following recommendations to the administration of the National Capital Territory of Delhi.

(i) the investigation in the instant case should be handed over to the C.B.I at the earliest;

(ii) departmental action should be taken against the ASI of a neighbouring police station who was allegedly pressurizing member of the family of the deceased;

(iii) reasonable protection should be given to the members of the family and also to other witnesses until the regular trial takes place;

(iv) Interim compensation of Rs.50, 000/-should be paid to the dependents of the deceased within one month, without prejudice to the amount of compensation that may be claimed in accordance with law.[102]

Inhabitants of a cluster of villages in *Barwah* tehsil of *Baramulla* District, J&K, submitted a written complaint to the commission alleging the death, in the custody of the armed forces, of Mohammed *Akbar* Sheikh on 27 December 1993.It was asserted that he was seized during on army crackdown in the area on that date and that his dead body was handed over to the police in *Baramulla* on 29 December 1993. Proceeding under the Act, the Commission called for reports from the Defence and Home Ministries. The reply of the Defence Ministry forwarded a report from Army Headquarters. According to that report, the 15 Punjab Regiment was involved in an

[102] *Ibid*, National Human Rights Commission, Annual Report (1994-95) at 31 para 9.6 at 34

operation against militants on 27 December 1993 around the village of *Fatehgarh*, Tehsil *Barwah*, District *Baramulla*. All male adults were collected at the local government high school. Mohammad *Akbar* Sheikh agreed to assist one of companies of the unit in the matter of the search. Five hideouts were shown to the search party and weapons and ammunition too were recovered. The period being the last week of December 1993, the weather was harsh and the terrain difficult. The report attributed the death of Muhammad *Akbar* Sheikh to exhaustion. As Muhammad *Akbar* sheikh was not a man in normal health, it was the obligation of those who wanted to utilise his services for the purpose of the search, to take proper care of him. It was evident that exhaustion in this case was the result of the strain put upon him by the search party. Though the case was not one of custodial death, the situation was more or less akin to it.

After considering all aspects of the case, factual and legal, Commission was of the opinion that Muhammad *Akbar* Sheikh's life could have been saved if appropriate care had been taken of the Muhammad *Akbar* Sheikh, the commission directed the Ministry of Defence to pay Rs.50, 000/-as compensation to legal heirs of the deceased [103] In Punjab, in response to 2,097 reported cases of human rights violations, the National Human Rights Commission had ordered the state of Punjab to provide compensation in 109 cases concerning people who were in police custody prior to their death.[104]

Amnesty International had brought to the notice of the Commission a report on the disappearance of *Shri Harjit* Singh, an employee of Punjab State Electricity Board. It was stated that the Punjab Police arrested him on 29 April 1992 and that his whereabouts were not known. It was further stated that the Punjab police claimed that

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[103] *Ibid*, National Human Rights Commission, Annual Report (1994-95) 31, para 9.6 at 36

[104] Amnesty International Annual Report 2005 (India section) 26/8/2006 http://web.amnesty.org /report2005/ ind-summary-eng

Shri Harjit Singh was killed in an encounter, whereas the father of *Shri Harjit* Singh asserted that he had seen him alive twice in police Custody after the police claimed he was dead. The Commission called for a report from the Government of Punjab. The State Government reported that it had arrested *Shri Harjit* Singh.and another person on 11 May 1992.When policemen were taking them for the recovery of arms & ammunition, they were ambushed&, in the cross firing, *Shri Harjit* Singh and the other person died. It was said that *Harjit* Singh's body could not be handed over to his parents, as no one was available in his home. After the post-mortem, the body was cremated, Kashmir Singh, father of *Harjit Singh*, had filed a criminal writ petition in Punjab & *Harayana* High Court and the court had appointed the Sessions Judge, *Chandigarh* to inquire into the matter &submit a report. Observing that more than 2 years had elapsed since the direction of the High Court to the Session Judge, *Chandigarh* to investigate the matter, the Commission decided to intervene in the proceedings pending before the High Court &appointed a Senior Advocate of *Chandigarh* to move the court for fixing of a pre-emptory date for the submission of the report by the Sessions Judge.[105] In July 1994, pursuant to its circular of 14 December 1993, the Commission received a report from the Deputy Commissioner of Police, South District, New Delhi, in regard to a custodial rape by an ASI of the Delhi Police force. Another ASI had brought the victim to the police station, as she had got lost on her way to her parent's home. No report wars made in the daily diary of the police station of the victim having been taken to the police station, nor was due care taken to ensure the return of the victim to her family. The ASI who took her to the police station was accordingly placed under suspension. Another ASI who took her to his house in the residential quarters of Paharganj police station raped the victim. The

[105] *Ibid,* National Human Right Commission, Annual Report (1994-95)31, para 9.6 at 40.

ASI who committed the rape was arrested and the cases was sent to court for trial. The commission also received a complaint and a report on this incident from the Peoples Union for Democratic Rights (PUDR), Delhi. The Commission, on perusal of the report from the Government of NCTO, and also the report of the PUDR, directed the government of NCTD to explain as to why the woman was detained at the police station for the night, how it was that there was no supporting entry for her detention at the police station, and what steps had been taken or were proposed to be taken to ensure that women were not called to and detained at the police station for investigation, particularly at night. The Commission took serious objection to the persistence of such practices, notwithstanding the decision of the Supreme Court given some 15 years ago in the case of *Nandini Satpathi* vs. *P.L. Dani* [106]. The Government of NCTD subsequently reported that there had been a lapse on the part of duty officers both at P.S *Hauz Khas* and at P.S. *Okhla* for not recording the victim's presence in the police station and also for not informing her family members of her whereabouts. Departmental inquiry into the lapses has also been ordered against the concerned police officials. Instructions not to call women for interrogation in the night, and to detail women police officers if a woman is called for interrogation to a police station at an odd hour, have been reiterated by the government of NCTD for strict compliance by all concerned officers.[107]

It would be evident from the foregoing discussion that the existing remedies against torture are not adequate enough to bring solace to the victims of torture and their relatives and bring its perpetrators to justice. Correlatives measures should therefore be taken without any further delay, to bring an end to the practice of torture.

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[106] AIR 1978 SC 1025

[107] *Ibid,* National Human Rights Commission, Annual Report (1994-95)31, para 9.6.at 44

V. REMEDIAL MEASURES:

The widespread use of third degree methods has not only drawn the attention of our Courts but also of the recently constituted National Human Rights Commission. These and similar other bodies and Commissions have suggested various remedial measures to check the practice of torture and ill treatment. Following remedial measures need to be taken to halt the practice of custodial torture by the police and create an effective institutional framework for the prevention of torture and other human rights violations.[108]

(a) DIRECTIONS OF THE SUPREME COURT AND THE HIGH COURTS:

The Supreme Court and the High Courts have, through their judgements delivered from time to time have given several directions to the Central and State Governments to take measure to prevent torture. Some of the prominent directions are:

(1) Judicial inquiries should be made mandatory into all allegations of torture, including rape and deaths in custody. The government should ensure that prime-facie reports of torture, rape and deaths in custody published by the print media and brought to notice by Civil liberties groups are promptly and effectively investigated by an independent and impartial body. The Supreme Court and the High Courts should conduct their own inquiries whenever a victim alleges torture or illegal detention in a habeas corpus petition.[109]

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[108] For detail *See,* Sen, Shanker, *"U.N. Convention against torture"*, The Hindustan times (New Delhi), 17 November 1995; Singh, Prakash, *"police Accountability to the people",Ibid.,* 28 November 1995;Karan, Vijay, *"Human Rights: Breaking the Torture Habit"*, India Today, March 15, 1993; Mahajan, Krishna, *"SC Should Monitor Custodial death"*, the Indian Express (New Delhi) 12 April,1992.

[109] *A.Nallasivan* vs. *State of Tamil Nadu*, 1995Cr.L.J.2754; *See also,* 113th Report of the Indian law Commission.

(2) In order to establish liability of the police in cases of custodial death the presumption of guilt should be raised against them.[110]

(3) The Supreme Court suggested the police to depend on "its wits 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".[111]

(4) The women should not be called at the police stations for investigation, particularly at night.[112]

(5) The State Government should prepare pamphlets in local languages describing the Rights of arrested persons, which should be placed in each police cell so as to enable all detainees in police custody to know their rights.[113]

(6) 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.[114]

(7) The police should immediately inform the relatives of the arrested person.[115]

(8) Male detainees should be kept separate from female detainees and a female officer should be present during the interrogation of women detainees.[116]

(9) City and Sessions judges should make unannounced visits to police stations to check on the treatment of inmates.[117]

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110 *State of M.P* vs. *Shyamsunder Trivedi* (1995)4 SCC 262: see also 113th Report of the Indian Law Commission.

111 *Kishore Singh* vs. *State of Rajasthan*, AIR 1981 SC 625

112 *Nandini Satpathy* vs. *P.L.Dani*, AIR 1978 SC 1025

113 *Sheela Barse* vs. *State of Maharastra*, AIR 1993 SC 378-80

114 *Ibid.*

115 *Ibid.*

116 *Ibid*

117 *Ibid.*

(10) Handcuffs should be used in the rarest of rare cases, that too only when the person was "desperate, rowdy" or the one who was involved in non-bail able offence. He should be resorted to only when there is "clear present danger of escape" breaking out the police control and for this there must be clear material, not nearly an assumption.[118]

(11) Police training should be reoriented, to bring in a change in the mindset and attitude of the police personnel in regard to investigations, so that they will recognize and respect human rights, and adopt through and scientific investigation methods.[119]

(12) The functioning of lower level police officers should be continuously monitored and supervised by their superiors to prevent custodial violence and ensure adherence to lawful standard methods of investigations.[120]

(b) RECOMMENDATIONS OF THE NATIONAL HUMAN RIGHTS COMMISSION:

Addressing the problems of custodial violence by the police and security forces even in areas afflicted by terrorism and insurgencies has been a major concern of the NHRC ever since its creation in September 1993. One of the functions of the commission spelt out in section 12 of the Protection of Human rights Act 1993 is to 'review the factors including the act of terrorism that inhibits the enjoyment of human rights and recommend appropriate remedial measures'. The commission has despite of its limited powers vis-à-vis the armed forces, been viewing with seriousness the complaints of violation of human rights relating to anti- terrorist operations involving the police and security forces.

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[118] *Prem Shankar Shukla* vs. *Delhi Administration* (1981) 3 SCC 526
[119] *Sube Singh* vs. *State of Haryana,* (2006) 3 SCC 178 at 203
[120] *Id.*

The commission has taken a clear position on the vexed question of terrorism and human rights. It has reiterated more than once that terrorism can not be justified as it has now been recognised by the international community as an enemy of human Rights Rule of Law and democracy that aims at the destruction of civil society and unravelling of the state. It has been very emphatic in articulating its conviction that it is the duty of the police and armed forces of the country backed by all elements of civil society to fight and defeat terrorism. It has , however, been emphasizing from time to time that fight against terrorism has to be won in a manner that respects the Constitution of the republic, the laws of the land and treaty obligations of the Nation.

The NHRC has taken a number of initiatives to remove the infrastructural and procedural inadequacies in the existing machinery provided for enforcement of the right to life and personal liberty. Important point may are listed below:

(1) One of the first instructions of the Commission, issued on 14 December 1993, required all State Governments and Union territory Administrations to ask that the District Magistrates/Superintendents of police should send reports to the Commission within twenty-four hours of any occurrence of custodial death or rape.

(2) The Commission said that a further, major step is required to proclaim the impermissibility, in our country, of custodial deaths and rape, torture and other forms of cruel, inhuman and degrading treatment or punishment. Accordingly, the Chairperson recommended to the Prime Minister in 1994 that in the 125th year of the birth of Mahatma Gandhi, the Republic could best pay tribute to the values he embodied by acceding to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

(3) The Commission has recommended that, in states where the security forces are called upon to assist the civil authorities, local Magistrate or police officers should be associated, in particular, with cordon and search operations, in order to allay misgivings regarding the conduct of personnel of security forces and to prevent misuse of powers.

(4) In insurgency-affected areas, at the level of the district, district magistrates should chair regular meetings involving the security forces and be kept fully informed of operations by the latter. To the extent possible, leading non-officials, representatives of non-governmental organisations and others should be associated with such meetings.

(5) While the restoration of peace may indeed be the sine qua non for the full respect of human rights, timely and sagacious political measures that are truly democratic in character are necessary in the long run. They have for more lasting and beneficial results than reliance essentially on security forces, however devoted and disciplined they are, on restrictive laws, however carefully they may be applied. To meet this end appropriate political measures and initiatives be taken.

(6) Where violations of human rights occur as a result of the conduct of armed forces personnel, prompt and effective action should be taken under the law to prosecute those accused of wrongdoing. This would be in the interests of all concerned the victims, the armed forces themselves and the country at large.

(7) In almost all parts of the country there is a clear and increasing need to reform the police itself, to retrain and to reorganize it and to restore to it the skills and the integrity that the country so desperately needs if the function of

preserving law and order is to be improved. For this reason it is necessary that serious action be taken on the second Report of the police Reforms Commission including those suggesting the insulation of the investigate function of the police from political pressure.

(8) A high level committee should be set up in each state to review the cases of prisoners in order to ensure that they are not detained unlawfully.

(9) The quality of training of police, military and Para-military personnel should be improved and special measures be taken in order to ensure respect for the human rights of people, particularly in area of insurgency.[121]

(10) All post- mortem examinations in respect of death in police or jail custody should be video filmed and sent to the Commission.[122]

(c) RECOMMENDATIONS OF AMNESTY INTERNATIONAL:

Amnesty international recommends following steps to be taken to enhance the protection of human rights in India, halt the practice of torture and create an effective institutional framework for the prevention of torture and other violations of human rights.

(1) The Government should publicly acknowledge that torture is used as a routine method of interrogation and intimidation in police stations and other places of detention. It should make the combat of torture an issue of high priority to which the entire nation should be committed. All political parties should adopt such a policy and implement it in the states where they are in power.

(2) Judicial inquiries should be made mandatory into all allegations of torture, including rape and deaths in custody. The government should ensure that an

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[121] National Human Right Commission, Annual Report (1994-95)31, para 9.6 at 34

[122] The Hindu (Madras) 25 July 96.

independent and impartial body promptly and effectively investigates prima facie reports of torture, rape and deaths in custody published by the news media and by civil liberties groups. The judges should have all necessary resources and powers to carry out their investigations effectively, including powers to compel witnesses to attend and to obtain documentary evidence. Witnesses should be protected from intimidation and harassment and those accused of torture suspended from duty during such inquiries. The inquiries should be conducted within a reasonable time and the results should immediately be made public. Special care should be taken to protect poor and illiterate victims who lack access to existing redress mechanisms. The Supreme Court and the High Courts should conduct their own inquiries whenever a victim alleges torture or illegal detention in habeas corpus petition. In all cases where detainees are brought before the lower courts in a condition indicating they were or may have been tortured, such courts should inquire into the date of arrest, the identify of those responsible for arrest and detention, and the physical condition of the detainee. An independent doctor should immediately send such detainees for a medical examination. All detainees should have the right to a medical examination promptly after admission to the place of custody and regular thereafter, and to be examined by a doctor of their choice. Prompt medical examinations, by a female doctor wherever possible, are of crucial importance to women who allege they have been raped: it is virtually the only way in which rape can be authoritatively proved or disproved.

(3) The government should make a public commitment that torture or ill-treatment of detainees in custody of the police or security forces will not be

tolerated and that it will ensure that such abuses will invariably lead to the perpetrators being brought to justice. It should issue directives to all concerned authorities at the central and state levels that torture is forbidden under any circumstances, as stipulated in Article 4 of the international Covenant on Civil and Political Rights. The government should create effective systems whereby members of the police and the security forces will be held accountable for acts of torture. Legal provisions in Section 6 of the Armed Forces Special Powers Act granting the security forces immunity from prosecution, and provisions inhibiting prosecutions of police officers, such as exist under section 197 of the Code of Criminal Procedure should be abolished. Victims, their legal representatives and their relatives who wish to prosecute police officials for criminal offences and /or sue for compensation should have a legally protected right of access to all relevant documentary evidence including police and other officials records. They should also have the right of access to post-mortem reports. The government should consider appointing special prosecutors charged with supervising and, if necessary, initiating prosecutions of police and security forces personnel.

(4) The government should ensure that existing legal safeguards are respected in all circumstances, notably the rules that all detainees be produced before a magistrate within 24 hours of arrest and that women and children are not taken to police stations for purposes of investigation. The latter rule should be extended to include other places of interrogation such as army camps. The police should be given strict instructions to keep up-to-date centrally maintained registers of arrests and to promptly inform relatives of an arrest and the detainee's transfer. The legal machinery to combat torture should be

strengthened. The prohibition of torture and other cruel, inhuman or degrading treatment or punishment should be incorporated in the Constitution. Access to relatives and lawyers should be prompt. The United Nations Basic Principles of the Role of Lawyers specify that lawyers should have access to detainees within 48 hours of arrest. The duty to disobey [illegible] of the UN Code of Conduct for law Enforcement Officials should be incorporated in domestic legal instruments, especially the Indian Police Act. The right of detainees to have access to a medical examination, to request a judge or other independent body to order a second medical examination, and for victims of torture and their legal representatives to have access to the results of any medical examinations should be incorporated in law. Families of those who die in police custody should have the right to insist that a medical or other qualified person nominated by the family is present at the post-mortem. The government should draw up detailed guidelines for the interrogation of suspects and publish them after consulting with lawyers, bar associations, civil liberties groups and medical professional groups. It should review these guidelines periodically in consultation with these groups to ensure that they are and remain an effective mechanism to prevent torture Special rules should be drawn up to protect particularly vulnerable groups from custodial violence. Female detainees should be kept separate from male detainees and female officers should always be present during their interrogation. The government should allow independent bodies to regularly inspect all places where detainees are held. It could consider granting access to police stations by local judges to make unannounced visits or grant such access to

representatives of citizen's committees. it should allow the International Committee of the Red Cross (ICRC)access to all area where thee is armed conflict between the security forces and opposition groups, notably Jammu and Kashmir, Punjab and the north-east states, where the rights of detainees are most at risk. The ICRC should be allowed to carry out its traditional

(5) The officers in charge of police stations should be instructed that all detainees must be formally notified of their rights. A list of the rights of all detainees in the local language should be displayed in all police cells and other prominent places in police stations. The duties of the police under Section 29 of the Indian Police Act, not to perpetrate "unwarrantable personal violence" on persons in their custody and to ensure that they are safely kept, should be similarly displayed.

(6) The government should institute an intensive program of human rights education as a standard part of the training curriculum for all police and security forces personnel involved in the arrest, detention and interrogation of suspects. It should clearly identify actual practices amounting to torture under the Indian Police Act and other legal instruments. The government should order a review of training methods to ensure that these fully reflect international standards. It should instruct police officers and members of the security forces that international standard, which India is obliged to uphold, prohibit the use of torture under any circumstances, even in situations of emergency. It should instruct all law enforcement personnel that orders from a superior officers are no defence against charges of torture. It should create incentives for those who show care to protect the rights of detainees and

prisoners in their custody. The government should undertake an urgent program of police reform, so as to create a force free from political influence and patronage. It should review and improve the conditions of service of the police as well as their right to organize and express themselves, enabling them to enhance standards of professionals practice and resist improper interference by political and other local forces. It should examine and implement without further delay the relevant recommendations for police reform and investigation into police misconduct made in the seven reports of the National Police Commission 1979-1981.

(7) There should be a statutory right to compensation. An effective machinery for redress for victims of torture and ill treatment, including rape, and custodial deaths should be established. Legal aid for the victims of abuses or their families should be easily available enabling them to sue for compensation. Because of the legal and practical difficulties in obtaining timely and adequate compensation, the government could establish special tribunals solely charged with the allocation of prompt and adequate compensation to all victims of human rights violations. It should be paid by the appropriate state government or, in case of the army, the central government.

(8) Appropriate facilities should be created in all Indian states for the medical treatment and rehabilitation of victims of torture and cruel, inhuman and degrading treatment.

(9) The government should order an authoritative investigation into the causes and the pattern of torture in India and the circumstances facilitating its widespread occurrence. If necessary, special structures and mechanisms should be established to receive reports of torture, rape and deaths in custody.

These could be independent bodies in the various states formed to monitor such complaints and supervise appropriate follow-up. At the national level, an ombudsman or multi-party legislative committee could be established with the staff and facilities to investigate patterns of torture and custodial deaths and ensure their prompt and effective investigation, and follow-up. These bodies should be obliged to report periodically to the public and recommend appropriate action to be taken to eliminate and prevent custodial violence.

(10) The government should strengthen its international commitment to prevent torture which it affirmed when it initiated and made a Unilateral Declaration against Torture in 1979.In doing so, India declared it would comply with the UN Declaration against Torture and implement its provisions through legal and other effective measures. The government should now, like an increasing number of other countries throughout the world, become a party to the UN Conventional against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It should ratify or accede to the (first) Optional Protocol to the ICCPR, which allows individuals to complain to the Human rights Committee for effective remedies after they have exhausted all domestic avenues for redress. The Government should remove the reservations it made when acceding to the ICCPR withholding from Indian citizens the right to compensation in case of wrongful arrest or detention. The government should respond in substance to the queries addressed to it by the UN Special Rapporteur on torture and the UN Special Rapporteur on summary or arbitrary executions. Relevant national and international bodies

should be permitted free access to investigate reported human rights violations.[123]

The above mentioned are some of the sensible suggestions which by the judiciary and various commissions which when implemented in right earnest can go a long way in checking the practices of torture and ill treatment by the police and the security forces and would also develop the confidence of the people in the democratic system of the country besides improving the image of India in respect of human rights at the international level. Unless the policy markers act upon the various remedial measures suggested the state of human right in India will further deteriorate it is time every one should realize that the issue of human right is no lounger an issue which can be left to state/ government alone to deal with it has assumed an international dimension and therefore cannot be claimed as coming exclusively within the domestic jurisdiction of a country.

[123] *See,* Human Rights in India (The Updated Amnesty International Report) at 91-96(First Published in 1993).