

CHAPTER 2

THE PRACTICE OF TORTURE: A HISTORICAL RETROSPECT

When we trace the history of individual rights we see that the primitive society's rights were absolute and inherent in them. It was neither guaranteed nor imparted to them by any one it can be said that they had enjoyed almost all the civil and political rights but this absolute right had made them like animals. This absolute freedom became curse for them. Consequences were the emergence of the concept of "Social Contract theory". The people themselves agreed to contribute their freedom to a "Common Will" which could protect them from the barbaric consequences of absolute freedom. As the primitive man had no notion of fundamental rights, even though he did have a number of freedoms which no civilized man can ever think of but in a society where refinement did not exist. These freedoms indicated his closeness to other animals. Hence, in the primitive Society which was purely unorganized, these freedoms had neither any meaning nor relevance to it.¹ Torture is violation of one of the fundamental rights. Torture is no doubt an international phenomenon but the incidents are much more in developing countries and the overall situation in India is far from satisfactory custodial violence including torture and death in lock-ups strike a blow at the rule of law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of grave concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizen. It is committed under the "shield of uniform" and within four walls of a police station or lock-up, the victim being totally helpless. Sometimes, the police officers arrest the person without warrant for an offence and the arrested persons are subjected

¹ Raj Kishore Pathak ; "The concepts of human rights(Historical and jural development)" *Volume XIII CILQ* 2000, at 234.

to torture by the officers, in order to extract information from them or to force them to make confessions of their committing the offence. Such an act is also done with the motive of forcing them to say or do something against their will. This brutal behavior sometimes results into death of the concerned person. In order to prevent prosecution, every effort is made by the police to create evidence to support the view that the arrested person died after he was released from jail. Deaths are not usually shown in the records of the police. The other police officers, due to the strong bond of brotherhood prevailing between them, do not give any attention to the complaint filed by or at the instance of the victim. If, however, first information report has been filed and prosecution proceedings are instituted against the officers, no direct evidence is available to the victim or his relative in order to substantiate the charge due to the fear exhibited on the fellow prisoners. They are also reluctant to appear as evidences in the prosecution proceedings.

The use of torture by the police for the extraction of confession from the accused person and also for the suppression of political dissent on the direction of the ruling political leaders has assumed serious dimension in *India* with far-reaching implications for the suspected offenders, their relatives and for all those who are not on good terms with the administration, particularly human right activists, environmentalists and social activists².

Torture of detainees in police and military custody to extract information and 'confessions' continues throughout the country. In the year 1995, at least 100 people died in police custody, many as a result of torture. Most victims were criminal suspects, although some were political detainees. Many torture victims came from underprivileged sections of the society, such as the Scheduled Castes and Scheduled

2 Amnesty International Report 1996, (London) at 172-75

Tribes. Rape of women by members of the security forces was also widely reported. Dozens of political detainees 'disappeared' during the year 1995. Most were young suspected of having links with the armed opposition groups, many solely because they lived in areas where armed groups are active. Government forces continued arbitrary and unlawful deprivation of life of those in custody. Often person is taken by the police or by plain clothes man of police force or other enforcement agency unable to trace him and sometimes could not be traced for months together and some times found dead due to police or other enforcement agency using third degree method for obtaining requisite information regarding some related case or confession or to make him agree with some planned crime bet by them for the reasons best known to them. Custodial violence or so-called atrocities committed by members of the police force, the prison officers and men and members of the Para-military organisation have been a subject of great concern to the government and the society.³

Allegations regarding violence and torture inflicted on the arrested persons, prisoners and members of the public have given rise to heated discussions at different forums. Any way, custodial crime or violence may be committed in different forms-

- (i) Physical and mental torture inflicted on accused persons in police custody during and following their arrest.
- (ii) Incidents of torture or sexual abuse on women in custody.
- (iii) Incidents of atrocities committed in prison by the prison staff on convicts or under trial prisoners.
- (iv) Incidence of violence and atrocities committed by the members of military and paramilitary organisations in post-war period or in course of

³ *Id.*

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suppression of activities of the extremist groups for maintenance of internal security, and

- (v) Incidence of torture, ill-treatment and sexual abuse on women victims in rescue homes.⁴

Amnesty International's previous reports of human rights bodies like 'ASIA WATCH' also gave an extensive account of torture committed by the police and military and paramilitary forces. But torture is not a new phenomenon for this country; the police and often law enforcing authorities ever since ancient times have practiced it. Until the end of eighteenth century, physical torture was legal and officially admitted as a method of interrogation in many countries including India.⁵ Thus the use of torture in independent India is the legacy of past centuries.

I. CUSTODIAL TORTURE AN OLD AGE PHENOMENON

The present form and function of any police organisation is linked to the history of its development.⁶ The practice of brutal measures by *Indian police* is not a new phenomenon, albeit it can be traced to the ancient *Vedic* period of *Indian history*.⁷ It was during the epic days of Ramayana and Mahabharata, the Greek fables of physical torture, Nazi's torture camps, and the anecdotes of maltreatment meted out by Roman Army, horrifying tales of Hitler as inimical sentinel of extinctions, Cabal's brutal gender violations under reign of King Charles, *Mughal* reign of terror. British onslaught over the Indians during pre-independent period and many other instances of horrendous events of torture and physical brutalities are indelible in the records of

⁴ Srivastava V.P., *Human rights: Issues and Implementations*; Vol.I, Indian Publishers Distributors, Delhi at 702 (2004). See also Nirman Arora: "Custodial Torture in Police Station in India: A Radical Assessment", 41, *JILI* (1999) 513 at 515-16.

⁵ Nigel Rodley, "The Treatment of Prisoners under International Law" at 7 (1987)

⁶ Peter K Manning & John Van Mammen (Eds.), *Policing: A View from the Street*, at 1(1978).

⁷ Nirman Arora, "Custodial Torture in Police Station in India; A Radical Assessment" 41, *JILI* (1999) 513 at 516

tortures. Violation of personal freedoms, mainly subjugated due to physical and mental suppressions have prevailed upon in alarming proportions since time immemorial. The modern mentors of enforcement authorities still act as a comper to bench mark these traditional and conventional of torture, mental strife, physical conspiracy and other blatant resisting modes to cut and nip to bud the incumbents who are deliberate victims of such atrocities and violations at the hands of law enforcing personnel.⁸

(a) ANCIENT INDIA:

Torture and violence have been identified with the police in India ever since the *Vedic* age (2000-1400B.C).⁹ In our *Vedic* civilisation it was seen that full faith in the basic goodness of man was relied on to atone for any injury caused in the feelings of others were used with confidence in maintaining social peace. The offender after atonement was restored to his original post, prestige, status, vocation and life, without any stigma. Physical pain, torture, capital punishment, etc. were not even recognised as forms of punishment. The king was looked upon as representative of god and was guided by the advice tendered by the *Dharmacharyas*.¹⁰ In the *Vedic* period the ordeals of fire, water, poison, and rice grains fountain cheese etc were in vogue during that time.¹¹ In the epic period (1400-800 B.C.) torture was practiced on prisoners by the police. *Kautilya's Arthashastra* contains description of various kinds of torture such as burning of limbs, tearing by wild animals, trampling to death by elephants and bulls, cutting of limbs and mutilation, etc. *Manu*, the lawgiver of that age emphasized the necessity of torture to protect the society from the hands of the criminals. In the

⁸ Thrity D.Patel, "*Torture: Human Rights and Accountability of Law Enforcing Agencies*", CILQ (1999) at 547.

⁹ Encyclopedia of Police in India, Vol.II, Part I, Ashish Publishing House, New Delhi, 1992, at763.

¹⁰ Nitai Roy Chowdhary, *Indian Prison Law and Correct of Prisoners* (2002) at 16

¹¹ V D Kulshreshtha, *Landmarks in Indian Legal and Constitutional History* (1995) at 9

Buddhist period (B.C.320-300A.D.), which was an age of great humanitarian, the administration of justice had become correspondingly imbued with humanitarian ideals. Accordingly, torture in any form was strictly proscribed and special favours were shown to prisoners who happened to be women, aged or who had many dependents. In the *Gupta* period (A.D.320-500) if facts against a prisoner were not clearly established by evidence it was lawful to use four kinds of ordeal. Among them trial by ordeal was fairly common. During the six and a half centuries intervening between the deaths of *Harsha* in (A.D.650) to the rise of Mohammedans power not much information is available about the criminal justice system. Generally speaking, a medley of petty Hindu kingdoms with ever varying boundaries was ceaselessly engaged in dynastic wars. During this period there was a great deal of rough Justice dispensed through extra-judicial channels.¹²

(b) MUGHAL INDIA

In the medieval period the Rulers usurped to themselves all the authority from primary hearing to appeal from apprehension and trial to execution of punishment. The rulers in this period set himself as the all-powerful authority and master of events. The State enjoyed in presenting its most ugly and dreadful face supported on the points of bayonets to force mute submissions and obedience.¹³ The most common form of punishment at that time was death, mutilation, public humiliation, fines, forfeit of property, banishment, transportation and imprisonment.¹⁴ The practice continued in the *Mughal* period in the form of inflicting several inhuman punishments based on the principle of retributive theory. In the *Mohammedan* period the *Shariat* law was applied to crimes; a thief's hands were to be cut off, stoning the adulterer and

¹² *Id.*

¹³ *Ibid.*

¹⁴ Reckless, Walter C:s *The Crime Problem*, (1969) at 497.

adulteresses to death; life for life, tooth for tooth, if blood money, or any other form of compensation to the kin or the sufferer himself was not acceptable.

Under the *Mughals*, no criminal or civil code existed and torture to secure confession was wide spread. *Akbar* certainly tried to avoid harsh treatment to prisoners by his officials. But the deliberations proceeding the infliction of punishments during the regime of *Akbar* were absent from *Jehangir*'s dispensation of justice under which trials were quick, and were also executions, hanging, beheading, impaling, killing with daggers, by elephants, serpents, etc. *Shahjahan* showed even greater ferocity and cruelty than *Jehangir* and took a savage pleasure in witnessing the execution of punishments, which he had decreed.

Aurangzeb, on the other hand, in his efforts to attain the ideal of a strict Muslim and to follow the law and traditions of Islam in every detail of his administration and personal conduct, introduced religion-based discrimination in the administration of criminal justice. Under him *Hindus* were punished more severely than *Muslims* for the same offence. When a *Hindu* found guilty of even a serious offence embraced *Islam* he was let off with a minor punishment.¹⁵ The *Mughal* system suffered from one basic defect i.e. there was no single well organised central police authority to control, supervise and co- ordinate the functioning of several branches of police administration.¹⁶

With the collapse of the *Mughal* empire and till the advent of the British rule in India, criminal justice system collapsed too although the *Shariat* law was still in force. The Indian Penal Code of 1860 abolished the *Shariat* law.

¹⁵ Jain, M.P. *Outlines of Indian Legal History*, N.M. Tripathi Pvt. Ltd., Bombay (1996)

¹⁶ J. C. Madan, *Indian Police: Its Development upto 1905 a historical Analysis* (1980) at 10.

(c) BRITISH INDIA

The British established their kingdom on the ruins of the *Mughal* Empire. They showed a great endeavour and enthusiasm in improving the Indian legal system on the basis of the English legal system. But the harassment and barbaric treatment of the inhabitants in police custody went on without any pause. The rights of the person in custody were suspended and human rights phenomenon was anathema for the police officers because their prime concern was to act in furtherance of British rule.¹⁷ It was only in the middle of the nineteenth century that imprisonment became the main form of punishment. But the prisons nowhere had till then merged as the instrument of carrying out judicial punishment. Cantor observed, "Imprisonment is the modern method of disposing serious offender. It is difficult to imagine surrendering this method. It was just as difficult to surrender the practice of torture in the middle Ages or public execution for every felony in England. A brief sketch of the methods of punishment in the past will show how firmly different ages clung to those current practices which to us today appear utterly barbaric."¹⁸ He also said that within "the prison system which we have inherited from the nineteenth century maybe as irrational as the inquisitional torture of middle ages."¹⁹

In the early years of their rule the British found that gangs of professional and hereditary robbers and murderers known as "*thugs*" were operating in every remote part. Inhabitants were indiscriminately apprehended on false charges and incarcerated in jails for years before they were brought for trials and many of them perished in jails. At that time torture by officials including *Kotwals* was widely prevalent resulting in deaths sooner or later, and criminal justice system did not exist at all. The

¹⁷ Nirman Arora, "Custodial Torture in Police stations in India: A Radical Assessment" 41 *JILI* 1999 513 at 516.

¹⁸ Cantor, Nathaniel F., *Crimes and Society*, Henry Hello and Company, New York, (1930) at 200.

¹⁹ *Ibid.*

British restored order from chaos and destroyed the *thuggee* system, put down barbaric social customs like “*Sati Pratha*”, built up the judiciary, the police, and the jails and codified laws.

Reflecting on the use of third degree methods by the Indian Police, Sir *William Sleeman* observed:

“Men are often ultimately acquitted for want of judicial proof, when there is abundance of the moral proof on which a police officer or magistrate has to act in the discharge of his duties, and in a country where gangs of professional and hereditary robbers and murderers extend their depredation into very remote parts, and seldom commit them in the districts in which they reside, the most vigilant police officer must often fail to discover the perpetrators of heavy crimes that take place within his range. When they cannot find them, the native officers seize innocent persons and forced them into confession or else try to conceal the crime.”²⁰

Justice Sir C. Walsh a judge of *Allahabad* High Court also criticized and made a strong criticism about the evil of torture practiced on suspects by policemen. The main reason for the growth of torture during the British period was the investigating officer’s over zealousness to secure conviction was considered as the yardstick to assess the merit of an investigating officer. The craze for conviction became so rampant that the system of investigation itself underwent almost a reverse process. This was elaborated by Justice Walsh who said, “Paradoxically though it seems, in many cases the fact is that, whereas the English detective begins with his available witness, and works his way up to the discovery of the accused, the Indian sub-

²⁰ Encyclopaedia of Police in India, Vol. II, Part I, Ashish Publishing House, New Delhi, at 765 (1992).

inspector begins with the accused, and from him works his way up to the witnesses, who are sometimes surprised to know.”²¹

The average Indian method of police investigation was, and to a certain extent even today is that the investigating officer finds rightly or wrongly his suspects, extorts a confession from him and thus proceeds to a search for facts to fit them. Thus two detestable methods, namely, third degree and padding were and still continue to be critical components of police investigation.

(i) Torture Commission:

With a view to prevent the use of torture by the police the British took many steps and measures from time to time. Sir Charles Napier who conquered the territory of *Sindh* in 1843 adopted the Royal Irish Constabulary model for policing in *Sindh* and established a separate police organisation, totally controlled by its own officers. Certain disciplinary guidelines were also issued to the cops. This was the first path breaking initiative by the British Government to prevent the tortuous and corrupt practices of the police. This positive step encouraged the Government of other presidencies to take up similar incentives. Thus the Government of Madras, in order to introduce the similar reforms as of *Sindh* police administration, set up in September 1854 a Commission known as Torture Commission to inquire into allegations of torture widely used by the revenue and police officials. That Commission submitted its report in April 1855. The Commission while recommending substantial changes in the police administration also demarcated the boundaries of the duties and

²¹ *Id.*, at 766

responsibilities of the police in order to do away with their extra-judicial exercise of power.²²

(ii) Enactment of Criminal Laws and Procedures against Torture:

The depictions of rampant and pervasive brutality in lock-ups, rape and death in custody and wide spread corruption among the policemen galvanised the governmental machinery to embark upon the reformation process in existing laws. Consequently the great reformation in the state of society was however brought about by the enactment of the Indian Penal Code of 1860, the Indian Police Act, 1861, the Indian Evidence Act, 1872, and the Code of Criminal Procedure, 1898. Similarly, the Madras District Police Act 1859 was passed on the basis of the recommendations of the said Commission for Madras Presidency. Section 24²³ and 25²⁴ of the Indian evidence Act, section 162,²⁵ 163,²⁶ 172²⁷ and 173²⁸ of the Code of criminal Procedure

²² Nirman Arora, "Custodial Torture in Police Station in India; A Radical Assessment" 41, *JILI* (1999) 513 at 516-17.

²³ Section 24 reads as under:

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

²⁴ Section 25 of Evidence Act provides that:

No confession made to a police officer, shall be proved as against a person accused of any offence.

²⁵ Section 162 of Cr. P.C. reads as under:

(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it, nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made: Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872) and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act. Explanation. An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and

otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.

26 Section 163 of Cr. P.C., reads as under:

(1) No police officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in section 24 of the Indian Evidence Act, 1872 (1 of 1872). (2) But no police officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will: Provided that nothing in this sub-section shall affect the provisions of sub-section (4) of section 164.

27 Section 172 Cr.P.C., reads as under:

(1) Every police officer making an investigation under this Chapter shall day by day enter his proceeding in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation. (2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. (3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the court; but, if they, are used by the police officer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer, the provisions of section 161 or section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply.

28 Section 173 Cr. P.C. reads as under:

(1) Every investigation under this Chapter shall be completed without unnecessary delay. (2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating- (a) The names of the parties; (b) The nature of the information; (c) The names of the persons who appear to be acquainted with the circumstances of the case; (d) Whether any offence appears to have been committed and, if so, by whom; (e) Whether the accused has been arrested; (f) Whether he has been released on his bond and, if so, whether with or without sureties; (g) Whether he has been forwarded in custody under section 170.

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation. (4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit. (5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report-

(a) All documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation; (b) The statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witness.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the matter of the proceeding or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate exclude that part from the copies to be granted to the accused and stating his reasons for making such request. (7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub-section (5). (8) Notwithstanding in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed and the provisions of sub-section

and section 330²⁹ and 331³⁰ of the Indian Penal code furnished the cops with certain disciplinary rules and regulations to combat the miserable incidents of police torture. Section 339³¹ of the Indian Penal code making 'wrongful restraint' covered illegal custody. It was another landmark initiative taken by Lord *Curzon*, when he set up the Police Commission in 1902. The commission submitted its report in 1903 and designed several measures to improve the police administration and to mitigate the effect of harsh attitude of police personnel. The police Commission, while criticising the working of the police, noted:

The police are far from efficient; it is defective in training and organisation; it is inadequately supervised; it is generally regarded as corrupt and oppressive; and it has utterly failed to secure the confidence and cordial co- operation of the people.³²

Though the Government of India passed orders on the Report of the Police Commission on 21 March 1905 but the behaviour of the police officers remained

(2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).

²⁹ Section 330IPC reads as under:

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

³⁰ Section 331 IPC reads as under:

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

³¹ Section 339 IPC reads as under:

Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has right to proceed, is said wrongfully to restrain that person. Exception: - The obstruction of a private way over land or water, which a person in good faith believes himself to have lawful right to obstruct, is not an offence within the meaning of this section.

³² See, Report of the Indian Police Commission 150 (1902-03) by Government training Office, Shimla.

unchanged. Some other legislations regarding police administration were also passed i.e. the Indian Riffles Act, 1920; the Police (Incitement of Disaffection) Act, 1922; the Delhi Special Police establishment Act, 1946 etc. but from 1903 till 1947 when India became independent, the British set the police machine as *status quo* so as to suit their imperialist need. But with the transition of India from a slave country to an independent, socialist, democratic, and welfare state, the style of police handling of offenders and law and order situations had to change from an aggressive and 'mailed fist' attitude to peaceful and persuasive handling of agitating groups.³³

The British were, by and large, fair and legal. But in the interest of the *Raj*, they encouraged brutality and third degree against terrorists and revolutionaries and used special powers and extra-legal methods. Many prisoners were incarcerated in prison cells, kept under fetters and whipped. The massacre of men women and children in *Jallianwalla Bagh* and the violence perpetrated by the police and the army during the "Quit India Movement" in 1942 are still fresh in our memory. In tribal areas burning down villages and harsh punishments were used to bring the tribal under subjugation.

(d) INDEPENDENT INDIA:

After independence, in order to protect prisoners against severity of treatment our Constitution provided a number of safeguards against torture and imposed considerable restrictions on law enforcement officials against unlawful activities including torture in police custody. The adoption of the constitution of India ushered in a sanguine hope that the law enforcement officers will try to improve the tarnishing police image and to make healthy environment of public co- operation. The democratic principles enshrined in the Constitution changed the prime duty of the

³³ Rajinder Prasher, *Police Administration* 29 (1986)

police force. Now the protection and safety of the interests of the public became their main duty. But unfortunately, the Indian police have not been able to cleanse the stigmas cast on it. However, as the years rolled by, these measures did not bring about any perceptible change in the police operations compared to the pre- independence days. The practice became more pronounced, in fact, after independence. The passing years saw vested interests utilizing the police for their personal and party ends.

Moreover, its third degree methodology of investigation has caused further disenchantment and disillusionment among the citizen. They no longer repose faith in the police administration of the country and thus, the relations between police and public have worsened and became more complicated than they were during the early years of independence.³⁴

The custodial torture has become so common these days that not only the police and bureaucracy but even the people take it for granted as a routine police practice of interrogation. The result is that the news of such outrageous conduct causes nothing more than a momentary shock in the society. When something terrible takes place, there is public uproar. Only then the government takes notice of the custodial torture as the public out cry leaves them with no other option. Even the quality cops usually suffer at best the punishment of brief suspension. Once the incidents fade away from the memory of the public, they are again back in the service.³⁵

The basic concepts of democracy changed the duties, responsibilities and ethos of the police but the style of the police remains as it was during the British rule. In the era of national movement for independence our leaders condemned police

³⁴ S.K.Ghosh, *The Betrayal of the Police* v (1991)

³⁵ Saini R.S, "Custodial Torture in Law and Practice with reference to India" 36 *J.I.L.I.* (1994) at 166.

brutality but paradoxically they too used and misused the police to deal with various conflicts, which arose due to widening of the gap between rising expectations and their fulfilments. The police have been used as the strong arm of the administration, charged with the duty of keeping a political party in power. The police have been badly politicised and misused for partisan ends. The present social scene in the country is pregnant with violence of different varieties. With so much violence around, and this does not exclude even our political, religious and social leaders, the police which are but a small section of the same society, can not be any different.

Due to continued police brutality and torture during the past two decades it seems that custodian of law become the law-breakers. After the eighties the police seem to be more concerned with *lathi*-wielding attitude and its brutality and use of third degree methods by it has become the order of the day. The mounting police atrocities and other repressive measures are the instances of violations of human rights.

(i) Police Atrocities and torture during Emergency:

During the emergency period, police atrocities became violent and alarming. In March 1976, the police took a Satyagrahi into custody, but no case was registered against him. Moreover, he was kept in illegal confinement for a few days during which he was objected to various kinds of physical torture like stamping on the bare body with heeled boots, beating with cane on the bare soles of feet, beating on the spine, beating with rifle butt, inserting live electric wires into body crevices, burning with lighted cigarettes and candle flame, etc. Such were the acute form of torture that were used by the police during emergency.³⁶

³⁶ See, "Police Atrocities", "Emergency Phase" Cited in *Violations of Democratic Rights in India* (edited.) by A.R. Desai, Popular Prakashan, Bombay at 262 (1986)

In *Kerala*, police atrocities took ugly turn when all prisoners were stripped to their underwear and beaten up by groups of 10 to 12 constables. No food was provided while in custody. If physical signs of beating are too obvious they were not produced before a magistrate but moved from station to station. *Madhya Pradesh* was such a state where maximum numbers of prisoners were kept in jail during the operation of emergency. In *Gwalior District Jail*, political prisoners were kept along wide notorious dacoits were allowed to be abused by them.³⁷

Police atrocities in the emergency reached its climax when in *Delhi*; mostly students became its victims. The police resorted to third degree methods to get information from the students. *Hemant Kumar Vishnu* Secretary, *Delhi University Students Union* was arrested with fellow students at *Buddha Garden*. He was hung upside down, beaten, burned with candle flame on the bare soles of his feet; chilli powder was rubbed into his nose and rectum to obtain a confession about some non-existent plot. He was then transferred to *Rajendra Nagar* Police Station and a case was registered against him. *Mahavir Singh*, another *Delhi University* student, was hung upside down, stripped naked and beaten, *Shiv Kumar*, a *B.Sc.* student was arrested and beaten with rods, shoes and gun butts and made to inhale chilli dust. *Harish Kumar* of *Tilak Nagar* and *Suresh Jain*, an *M.A.* student both were severely beaten.³⁸

Haryana also became the victim of police atrocities. At *Yamuna Nagar* in *Mulik Chand, Satyapal* and *Pawan Kumar* were arrested on November 23, 1975. On November 24th night, he was made to stand naked outside the cold wintry night while buckets of water were poured over him. He was not allowed to sleep. Also arrested and tortured were *Vijay Kumar, Sushil Kumar* and *Dinesh Kumar*. In *Karnal, Sultan*

³⁷ *Id.*, at 265

³⁸ *Id.*

Singh Dhan Pal, Ravi Dutt and Lekh Raj arrested on November 14, 1975 stripped naked, and severely beaten.³⁹

In this way during emergency various types of police atrocities were committed upon the poorer people, students teenagers and even teachers were not spared.

(ii) During Janata Party Regime from June 1977 to May 1978:

In the 1977 general elections Mrs. *Indira Gandhi* was unseated from power, but the trigger-happy, *lathi*-wielding attitude of the police did not change. Even during the *Janata* regime, we witnessed police *lathi*-charges, tear-gassing, ban on strikes, prohibitory orders and other repressive measures to suppress the working class and other sections of the toiling people. Whether India is ruled by congress (I) or *Janata* Party or *Janata* Dal, police atrocities have continued.⁴⁰

Although UP has beaten Bihar in police firings, but the latter can still claim the leading place in jail killings. In Bihar on the night of July 3, 1977 agricultural worker's leader of East *Champaran*, *Gambhira Prasad Sah*, was picked up by the police from a friend's house at *Chhoradano* without any warrant. He was taken to *Dharpa Math*. The *Mahant* of the Math was the local landlord, *Goondas*. Later, he was transferred to Police Station *Chhordano* where another round of beating followed. As a result of this torture, *Gambhira* died. *Karpoori Thakur's* government not only refused to institute an inquiry into the murder, but also withdrew the order of suspension on the policemen who had beaten up *Gambhira* to death. The DIG, *Tirtut*

³⁹ *Id.*, at 268

⁴⁰ G.S Bajwa and Dilbir Kaur Bajwa: "Violations of Human Rights in India –Nature and Extent of Police Atrocities" in *Human Rights in India* Edited by B.P. Singh Sehgal at 224.

range even recommended promotion for the ASI who led attack on *Ghambhira* of death.⁴¹

On June 21, 1977 *Shobhari Rai* and *Sankhi Rai* (two agricultural workers of village, *Saihara, Sitamarhi* district) were arrested by the police. They were brought to the local landlord's house and shot dead. On July 22, 1977, *Suresh Yadav*, a poor peasant, died from torture in the lock-up of a sub-urban police station of *Monghyr*. On 15 October 1977, police opened fire on a group of villagers at *Nawada* when they protested against the misbehavior of a police party. On October 29, 1977, the police opened a fire at *Teenpahar* railway station thereby injured two persons. Between December 12 and 14, 1977 a number of policemen *lathi* charged the students who were demonstrating in *Patna* for educational reform. On 3 March 1978, police brutally *lathi*-charged a demonstration of Backward Classes in front of the Assembly House in *Patna*. On 31st March 1978, police opened fire without warning in *Raghunathpur Bazaar, Bhojpur* district, killing four persons on the spot.⁴²

Police *lathi*-charged students at *Lucknow, Allahabad, Agra, Gorakhpur, Saharanpur* and other towns in January 1978, when they demonstrated in support of the striking Secondary Teachers. In *Lucknow* a large number of girl students were injured. Police fired 50 rounds of tear-gas shells on students of *Dayanand Anglo-Vedic College, Kanpur*, on April 6, 1978 as they agitating for their demands. It has been seen how shamelessly UP Chief Minister *Shri Ram Naresh Yadav* during *Janata* regime (a protégé of Union Home Minister *Charan Singh*) had sought to justify the blood bath and other atrocities perpetrated by the Provincial Armed Constabulary (PAC) in the campus of the Pant Nagar Agricultural University. The Chief Minister, whose resignation had been demanded by a large number of his own party legislators,

⁴¹ Prabhat Das Gupta, "A Catalogue of Depression" June 1977- May 1978, *Id* at 286.

⁴² *Id.*, at 286-87

did not order even judicial inquiry into the Agra firing.⁴³ In this way, *Janata* Party regime also resorted to police power to suppress the anti-government protests. In Haryana on June 28, 1977, *Harnam Singh*, a fireman of *Prestolite* Company, *Faridabad*, died in Police lock-up after eight days of torture. His dead body showed nails marks. He was arrested and tortured for a self-implicating statement at the behest of the employers who were afraid that *Harnam Singh*, who knew a lot about their misappropriation of Company's property, might one day expose them. Another instance of police atrocity is *lathi-charge* on students at *Rohtak* on 13th September 1977. *Ramji Lal*, a *Harijan* youth of *Mohammadpur* village, *Hisser* district was shot dead by a police officer because he wanted to see the search warrant before he could allow the police to enter inside the house. His brother, who protested was also shot and injured. The dead body was kept lying at a road crossing for hours.⁴⁴ In the rural areas, the landlords who think that *Janata Party Raj* is their *raj* let loose their hirelings against the *Harijans* and other rural poor with the connivance of the police and sometimes even with their direct help. *Jagjivan Ram* even publicly complained that atrocities against *Harijan* had increased during *Janata* regime.⁴⁵

In Punjab an agricultural worker of *Vailen Puien*, *Fatehabad* police took *Puran Singh*, to police custody in September 1977. he was tortured to death in the police lock-up. News of his death leaked out only on 18th September 1977. *Yaspal*, a former editor of *Jullunder* Edition of *Milap*, was taken in police custody on 28th September 1977 and subjected to brutal torture to extract confession. November 1 and 2, 1977, students were *lathi-charged* at *Amritsar*, *Ludhiana*, *Bathinda*, *Jullundar*, *Faridakot* and *Sangrur* for taking out protest demonstration against price rise and

⁴³ *Id.*, at 284

⁴⁴ *Id.*, at 291

⁴⁵ *Id.*, at 284

atrocities of *Harijans*. On 11 March 1978 police fired to disperse the demonstration of State government employees at *Ludhiana*.⁴⁶

(iii) The Police Atrocities and torture—After Eighties

Due to continued police brutality and torture during the past two decades it seems that custodian of law become the law-breakers. After the eighties the police seem to be more concerned with lathi-wielding attitude and its brutality and use of third degree methods by it has become the order of the day. The mounting police atrocities and other repressive measures are the instances of violations of human rights.

After 1980, police has resorted to more repressive techniques as not to leave any scar of police atrocities on the body of victims. Even minors were not spared at the hands of police. A newspaper published a report, according to which 'Young boys of 10 to 14 years' were being supplied to convicts for their delectation and a boy named *Munna*...was in agony because 'after the way he was used, he was unable to sit'⁴⁷ The helpless boy gave the description of police torture in a telling manner: "I was taken to *Baz Mandi* Police Station and beaten up. My feet were swollen. They put a bandage around my forehead and passed electric shocks through it."⁴⁸

The story does not end here. The police in a small town of Madhya Pradesh tortured many young boys into impotence. This said tale of torture was reported in *Sunday*,⁴⁹ whose correspondent obtained a signed affidavit from the victims in which they explained the barbaric technique employed by the police. The young men were hanged upside down. They were then beaten up ruthlessly and then electric shocks

⁴⁶ *Id.*, at 290-91

⁴⁷ *Munna vs. State of U.P.* AIR 1982 SC 806

⁴⁸ "Boys reveal tale of torture in jail" in *The Indian Express*, February 12, 1982.

⁴⁹ See, "torture into impotence" *Sunday*, November 8, 1981 at 16.

were passed through their genitals, which made them important. At least the police rendered thirteen of the victims sexually defunct. The police adopted these savage techniques of torture to terrorise the people.⁵⁰ Out of these thirteen young men are students. Is police meant for protecting these innocent men or perishing them? That remains a fundamental issue to assess. The police are using several brutal methods to get forced confession from innocent people. This inhuman torture starts with a through beating of the victim. And, if the refuses to confess, then he made is taken outside where the victim is stripped and then made to sit on the top pf sharp bamboo. After this, the policemen start pressing hard on the victim's shoulders in order to impale him. The torture is enough to make any victim admit to any crime. The police have destroyed the life of several people by using such third degree methods.⁵¹

(e) TORTURE IN COUNTER-INSURGENCY:

The mankind is facing a great challenge, in the present scenario, for the violation of human rights- not at the hands of the authorities, but in the hands of the terrorists and religious fundamentalists. Both violate human rights and block the process for social development. Terrorism is a negation and violation of norms of human behaviour recognised by all civilised people of the world.⁵² Torture is common in areas affected by insurgency, secessionism, terrorism or civil strife like Punjab,

⁵⁰ One of the methods of torturing the inmates was *Laxman Jhula*. This barbaric form of torture was used to terrorise the persons either to extract confession from them or to extort money. The victim was strapped of all his cloths, and then hung upside down from the ring fixed in the roof of the room with the help of a rope. The hands of the victims were tied. Then start the thrashing of the victim on the soles of his feet- such a place for beating was used because it left no marks if the victim was still reluctant to confess, the torture was carried to a still vicious stage, the line wires were placed against victims genitals and electric shocks were repeatedly administered till the victim was helpless with pain. The torture leads to impotence. See id

⁵¹ G.S Bajwa and Dilbir Kaur Bajwa: "Violations of Human Rights in India –Nature and Extent of Police Atrocities" in *Human Rights in India* Ed. B.P.Singh Sehgal at 18

⁵² K.L Bhatia, Jagmohan Singh, Sanjay Gupta and Sunayana Trisal "Terrorism- Sans Human rights: Challenge for N.G.O.'s,HRC's and HRO's" in *Human Rights in India*".Ed. B.P.Singh Sehgal at 518

Jammu and Kashmir and Northeastern states.⁵³ In these areas, the militant groups have been responsible for numerous human rights abuses including kidnapping, torture, killing and hostage –taking. Faced with this situation when police and securities forces resort to stern actions against these anti-national and anti-people elements in order to contain the said menaces and defend the national unity of country they also sometimes commit human rights abuses including acts of torture and cruel or inhuman or degrading treatment or punishment, illegal and arbitrary detention, and custodial death or extra –judicial killings. These irresponsible actions not only bring bad name to such forces but also help the militant organizations to mobilize and carry the support of the local population and tarnish the image of India in human rights forums. It is important to mention that terrorists grating in a democratic state take full advantage of legal and constitutional rights and they seek to subvert the system by acts of terror and violence exploiting the weaknesses of the democratic system to their best advantage⁵⁴

It is equally important to mention that abuses of authority by police flourish not only because of official negligence or acquiescence, but also because rightly or wrongly broad sections of the people consider that police are required to carry out a necessary and unpleasant task if both state and society are preserved and protected and it is a result that police have involved in fake encounters⁵⁵.

In recent years, many laws have been enacted in order to arm the police and security forces with wide powers of arrest and search warrant. Prominent among them

⁵³ See Human Rights in India (the updated Amnesty International Report), at 18 (first published in 1993).

⁵⁴ Singh, Randhir, "Terrorism, State Terrorism and Democratic Rights" Mainstream, January 25 1992, at 29-46.

⁵⁵ *S. Sodhi vs. State of U.P. and Others*, AIR 1994 SC 38

had been the Terrorist and Disruptive Activities (Prevention) Act (TADA).⁵⁶ After this statute lapsed, Prevention of Terrorist Activities Act (POTA) has been enacted by the Parliament⁵⁷ and the Armed Forces (Special Powers) Act. The Armed Forces Special Powers Act (AFSPA) and the Disturbed Areas Act remained in effect in Jammu and Kashmir, Nagaland, Manipur, Assam, and parts of Tripura, where active and violent secessionist movements existed. The Disturbed Areas Act gives police extraordinary powers of arrest and detention, and the AFSPA provides search and arrest powers without warrants.⁵⁸ Human rights groups alleged that security forces operated with virtual impunity in areas under the act. Security legislation was used to facilitate arbitrary arrests, torture and other grave human rights violations, often against political opponents and marginalized groups... The Armed Forces Special Powers Act 1958, which grants special powers to the security forces, is under review, there is concern over its continued enforcement in “disturbed areas”, including large parts of the northeast. The culture of impunity developed during that period continued to prevail and reports of abuses including torture and ill treatment persisted.⁵⁹ Maharashtra and other States had enacted similar laws. These are very serious and complex crimes that transcend State boundaries. As many of these crimes are inter-State in character, it may be necessary to examine if some of these matters should be included in the Union list to enable the Govt. of India to meet this growing challenge in an effective manner.

Some over enthusiastic and overzealous members of police and security forces has interpreted the provisions of these laws as a license to torture and kill with

⁵⁶ The Act was, however, repealed in 2003.

⁵⁷ The Act was, however, also repealed in 2004.

⁵⁸ See, Section 1(d) of AFSPA

⁵⁹ *Amnesty International Annual Report 2005* (India section)
<http://web.amnesty.org/report2005/ind-summary-eng> dated 26/8/2006.

impurity. It has been observed that the members of security forces, often, pick up suspected terrorists without formally arresting them in illegal custody, causing incalculable harm to the prestige and image of the security forces. The militant's relatives, including their parents, sisters, and brothers, were detained illegally for days, in many cases in order to exert pressure on the militants to surrender⁶⁰. Torture varies from person to person. It is said that the victims of torture are often persons accused of petty crimes almost always poor, with little or no power-political, financial or societal to back them. They are also persons who do not have the legal or other resources to initiate action against the policeman who tortures them.

During interrogation, the suspects were subjected to merciless beatings, with *lathis*, riffle butts and whips. Many were kicked, punched and trampled on the ground. A few were stripped and electric shocks were applied to their body including private parts. Hairs were pulled out. Thus, torture became an independent tool for creating terror in the minds of suspects. The methods used are as under:⁶¹

1. Beating both in public views at home before family members and also inside the army camps by hands, lathis, rifle butts, whips:

- (i) Punching in face, head and abdomen.
- (ii) Kicking in chest, abdomen and back.
- (iii) Trampling and kicking a man, made to lie down on ground.
- (iv) Beating with *lathis* or soles of foot.

2. Hanging the persons from ceiling beams by hands.

- (i) Hanging from tree, in upside down position.

⁶⁰ *Sube Singh vs. State of Haryana*, (2006) 3 SCC 178

⁶¹ Srivastava V.P., "*Human rights: Issues and Implementations*"; Vol.I.Indian Publishers Distributors Delhi (2004) at 700; See, also J.S. Bisht, "*Custodial Torture: An Invasion to Right to Life [A Socio-Legal Perspective]*", XXX IBR (2003) at 336.

- (ii) Hanging the persons by one hand only, other hand bound behind back.
- (iii) After a person is so hanged, he is severely beaten or other forms of torture are carried out.
3. Wet submarine treatment immersing the head of the person in a bucket or drum of water till he is nearly drowned.
 4. Continuously pouring water over the mouth and nose of a person after he is bound up and is mobilised till he is nearly suffocated.
 5. Staking-a person is made to lie down on ground, either face up or face down position, and his hands and feet are tied in a spread-eagled manner to stakes driven to ground. By this method a person is totally immobilised. Then, he is beaten, kicked or trampled under boots or tortured in other ways. Two soldiers causing blood vomiting roll sometimes lathi forcibly over his back and evacuations of bowels in severe pain.
 6. Keeping bound up in an uncomfortable sitting position to a stake or tent pole for hours, even days together.
 7. Frame treatment-a person is bound spread eagled to a vertical rectangular wooden frame, and thus immobilised is tortured.
 8. Giving electric shock-electric shock is given from a 12 volt car battery or directly from domestic mains shocks are given to head, eyes, cheeks, ears, neck, shoulders, armpits, back and even to private parts.
 9. Uprooting hairs by pinchers from head, eyebrow, armpit and even pubic hair.
 10. Hitting a person on his genitalia and testicles till he become unconscious from pain.
 11. Applying chilli powder to eyes with the hands bound behind his back, and also to arms.

12. Forcefully pulling apart the legs by two soldiers, resulting in tear of the anus.
13. Pushing a stout *lathi*, smeared with chilli powder and petrol, through the anus.
14. Burning with lighted cigarette butts. Such burns are even given to private parts.
15. Sticking pins all over the body.
16. Burying in ground up to neck and covering the head with bucket.
17. Denying food and water for days together.
18. General physical punishment and humiliations. Usually large groups are subjected to these. People are lined up in a field or in camps, sometimes in full views of the womenfolk, and are forced to do the following-
 - (a) To kneel facing the sun for hours.
 - (b) To stand necked in sun and rain.
 - (c) To stand in waist-deep or neck-deep water for hours.
 - (d) To perform frog jumps till the person is exhausted.
 - (e) To run in circles.
 - (f) To carry army *jawans* on back over long distances.
 - (g) To perform sit-ups holding the ears.
 - (h) Forcing to eat sand, earth or to drink alcohol and filthy water.

The most disturbing features of their wide-spread inhuman torture are that the persons tortured are loosing their mental balance, memory lapses, in coordination of thought and action, visual disturbances, inability to use one or more arms, forearms fingers, legs etc, impotency and other sexual abnormalities etc.⁶²

⁶² Srivastava V.P., "*Human rights: Issues and Implementations*"; Vol.I. Indian Publishers Distributors, Delhi (2004) at 701.

II. NATIONAL SECURITY – NOT AN EXCUSE FOR USE OF

TORTURE:

Torture to the suspects is sometimes justified on the ground of national security. It is argued that terrorism; insurgency, secessionisms and armed rebellion put innocent lives at risk and endanger the national security. Such extra-ordinary situations require extra-ordinary response from the state agencies, which in turn justifies the deviation from the principles of liberal criminal jurisprudence and conferment of wide ranging powers on police and security forces. Moreover, rights and liberties are not absolute, entirely free from any restraint, for that would lead to anarchy and disorder.

The reasonable grounds of restrictions on the individual's fundamental rights find place in almost all the constitutions of the world including the Indian constitution⁶³ and international human right instruments. Supporters of national security theory argue further since like individual, every state has the inherent right of self-defence the state may exercise abnormal powers during an emergency and deviate from its normal obligation to protect and enforce the human rights of its citizens. It has been argued that where a country's own survival is in peril dictates of national security override human rights concerns. This is acknowledged under many international instruments of human rights.⁶⁴

While no one could disfavour such reasonable restrictions on the rights of men it should be acknowledged that there has been numerous assaults on the individual's rights and liberties by the state in the name of national security such as

⁶³ See, the Constitution of India, Article.19 (2-6).

⁶⁴ See, International Covenant On Civil And Political Rights 1978, Article. 4 (1); The European Convention On Human Rights 1953, Article.15 (1) for texts see A.H Robertson, Human Rights in the World at 202-4 (Manchester, 1972).

confiscation or nationalization of private property; license through wire-tapping and mail opening; arbitrary search and seizure; arbitrary arrest and detention for indefinite period; suspension of *habeas corpus*; summary trials and executions; denial of appeals to the judiciary; resort to torture; political internment; so on and so forth.⁶⁵ Thus, there appears antagonism between the rights of man and the concept of national security. But they in fact are linked together. There is a close relationship between the two. A charter of rights has no meaning to those persons who constantly live in anarchy and disorder. People's right may not last long when the countries are in peril due to either external attack or serious internal disorder. In a word, Human rights cannot last long without national security. On the other hand, the deprivation of individual's basic fundamental rights by the authoritarian or dictatorial regimes for a long time breeds anger, frustration and disillusionment which ultimately lead to rebellion and internal disturbances shaking the very foundation of national security. So the 100-dollar question is how far and how much can the individual's right can be sacrificed to promote national security. This question cannot be answered properly unless the concept of national security is properly understood and is distinguished from the security of regime/individual.⁶⁶

Like individual, every state has the inherent right of self-defence. This right is available to the states in any situation, which threatens its existence. Accordingly, the State may exercise abnormal powers during an emergency and deviate from its normal obligation to protect and enforce the Human Rights of its citizens. This right of derogation of the state is acknowledged under many international instruments of

⁶⁵ R.S. Saini: "Custodial Torture in Law and Practice with Reference to India" 36 *JILI* (1994) 166 at 170

⁶⁶ *Id.*

human rights.⁶⁷ Human rights activists, therefore, argue that the concept of national security should not be overstretched or misused to justify human rights abuses in any situation. States are no longer free to treat their citizens in any manner of their liking, because, their response to crisis situations is subject to their commitment to protect and promote human rights and fundamental freedoms of individuals as well as constitutional and legal limitations. It has been maintained that just as human rights and fundamental freedoms are not absolute, similarly the right of derogation the State is also not an absolute one. There are certain rights, which must remain unaffected even during emergency. Right to life and freedom from torture belong to the category of such rights.⁶⁸

As the International Commission of Jurists (ICJ) rightly noted that there was a tendency for some government to regard any challenge to their authority as a threat to “the life of the nation”. This is particularly true of regimes which do not provide any lawful means for the transfer of political power and which in consequence are inclined to regard any criticism of the government as an act subversive of public order.⁶⁹ Further, it aptly observed:

“Having dismantled the legal machinery for the protection of the citizens, they (individuals/regimes) frequently permit their security forces to abuse the “non-dirigible” rights, including the right to live and freedom from torture or other cruel, inhuman or degrading treatment or punishment. These result such

⁶⁷ See, International Covenant on Civil and Political Rights, Article 4(1); The European Convention on Human Rights, Article 15(1); An American Convention on Human Rights, Article 27(2), for text see, A.H. Robertson, “*Human Rights in the World*” 202-04(Manchester, 1972)

⁶⁸ See, International Covenant on Civil and Political rights, Article. 4(2); The European Convention on Human Rights; Article.15 (2); See, Robertson; *Id.* at 204, 229 and 253.

⁶⁹ International Commission of jurists, State of Emergency: Their impact on human rights at 1 (1983).

inhuman practices as anonymous arrests, secret detentions, disappearances, extra judicial killings, and systematic practices or torture.”⁷⁰

It is noteworthy that the rights are permitted to be derogated under the international law to defend and safeguard national security but not individual's security. What is further required is the proper balancing between the human rights of the individual and need to maintain domestic order. But the realization of this goal in reality is a highly complex problem facing the Statesman and Jurist's alike.

The national security should not become an excuse for the denial of the basic and non-derogable rights like- right to life and freedom from torture. Under no circumstances, however grave it, may appear, should these “non-derogable” rights be allowed to derogate. Because once there is derogation for an apparently justifiable cause, there is always a tendency among the wielders of power, in order to perpetuate their power, to continue the derogation of Human Rights either in the national interest or security of State. History is full of examples of the disastrous consequences of such derogation.⁷¹

III. CAUSES FOR THE USE OF TORTURE BY THE POLICE:

Police sub culture inherited by Indian Police from the colonial past has been not human rights friendly. Army, like training, autocratic, Administration and fiat, attitude to administrative decision etc. made the older generation to adopt human rights friendly approaches to human issues. As a result there existed a culture of human rights violations against the weak and the defenceless human beings- those who were under the police custody in particular – whose fundamental rights to human dignity were trampled upon. They were not reacted against the fact was that the sub

⁷⁰ *Id.*

⁷¹ R.S. Saini “*Custodial Torture in Law and Practice with Reference to India*” 36 JILI (1994) 166 at 171-72

culture which prevailed in police a sub culture which violated human rights – was encouraged by the silent approval of them by the superior ranks in police.⁷² Thus, the police sub- culture that was in existence during the British Regime continued to operate and in the culture, torture of citizens was permitted and tolerated by the authorities and the general public alike. Hence, if a change is desired a police Act has to be enacted for redefining the role and function of the police. The police force is an essential component of the government of a state as the foundation of social order. They maintain peace and order without which no political structure can subsist. Therefore, maintenance of an efficient, fully staffed and equipped adequately remunerated and contented and loyal police force is an essential condition for good police administration. But, the police culture that existed in the pre-independence period was allowed to continue even after India became independent. The basic law, the police Act 1861 remained practically unchanged and there was no sincere or wholehearted attempt on the part of the Government to redefine the role and responsibility of the Police until quite recently. Thus the police sub culture that was in existence during the British Regime continue to operate and in the culture , torture of citizen was permitted and tolerated by the authorities and the general public alike. It is necessary to have a brief look at the prominent causes for the use of torture by the police.

(a) NEGATIVE PUBLIC IMAGE:

First and foremost reason is the negative public image of the police due to which they do not get requisite public co-operation and support in their task of crime prevention and crime control, which is indispensable for the proper functioning of

⁷² James Vadackumchery, *Human rights friendly Police: A Myth or reality?* A.P.H. Publishing Corporation, New Delhi at 20-21(2000)

criminal justice system for the police investigation because, unfortunately, the police in India maintained only confrontational relationship with general public. The common man does not look upon policeman as his friend. The average citizen suffering too much from the feeling of insecurity due to escalating lawlessness and being ignorant of and indifferent to the legal and ethical aspects of administration of justice welcomes the disposal of criminals by the efficient summary methods employed by the police.⁷³ As a matter of fact the situation has not altered very much since Mr. Justice Straight made the pessimistic observation about the police in 1884.⁷⁴

“These legislative provision leave no doubt in my mind that the legislature had in view the malpractices of police officers in extorting confessions from the accused person in order to gain credit by securing convictions and that those malpractices went into length of positive torture, nor do I doubt the legislature, in laying down such stringent rules, regards the evidence of public officers untrustworthy. It requires no vivid imagination to picture what to often take place when two or three of these not very intellectual highly paid officers are called away to a village to investigate a grave crime of which there no very clear traces. Naturally, it is much the easier way for them to begin by endeavouring to obtain a confession from the obtain a confession from the suspected person or persons instead of searching out the clues to the evidence from independent sources ... I say it is no sense of disparagement, but it is impossible not to feel that the average Indian policemanis not likely to be over nice in the methods he adopts to make a short out to the elucidation of a difficult case by getting a suspected person to confess”.

⁷³ See *V.P. Srivastava: Human Rights: Issues and Implementations Vol. I (2004)* at 707

⁷⁴ *Queen Express vs. Babu Lal (1884)* 6 All 509

There are many reasons for bad police image as rightly observed by Justice O. Chinappa Reddy:⁷⁵

“I think it is due to a combination of several circumstances, occasional high-handed behaviour including acts of violence: occasional perjury; more important than the actual high – handedness and perjury an attitude of casualness and indifference in the exercise of high-handedness and the giving of perjured evidence; the corruption of a few; a general misunderstanding of the police procedure method and work; a remainder of one’s own acts of trespass and a general resentment of authority are several of the factors which contribute to a citizen’s hostility towards a policeman”.

Implementation of recommendations for police reform such as those proposed by the National Police Commission would have improved the police image in the eyes of the general public but unfortunately those recommendations have been ignored by successive Governments.

(b) POOR WORKING CONDITIONS:

Poor working conditions of the lower rungs of the police force are also responsible for many of the excesses. The police force today is dissatisfied on many counts. They work in conditions, which are abhorrent to many. They may be called to duty at any time and anywhere. Their duty is harassing, unpleasant and irksome. Their salary is meagre and living conditions quite miserable. They are nourished. Accommodation facility is far from satisfactory. Many police establishments are under-staffed and the workload is heavy. Men are affected in their work by their surrounding and it is degrading, demoralising and dehumanising to the police to be housed as they are now. Men living amid such surroundings and housed as policemen

⁷⁵ *Developing Society and Police*, Osmania University Publication, at 2

are, suffer a loss of self respect and they feel as if the community as large has no sympathy for them, nor interest in them. Subordinates are treated with lack of concern for their self respect and well being; harsh and unethical methods are used against them and fair play and justice take a back seat when dealing with them. This would lead them to divert all their pent- up feeling and wrath against the public, whenever they get a chance to do so.⁷⁶ As pointed out by Prof. *Upendra Baxi*, the police remain “an exploited, neglected and despised minority” who are denied the most basic minimum working conditions and who are “subservient to the rules rather than responsive to the people.”⁷⁷ These conditions breed a tremendous degree of frustration, discontent and helplessness in the police force, which in some cases have resulted in police, revolt for example P.A.C. revolt in *U.P.* and police revolt in *Haryana*. Describing the pathetic and adverse conditions in which the police have to work a leader of an Official Police Association said:

“We are the lowest paid among the Government employees, misused by politicians and officials alike, run around for twenty four hours and earn finally not two square meals but a bad name from the public.”⁷⁸

Moreover, when some ghastly or brutal crime takes place, there is constant pressure from seniors to apprehend the criminals quickly. The number of cases he “solves” influences the good confidential report and promotion of a policeman. Besides, there is combined pressure the policemen often tend to use the third degree methods to get the quick result at the risk of magisterial inquiry, transfer, dismissal from the service and even criminal prosecution.

⁷⁶ See, *V.P. Srivastava: Human Rights: Issues and Implementations Vol. I* at 706 (2004)

⁷⁷ Human Rights in India (the updated Amnesty International Report), (First published in 1993) at 76

⁷⁸ The Hindustan Times (New Delhi), 27 September, 1991.

(c) POLITICAL INTERFERENCE:

Growing political interference often turns the police the agents of ruling party. A former Director of the National Police Academy expressed his concern over this unfortunate situation in these words:

“It now seems to be taken for granted that ... the police would be available to the ruling party to protect its supporters, to harass its opponents, and to further its political interests In many places the politicians, the police and lumpen elements have developed a vested interest. For the policeman who joins this combine it's both a means of enrichment and an insurance against punishment if exposed.”⁷⁹

In case in which the political bosses are interested the police are required to achieve instant results at all costs. This unwarranted interference by the politicians in the police work also dampens the spirit of honest and sincere police personnel. This has contributed to and sometimes directly resulted in the police torturing suspects and political opponents even to death. What is most disturbing is the erroneous belief of majority of ministers, administrators and police official about the inevitability and indispensability of third degree methods are only effective means to deal bad characters and produce better results.

(d) LACK OF PROPER TRAINING:

Lack of adequate and proper training and orientation pertaining to human rights, non-use and non-availability of scientific aids in investigation and interrogation, absence of effective system of intelligence collection, lack of necessary infrastructure in police station, understaffing of the police stations and decay in criminal justice system have also contributed to the persistence of torture by the police during the

⁷⁹ The Indian Express (*New Delhi*), 17 September.1988.

investigations and interrogations. Inadequate police training contributes to the custodial violence, but again recommended improvements have not been implemented. Officials complain that a total lack of modern investigate techniques contributes to police excesses. Theoretically the senior police officials disapprove of torture but non-availability of training in modern and scientific techniques of interrogation force them to resort to 'third degree methods'. During the training of Indian Police service officers at the national police academy there is constant emphasis of sensitizing them to the issues of human rights and making clear that extra legal methods are counter productive. In all police training institutions in the country there should be constant emphasis on the effect that no explanation or expediency can justify the use of torture. It is necessary to provide more powers to facilitate investigation by the police but at the same time it has to be strictly insured that powers are not misused.⁸⁰Emancipatory human right training of the police personnel, particularly of the subordinate rank, is necessary to make the police more professional, responsive and people- friendly. In this connection it may be mentioned that the National Human Rights Commission has prepared a model human rights training syllabus for police officers of all ranks in consultation with the director General of Police of all States and circulated it to all police training institutions. Appropriate training in human rights principles will have an elevating impact.⁸¹

(e) ORGANISATIONAL FACTORS:

Police organization is still structured on the 1861 Police Act, Section 23 of which requires a police officer "promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority." This allows civil and political

⁸⁰ Shankar Sen , *Human Rights in Developing Society*, APH Publishing Corporation, New Delhi (1998) at 101.

⁸¹ *Ibid.*, at 149

executives authority to control the police. As Prof. *Upendra Baxi* rightly concluded in a study of the Indian Legal System:

“No wonder ‘third degree’ methods prevail.... since the order to use them on suspects in police custody comes from such ‘competent’ authority (including not infrequently from the Superintendent of Police)”.

Secondly, the police force is facing the problem of inadequate strength compared to increasing rates of crimes. Their task is overwhelming which goes far beyond the duties of enforcing the law and controlling the crimes. They hardly find adequate time for proper investigation and detection of crime. So the adoption of third degree method becomes inevitable in practice.

(f) POLICE CULTURE:

It is necessary in this regard to bear in mind another aspect of police functioning there are informal rules of police sub culture which glorify deviance not in terms of personal gain or aggrandizement, as a requirement of completing the police job. Several studies have highlighted the unfortunate the situation in police organisation which engender a belief a newly recruited officers that what they have been taught in training school is to be quickly unlearned and they must fall in line with the prevalent culture in the police organisation in which the emphasis is on the end of apprehending and the convicting criminals and not on the means to be adopted to attend the objectives.⁸²

The psychological studies have revealed that it is the sense of frustration, helplessness and failure to control crime through socially approved channels of administration of justice that generates the police culture of cynicism, police brutality and counter- violence. Case studies of police barbarity as witnessed at *Narainpura*,

⁸² *Id.*, at 97

Baghpat and *Bhagalpur* are results of psychological distortions and undue stress and strains of the defective criminal justice system. The pent up frustration against the limitations of the outdated criminal justice system sometimes finds expression in the most outrageous violations of the law by the police.

According to Punjab Police Commission “considerable evidence has led to the effect that police make out false encounters with criminals and shoot them because they can not obtain sufficient evidence against them to bring them to justice before the courts of the law.”⁸³ It explains police lawlessness as a part of police sub-culture built up by the various external factors. In a police culture, taking short cuts to solve cases and making short shrift of criminals is regarded as the only way to survival. Police lawlessness is, to some extent, a result of criminal justice system, which is “terribly cumbersome, expensively dilatory and cumulatively disastrous.”⁸⁴ This fact was conceded by the former Inspector General of Police of *Tamil Nadu* when he gave the following explanation: “when the police are pressurized to deliver results when they don’t have adequate time or manpower to devote to crime investigations they take shortcuts to achieve their ends .In this process violations of fundamental rights do occur.”

Therefore, for ensuring adherence to human rights norms by the police, it is necessary to build up an organizational culture that frowns on abuse or misuse of force and authority.⁸⁵

(g) CORRUPTION IN APPOINTMENT AND TRANSFER:

⁸³ See, Report of the Punjab Police Commission, at 62 (1961).

⁸⁴ See, V.R.Krishna Iyer, *Criminology, Law and Social Change*, at 92.

⁸⁵ Shankar Sen , *Human Rights in Developing Society*, APH Publishing Corporation, New Delhi (1998) at 148.

The appointments⁸⁶ to the police force and promotions therein are bought and sold or obtained by personal influence and pull without regard to merit, leaving no incentive for any police man to do his duty. If, in addition to this, transfers and assignments are solely matters of influence or money, then the demoralisation is complete. Under these conditions, the best men are thoroughly disheartened and discouraged and some of them retire or resign. If they remain, they perfunctorily do as little as possible. The police investigators in India are an overworked and beleaguered lot. This leads not only to delayed investigation adversely affecting almost the entire criminal justice systems, but is also one of the main causes for police opting for short cuts of investigation based on third degree methods.⁸⁷ The police are doing a difficult and dangerous job. The society demands from them without understanding what their moral and professional problems are. The public use the police as an escape goat for their neurotic attitude towards crime, their own lack of social responsibility and for resentment, which should more properly be aimed at the Government. The public often forgets the fact that the police are the visible manifestation of State's coercive authority but police are required to support on political culture in which they may not have much faith. The police are expected to be human and super human at the same time official interference is resented but official protection is welcome. His dismissal is demanded if he does not enforce law but when it comes to one's case, he is resented. He is condemned for corruption but he is offered bribes. He is criticised, not supported and is deceived but still he is depended upon. This schizophrenic approach towards the police has made a complex problem worse compounded.⁸⁸

⁸⁶ See, Times of India 24 August 2005.

⁸⁷ See, V.P. Srivastava: *Human Rights: Issues and Implementations* Vol. I (2004) at 707

⁸⁸ *Id.*

Regarding manpower available to the police in *India*, the I.P.S. officers and the officers belonging to State service consists of bright graduates and post-graduates. The lower level officers the so called “cut hurgedoze” especially the constables, who is the backbone of police organisation and the visible manifestation of the police force so far as the lay public is concerned, in most cases does not possess adequate educational and intellectual attainments. He must be a man of stature, educated, intelligent, alert, and truly interested in work possessing a good judgment, initiative and courage. But unfortunately, partly due to the legacy of British rule and partly due to emoluments and working conditions, the quality of personnel recruited to this vital post is not up to the mark.⁸⁹

(h) IMMUNITY AMONG POLICEMAN:

Apart from above enumerated reasons, the Amnesty International considers the main reasons behind custodial torture to be feeling of immunity among policeman as they are fully aware that they would not be held accountable, even if they kill the victim and even if the truth is revealed.⁹⁰ It is a surgical tool for the policemen, paramilitary forces and even for other law enforcing agencies against the accused or the assailants. The incumbent has to undergo the physical and mental wrath beyond one's endurance.⁹¹

(i) PRESSURE OF THE JOB:

One of the causes of custodial torture is the tremendous pressure on the police to detect cases whenever there is surge in crime, and particularly heinous crime.

⁸⁹ *Id.*

⁹⁰ Human Rights in India (The Updated Amnesty International Report), 76(First published in 1993).

⁹¹ Thrity D Patel: “Torture: Human Rights and accountability of Law enforcing Agencies” Vol. XII *CILQ* 1999 at 539.

Whenever crime increases, it is the police which is singled out for blame.⁹² It is a fact that officers of police stations who do most of the investigations are a hard-pressed, hard worked and beleaguered lot. An analysis of the national police commission shows that an investigating officer is able to devote only 37% of his time in investigational work while the rest of his time is taken by other duties connected with maintenance of VIP *bandobast*, petition enquiries, and court attendance etc. The result is farewell to open and painstaking investigation and independence on short – cut, extra legal methods and torture. For success of thorough investigation permitted under lodge and rules and increase of the investigation staff and separation of the law and order and investigation staff is absolutely necessary. This suggestion is made by the expert bodies like law commission of India, Justice *Malimath* Committee report⁹³ and national Police commission. This will however necessitate substantially larger recruitment of police men to coop with heavy work load.⁹⁴

IV. CURE FOR THE USE OF TORTURE BY THE POLICE:

It is the responsibility of the Government to give their police a living wage and reasonable means of supporting themselves and their family without resorting to dishonest practices. The policeman should be kept above need by providing good working conditions and emoluments, prescribing higher educational qualifications and by devising scientific selection techniques, which take the psychological, psychiatric, social and cultural factors in to consideration persons having aptitude to work as policemen can be recruited and this would solve half the problem. Various facets of welfare like housing, health and medical facilities, education and

⁹² Shankar Sen , *Human Rights in Developing Society*, APH Publishing Corporation, New Delhi (1998) at 93.

⁹³ See, Recommendations on Committee on Reforms of Criminal Justice System, (March 2003) at 240.

⁹⁴ Shankar Sen , *Human Rights in Developing Society*, APH Publishing Corporation, New Delhi (1998) at 96-97.

employment for families; grant of leave; recreation: canteen and store facilities and improved conditions of service have to be provided to the police force so that the feeling of insecurity and inferiority complex existing in them can be removed.⁹⁵

Promotions of police personnel should be defined from the number of convictions they could secure.

Police recruitment should be in the hands of the police and the politicians should not have any in it, so also, their transfers.

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

The plea of the Government at the Centre and in the States that an increase in strength according to the norms of population or crimes is not feasible on account of financial stringency does not; in any way solve the problem. It is an irony in itself that police is a non-plan department in developing country like *India*. Police should receive due attention of Government including increase in strength and equipment to

⁹⁵ See, V.P. Srivastava: *Human Rights: Issues and Implementations* Vol. I (2004) at 708

combat the force of lawlessness and civil disorders. Apathy to this aspect of law and order is bound to result in dangerous consequences.⁹⁶

Police-public relations is another important aspect in police administration with public co-operation, even a highly efficient police force cannot discharge its primary duty of prevention and detection of crime satisfactorily. The best way to win the good will of the people is thousand efficient discharges of duties, exemplary personnel conduct and sympathetic and courteous approach to the public. The audio-visual media and the press must engage in more constructive, positive and vigorous efforts to foster better relations between the public, media and the police.

The malady of custodial violence is multi dimensional and too deep-rooted to be eliminated by reforms directed against the police alone. There has to be a national movement to change the general environment of non-accountability and norm-less ness, which is afflicting all social components and institutions.⁹⁷

In the background of detailed study on custodial torture in police stations, some remedial measures are suggested:

- (a) The process of recruitment should be devised on scientific lines in order to select the right type of candidates. The behavior and personality traits of the candidates must be addressed before their entry onto service.
- (b) The trainers should be highly capable and motivated to impart suitable training. The trainee should be trained to inculcate the spirit of service in the people in accordance with the rule of law. They should be trained to uphold human rights. Police academies should have courses on human rights.
- (c) The Police Act of 1861 should be amended as recommended by the National Police Commission.

⁹⁶ *Id.*

⁹⁷ *Id.*

- (d) The print and the electronic media should adequately highlight the achievements of the police. Also the, mass media must help promote traffic senses, civic sense, scientific temper, national spirit and humanism among the people as well as the police.⁹⁸
- (e) The criminal Procedure Code, the Evidence Act and the Indian Penal Code should be amended in order to remove the redundant provisions incorporated by the British Government for a subject nation and for promoting the Police Raj. (also recommended by *Dharam Vira* National Police commission)
- (f) The police machinery should be insulated from political interference. Central and State level security commission should be set up as recommended by the *Dharam Vira* Commission Report.
- (g) Some bold steps should be taken to achieve the objectives of human rights awareness amongst the masses of the country. And also the awareness about the remedies against the human rights violation. In furtherance of this object, the regular publication on NHRC, the Human Rights newsletter presently published in Hindi and English needs to be published in all major regional languages. Besides these steps, the human rights elementary education should be made compulsory to raise voice against the violation of their basic rights and would compel the police to think before using third degree methods randomly.
- (h) Independent human rights protection organizations have played a crucial role in monitoring and bringing to public attention cases of human rights violation. Such organizations should be encouraged and other emerging groups should come together to protect the rights and liberties of the citizens. Moreover, such endeavors should be made at the grass-root level also.

⁹⁸ *Ibid.*

- (i) The National Human rights Commission should have full powers of investigation independent of the police, including the powers to initiate investigations on its own, receive communications and compel the attendance of the witness and even transfer or suspend officials in order to protect the witness, The commission should extensive powers to hear the complaints against the police officials (also suggested by the Amnesty International)
- (j) Torture victims should be dealt with care and sympathy. They should be appropriately compressed and if the need arises should be provided medical treatment and rehabilitation.
- (k) Surprise visits to police stations and similar units by the senior officers should be made. This could help in the early detection of person held in unauthorized custody and subjected to all treatment. Any malpractice so noticed should be met with swift and deterrent punishment (also recommended by the NHRC in its Annual Report of 1996-97)
- (l) India should ratify the United Nations Convention on Torture to which it has already become a signatory since October 14, 1997. It would make India accountable to the U.N on torture cases that would help effectively tackle the increasing cases of torture in the country.

It is submitted that when the issue juxtapose the lines of innocent citizens and the possible curtailment of personnel liberties we all cherish, the answers are not easy. The upswing in the incidents of custodial torture and subsequent deaths has raised the eyebrow of critics of Indian Judicial system. In recent times human right issues in the world and with local variation in India are sought to be expanded by social activists, non- governmental organizations and special interest groups. Human Rights functionaries must consider the cases of custodial torture by the police more

effectively and handle the tangled web of facts, circumstances, perceptions and the situation more realistically. On the other hand, the police must do some introspection and try to sort out the solution to improve its tarnishing image. They must also remember that they are also under the law and not above the law. They can also be held liable for any violation of human rights. In fact, what the society needs is, well led well trained and well disciplined force of police which help in protecting the promoting the human rights. It is only with the co-operation of both the police and the public that we can become a strong and healthy democracy where the violation of human rights may become the thing of the past.