CHAPTER V

TERRORISM AND HUMAN RIGHTS

Human rights flourish in a climate of peace. The relationship of 'human rights and terrorism' is a vexed one. Man it is said "*has an inalienable right to go to hell in his own fashion, provided he does not directly injure the person or property of another on the way*"[1].

Lexicon meaning of the term 'human rights' is:

> *claims asserted or those which should be or sometimes stated to be those which are legally recognised and protected to secure for each individual the fullest and freest development or personality and spiritual, moral and other independence*[2].

The Protection of Human Rights Act, 1993 defines Human Rights as:

> *the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by the courts in India*[3].

There is a growing consciousness in the international community of the negative effects of terrorism in all its forms on the full enjoyment of human rights, fundamental freedoms, on the establishment of Rule of law and democratic freedoms as enshrined in the United Nations Charter and the International Covenants on Human Rights. All States are required to suppress all and any form of terrorist activities within their borders as terrorism represented globalization of fear and concept for the role of international law[4].

It was reported that it was unprecedented in the United Nations history for 168 member States to participate in the discussion of a single

---

[1] Novel Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control,* 1970, Chicago University Press, at 2.

[2] David M. Walker, *The Oxford Companion to Law* (1980).

[3] Section 2 (d) of The Protection of Human Rights Act, 1993, *'human rights' means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution* or embodied in the International Covenants and enforceable by courts in India.

[4] Y. Lakshmi G. Rao, *Terrorism And its Impact on Human Rights,* AIR (J) 2002,at 183-187.

agenda item on international terrorism which started on 1st of October, 2001, which demonstrated the seriousness with that the International Community regarded acts of terrorism as assaults on the civilization itself. Terrorism is one of the dreadful phenomenons of the present time. The dangerous trend towards an expansion of its scope had turned it into a real threat to mankind. In consideration of the human rights dimension of terrorism, it is not only the number of victims that should be taken into account but also its impact on the victims, the society and the state[5]. Killing of innocent people, destroying their property and creating an atmosphere of terror and fear in their minds violate the human rights of these innocent victims[6].

The issue of terrorism and human rights has long been a concern of the United Nations human rights program, but it has become more urgent following the attack of 11 September 2001 on the United States of America and the worldwide surge in acts of terrorism subsequent. Office of the High Commissioner for Human Rights condemns terrorism unequivocally and recognizes the duty of States to protect those living within their jurisdictions from terrorism.

The Office of the High Commissioner for Human Rights has placed a priority on protection of human rights, notably the right to life, and the question of protecting human rights in the context of counter-terrorism measures. The Secretary-General, the High Commissioner for Human Rights, and others in the United Nation system have emphasized that all must rigorously respect these human rights norms, including in states of emergency. As Secretary-General Kofi Annan stated at a special meeting of the Security Council's Counter-Terrorism Committee with International, Regional, and Sub-Regional Organizations, on 6 March 2003:

---

[5] 56th General Assembly of United Nations meeting held on 5th October 2001.
[6] *Ibid* note 4.

"Our responses to terrorism, as well as our efforts to thwart it and prevent it, should uphold the human rights that terrorists aim to destroy. Respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism - not privileges to be sacrificed at a time of tension."[7]

On 28 September 2001, the Security Council adopted Resolution 1373 under Chapter VII of the United Nation Charter;[8] obligating States to implement more effective counter-terrorism measures at the national level and to increase international cooperation in the struggle against terrorism. The resolution created the Counter-Terrorism Committee (CTC) to monitor action on this issue and to receive reports from States on measures taken. Former High Commissioner Mary Robinson and the late High Commissioner Sergio Vieira de Mello both addressed the Counter-Terrorism Committee, urging it to take account of human rights in its review of counter-terrorism measures. Mr. Vieira de Mello, speaking to the Counter-Terrorism Committee in October 2002, stated his conviction that *"the best - the only - strategy to isolate and defeat terrorism is by respecting human rights, fostering social justice, enhancing democracy and upholding the primacy of the rule of law."* Since then, the Counter-Terrorism Committee and the United Nation Human Rights Committee have exchanged briefings on their working methods and areas of concern.

In resolution 1456 (2003), the Security Council declared that *"States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law*[9]*."* Human rights law has sought to strike a fair balance between legitimate national security concerns and the protection of fundamental freedoms. It acknowledges that States must address serious and genuine security concerns, such as terrorism. The balance is reflected in the

7 General Assembly of United Nations meeting held on 6th March 2003.
8 The Security Council adopted Resolution 1373.
9 The Security Council adopted Resolution 1456.

International Covenant on Civil and Political Rights (ICCPR) as well as in regional instruments.

Threats to national security may, under very specific conditions, lead to a state of emergency under which certain rights are subject to derogation (suspension). However, certain rights are never subject to derogation. The question of states of emergency and derogation is addressed in *Article* 4 of the ICCPR. In July 2001, the United Nation Human Rights Committee adopted General Comment No. 29, concerning ICCPR *Article* 4, in which it clarified the scope of non-derogable rights and identified elements, which cannot be subject to lawful derogation. Despite the importance of the fight against terrorism, some United Nation human rights bodies have expressed concern that counter-terrorism measures may infringe on human rights. For example, United Nation special rapporteurs and independent experts, at their annual meeting in Geneva in June 2003, adopted the following joint statement[10]:

> *The special rapporteurs and independent experts express alarm at the growing threats against human rights, threats that necessitate a renewed resolve to defend and promote these rights. They also note the impact of this environment on the effectiveness and independence of special procedures.*[11]

Although they share in the unequivocal condemnation of terrorism, they voice profound concern at the multiplication of policies, legislation and practices increasingly being adopted by many countries in the name of the fight against terrorism, which affect negatively the enjoyment of virtually all human rights - civil, cultural, economic, political and social.

They draw attention to the dangers inherent in the indiscriminate use of the term "terrorism", and the resulting new categories of discrimination. They recall that, in accordance with the International Covenant on Civil and Political Rights and pursuant to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, certain rights are

---

[10] E/CN.4/2004/4, annex 1.
[11] *Ibid.*

non-derogable and that any measures of derogation from the other rights guaranteed by the Covenant must be made in strict conformity with the provisions of its *Article* 4[12].

The special rapporteurs and independent experts deplore the fact that, under the pretext of combating terrorism, human rights defenders are threatened and vulnerable groups are targeted and discriminated against on the basis of origin and socio-economic status, in particular migrants, refugees and asylum-seekers, indigenous peoples and people fighting for their land rights or against the negative effects of economic globalization policies.

They strongly affirm that any measures taken by States to combat terrorism must be in accordance with States' obligations under the international human rights instruments.

They are determined, in the framework of their respective mandates, to monitor and investigate developments in this area and call upon all those committed to respect for human rights, including the United Nations, to be vigilant to prevent any abuse of counter-terrorism measures.

Office of the High Commissioner for Human Rights action on the issue of human rights and terrorism is guided in part by General Assembly[13] and Commission on Human Rights[14] "*Protection of human rights and fundamental freedoms while countering terrorism*". These resolutions call on the High Commissioner's office to:

a) examine the question of the protection of human rights and fundamental freedoms while countering terrorism, taking into account reliable information from all sources;

b) make general recommendations concerning the obligation of States

---

[12] Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment 1984 came in to force on 1987.
[13] General Assembly Resolution 58/187 (2003).
[14] Security Council Resolution 2003/68.

to promote and protect human rights and fundamental freedoms while taking actions to counter terrorism; and

c) provide assistance and advice to States, upon their request, on the protection of human rights and fundamental freedoms while countering terrorism, as well as to relevant United Nations bodies. The issue of human rights and terrorism is also addressed in General Assembly[15] and Commission on Human Rights[16].

The Office of the High Commissioner for Human Rights also implements the findings of the Secretary-General's Policy Working Group on Terrorism, in particular its sub-group on human rights and terrorism. Based on a Policy Working Group recommendation, the Office published in 2003 the Digest of Jurisprudence[17] of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism. The Digest, which is available as an Office of the High Commissioner for Human Rights publication, makes several important contributions, for example by clarifying the concept of non-derogable rights under both the United Nations and regional human rights systems. It addresses the core principles of necessity and proportionality, which are fundamental to lawful counter-terrorism measures. Through excerpts from findings of the United Nations and regional human rights bodies, the Digest shows concerns that have been expressed over practices which are in use or under consideration by States today, such as the use of military tribunals to try civilians, and detention practices which disregard recognized international standards.

In 1997, the Sub-Commission on the Promotion and Protection of Human Rights recommended the appointment of a Special Rapporteur to conduct a comprehensive study on human rights and terrorism. The Special Rapporteur Ms. Kalliopi Koufa, Greece has submitted a series of reports to the

---

[15] General Assembly Resolution 58/174, 2003.
[16] Security Council Resolution 2003/37.
[17] www.undoc.org.

Sub-Commission since then.

Justice Krishna Iyer, the eminent Judge and commentator also opposed POTA in spite of admitting that "terrorism is dangerous and its ubiquity makes the menace a cause for consternation."[18] He warned that in the semblance of anti- terrorist enactment, every thing precious in our constitutionally sanctified criminal justice couldn't be subverted. He approvingly quoted the United Nations High Commissioner for Human Rights Marry Robinson who warned governments that '*measures to eradicate terrorism must not lead to excessive curbs on human rights and fundamental freedoms*'[19].

Arun Shouri argued that "*under the Unlawful Activities Act, 1967, only those individuals or organizations that aim at disrupting the sovereignty and integrity of the country can be proceeded against. The terrorist don sitting in Dubai exercising murderous control over the film world is not threatening the sovereignty of the country...?*" He further asks that "*can it be anyone's case that while it is all right to require a person on whom some computer hard disk are found to prove his innocence, it is wrong and diabolic to require him to do so if RDX and AK- 47 are found?*"[20]

The publication of the Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights While Countering Terrorism, on *13 August 2003* in a meeting with out voting[21];

1. *Strongly condemns* all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whosoever committed;

---

[18] G.B. Reddy, *Indian Legal Regime Relating to Prevention of Terrorism: An Analysis, Terrorism in South Asia: Views from India*, (2004) New Delhi, India Research Press at 256.

[19] *See,* V. R. Krishna Iyer, *Legally Speaking*, 2002, Delhi, Universal Law Publication Co. Ltd, at 242.

[20] *See,* his interview "*TADA was never a POTO Prototype- Clearing Some More Misapprehensions about the New Terrorism Ordinance*", The Hindustan Times, 12 November 2001.

[21] www.unodc.org.

2. *Recalls* that States must ensure that all measures adopted to combat terrorism comply with their obligations under international human rights law, international refugee law and international humanitarian law;

3. *Emphasizes* that States have the obligation, under international law, to protect all persons within their jurisdiction against terrorist acts, and to pursue and punish their perpetrators, in full respect of international human rights standards;

4. *Notes* that several important studies submitted this year to the Sub-Commission address, from different standpoints, the problem of respect for human rights in the fight against terrorism;

5. *Decides*, with a view to rationalizing the work of the Sub-Commission on the subject, to rename the existing sub-item 6 (*c*) "New priorities, in particular terrorism and counter-terrorism" to study the compatibility of counter-terrorism measures, both legislation and other activities adopted at the national, regional and international levels, particularly those adopted after 11 September 2001, with international human rights standards, giving particular attention to their impact on the most vulnerable groups, with a view to elaborating detailed guidelines;

6. *Also decides* to appoint Ms. K. Koufa as coordinator, with a mandate to gather the necessary documentation for the effective work of the Sub-Commission;

7. *Requests* Governments, intergovernmental organizations, national institutions for the protection and promotion of human rights, experts and non-governmental organizations to provide the coordinator and the Sub-Commission with all pertinent and precise information in this respect[22].

[22] Sub-Commission on the Promotion and Protection of Human Rights 2003/15. Effects of measures to combat terrorism on the enjoyment of human rights.

1. Amnesty International

According to the Amnesty International report there was increasing concern at the erosion of human rights protections in the context of "*anti-terrorism*" measures against armed political groups, and continuing communal tensions. Systemic discrimination against vulnerable groups – including women, religious minorities, *dalits* and *adivasis* (tribal people) – was exacerbated by widespread use of security legislation, political interference with the criminal justice system and slow judicial proceedings in a continuing climate of impunity. Tensions remained high in the state of Gujarat in the aftermath of widespread communal violence in 2002. Witnesses to the violence and human rights defenders were threatened and concerns grew about the impartiality of institutions of the criminal justice system in the state, including the police, prosecution service and elements of the judiciary. A committee constituted by the Ministry of Home Affairs suggested recommendations for the reform of the criminal justice system which could potentially undermine human rights protections even further[23].

2. Security Legislations

The Prevention of Terrorism Act (POTA)[24] continued to be used to detain political opponents and members of minority populations. The lapsed Terrorist and Disruptive Activities Act continued to be used to arrest people in Jammu and Kashmir by linking them to cases filed before 1995. Preventive arrest and detention provisions contained in other security laws as well as in the Code of Criminal Procedure[25] were also misused against political and human rights activities.

---

[23] Malimath, Report of Criminal Justice System Reform Committee, Ministry of Home Affairs, Government of India.

[24] The Prevention of Terrorism Act, 2002.

[25] Code of Criminal Procedure, 1973, herein referred as Code.

There were grave concerns about recommendations of the Malimath Committee[26] to incorporate into criminal law several provisions of the Prevention of Terrorism Act, which violate international human rights standards or which, if implemented, would lead to a heightened risk of human rights violations. For example, the Committee recommended that confessions recorded by a Superintendent of Police (or higher rank), which was also audio or video recorded should be admissible as evidence. The provisions of the Prevention of Terrorism Act could encourage the use of torture and ill treatment by admitting such confessions appeared to have been realized in practice. In Gujarat several detainees alleged in court that their confessions were extracted under duress. Preventive arrests and detention continued to be used against political opponents using state legislation similar to the Prevention of Terrorism Act in a number of states including Jammu and Kashmir, Andhra Pradesh, Arunachal Pradesh, Karnataka and New Delhi Union Territory. Only a handful of high-profile releases had been made by the end of the year despite a promise to review all cases of detainees held without trial for long periods under security legislation made under the Common Minimum Programme adopted by the new state government in Jammu and Kashmir.

3. Human Rights Commission

The government failed to consider the recommendations made by the National Human Rights Commission in 2002 for amendments to the Protection of Human Rights Act, 1993 under which the National Human Rights Commission operates. These amendments would have permitted the National Human Rights Commission to investigate allegations of human rights violations committed by the army or paramilitary forces, as well as those committed by the police, and incidents that took place more than a year before the complaint was made. The government's failure to deal with these

[26] Malimath , Committee on Reforms of Criminal Justice System, Vol. I March (2003), Government of India. at 3.

amendments served to strengthen impunity for human rights violations. State human rights commissions, established in 13 of the 28 states, and continued to suffer from lack of resources and expertise.[27]

4. Recent Amendments in Protection of Human Rights Act in 2006

In order to congregate the national as well as international claim for the establishment of National Human Rights Commission at the national level, State Human Rights Commission in States at the State level and Human Rights Courts for better protection of human rights a bill was introduced in the parliament on 14th May, 1993.[28] The Act came in to force on 28th September 1993, *i.e.*, the date when The Protection of Human Rights Ordinance was promulgated.[29]

The Act defines human rights in Section 2 (d)[30] and also defines International Covenants.[31] For the purpose of providing speedy trial of offences arising out of violation of human rights, the State Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify for each district a Court of Session to be a Human Rights Court to try the said offences.

Provided that nothing in this section shall apply if

(a) a Court of Session is already specified as a special court; or

(b) a special court is already constituted, for such offences under any other

---

[27] Report of National Human Right Commission 2005.

[28] The Act received the assent of the of the President on January 8, 1994 and published in the Gazette of India, Extra, Part II, Section 1 dated 10th January, 1994, at 1-16 St.No. 10.

[29] Section 1 (3) *The Protection Of Human Rights Act, 1993,* hereinafter referred to as the PHRA.

[30] Section 2 (d) of PHRA provides, *"human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.*

[31] Section 2 (f) of PHRA says, *"International Covenants" means the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights adopted by the General Assembly of the United Nations on the 16th December, 1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify"*

law for the time being in force.[32]

To deal with human rights violation cases it is not mandatory but discretionary to specify any Court of Sessions to be a Human Rights Courts. The Central Government has been empowered to constitute a body to be known as the National Human Rights Commission[33]. Accordingly, the National Human Rights Commission has been constituted under the Protection of Human Rights Act, 1993[34].There were additional *ex-officio* members,[35] their functions are same but they do not inquire *suo moto* into or on petition presented by the victims or any other person on behalf of the victim, complaints of Human Right Violations.[36]

The National Human Rights Commission was established under the Protection of Human Rights Act 1993, and amended by the Protection of Human Rights (Amendment) Act, 2006. The references cited are from the Protection of Human Rights Act 1993, as amended. The National Human Rights Commission is empowered to carry out a wide range of functions, including: to intervene in Court proceedings involving allegations of human rights abuses, study treaties and other international human rights instruments and make recommendations for their effective implementation, undertake and promote research in the field of human rights, and many other functions.

---

[32] Section 2 (e) read with section 30 of PHRA.

[33] Section 3 (1) of PHRA provides, *The Central Government shall constitute a body to be known as the National Human Rights Commission to exercise the powers conferred upon, and to perform the functions assigned to it, under this Act.*

[34] Section 3 (2) of PHRA provides, *The Commission shall consist of:*
(a) a Chairperson who has been a Chief Justice of the Supreme Court;
(b) one Member who is or has been, a Judge of the Supreme Court;
(c) one Member who is, or has been, the Chief Justice of a High Court;
(d) two Members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights.

[35] Section (3) of PHRA says, *The Chairperson of the National Commission for Minorities, the National Commission for the Scheduled Castes, the National Commission for the Scheduled Tribes and the National Commission for Women shall be deemed to be Members of the Commission for the discharge of functions specified in clauses (b) to (j) of section.*

[36] *Ibid.*

Section 12(a)[37] provides that the National Human Rights Commission is allowed to 'inquire, *suo moto* or on a petition to it by a victim or any person on his behalf, into complaints of- (i) violation of human rights or abetment thereof or (ii) negligence in the prevention of such violation, by a public servant.' *Article* 36(1)[38] provides that the National Human Rights Commission cannot accept petitions on matters which are already pending before a State Commission, and under *Article* 36(2)[39] the National Human Rights Commission cannot accept petitions after the expiry of one year from the date of the alleged human rights violations.

Under *Article* 13[40] of the Protection of Human Rights Act 1993, the National Human Rights Commission has '*all the powers of a civil court'* while inquiring into complaints. During investigation the National Human Rights Commission may: 'summon and enforce attendance of any person and examine him',[41] '*require* the discovery and production of any document'[42] and 'requisition any public record or copy thereof from any office'[43]. The National Human Rights Commission may 'also call for information from the

---

[37] Section 12 (a) of PHRA says, function *performed by commission:(a) inquire, suo motu or on a petition presented to it by a victim or any person on his behalf or on a direction or order of any court, into complaint of*
(i) violation of human rights or abetment thereof; or
(ii) negligence in the prevention of such violation, by a public servant.

[38] Section 36 (1) of PHRA provides, *Matters not subject to jurisdiction of the Commission*
(1) The Commission shall not inquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force.

[39] Section 36 (2) of PHRA says, *The Commission or the State Commission shall not inquire into any matter after the expiry of one year from the date on which the act constituting violation of human rights is alleged to have been committed.*

[40] Section 36 (2) of PHRA provide, *Powers relating to inquiries (1) The Commission shall, while inquiring into complaints under this Act, have all the powers of a civil court trying a suit under the Code of Civil Procedure, 1908, and in particular in respect of the following matters, namely :*
(a) summoning and enforcing the attendance of witnesses and examining them on oath;
(b) discovery and production of any document;
(c) receiving evidence on affidavits;
(d) requisitioning any public record or copy thereof from any court or office;
(e) issuing commissions for the examination of witnesses or documents;
(f) any other matter which may be prescribed.

[41] Article 14 (2) (a) of PHRA says, *For the purpose of investigating into any matter pertaining to the inquiry, any officer or agency whose services are utilised under sub-section (1) may, subject to the direction and control of the Commission:-(a) summon and enforce the attendance of any person and examine him.*

[42] Article 14 (2) (b) of PHRA provides, *require the discovery and production of any document.*

[43] Article 14 (2) (c) of PHRA says, *requisition any public record or copy thereof from any office.*

Central Government or any State Government or any other authority or organization subordinate thereto within such time as may be specified by it'[44] If this information is not received within the due time limits, the National Human Rights Commission 'may proceed to inquire into the complaint on its own'[45].

If the National Human Rights Commission inquiry discloses the commission of violation of human rights or negligence in the prevention of human rights by a public servant, there are certain recommendations, which the National Human Rights Commission can make to the concerned Government or authority. It may recommend a 'payment of compensation or damages to the complainant or to the victim or the members of his family' as it considers necessary[46]. It may recommend the initiation of 'proceedings for prosecution or such other suitable action' as it deems fit 'against the concerned person or persons'[47]. It also has the power to make any other recommendation it deems fit[48]. It may 'approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem fit against concerned person or persons'[49]. It may 'recommend to the concerned Government or authority at any stage of the inquiry for the grant of

---

[44] Article 17(i) of PHRA says, *The Commission while inquiring into the complaints of violations of human rights may–(i) call for information or report from the Central Government or any State Government or any other authority or organisation subordinate thereto within such time as may be specified by it:-Provide that–*
(b) if, on receipt of information or report, the Commission is satisfied either that no further inquiry is required or that the required action has been initiated or taken by the concerned Government or authority, it may not proceed with the complaint and inform the complainant accordingly.

[45] Article 17(i) (a) of PHRA provides, *if the information or report is not received within the time stipulated by the Commission, it may proceed to inquire into the complaint on its own.*

[46] Article 18 (a) (i) of PHRA provides, *The Commission may take any of the following steps during or upon the completion of an inquiry held under this Act, namely:-(a) where the inquiry discloses the commission of violation of human rights or negligence in the prevention of violation of human rights or abetment thereof by a public servant, it may recommend to the concerned Government or authority –*
(i) to make payment of compensation or damages to the complainant or to the victim or the members of his family as the Commission may consider necessary.

[47] Article 18 (a) (ii) of PHRA provides, *to initiate proceedings for prosecution or such other suitable action as the Commission may deem fit against the concerned person or persons.*

[48] Article 18 (a) (iii) of PHRA provides, *to take such further action as it may think fit.*

[49] Article 18 (b) of PHRA says, *approach the Supreme Court or the High Court concerned for such directions, orders or writs, as that Court may deem necessary.*

such immediate interim relief to the victim or the members of his family as the Commission may consider necessary'[50]. There are also procedures that the National Human Rights Commission is obliged to take. It must 'send a copy of its inquiry report together with its recommendations to the concerned Government or authority' and they must reply with comments on the report, including action taken within one month unless the National Human Rights Commission specifies longer[51]. The National Human Rights Commission must publish its inquiry report, with its recommendations and the Government replies[52]. Thus the main powers of the National Human Rights Commission are limited to recommending measures although it may recommend anything it deems fit, and publishing the human rights violation and government action or inaction in relation to it.

The National Commission of Human Rights recommended the following modified procedures to be followed by the State Governments in all cases of deaths in the course of police action[53]:

i) The officer in charge of a Police Station after receiving

---

[50] Article 18 (c) of PHRAsays, recommend *to the concerned Government or authority at any stage of the inquiry for the grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary.*

[51] Article 18 (e) of PHRA says, *the Commission shall send a copy of its inquiry report together with its recommendations to the concerned Government or authority and the concerned Government or authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission.*

[52] Article 18 (f) of PHRA says, *the Commission shall publish its inquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission.*

[53] NHRC's Guidelines on encounter deaths (2003) *On a careful consideration of the whole matter, the Commission recommends following modified procedure to be followed by the State Governments in all cases of deaths in the course of police action: -*
A. When the police officer in charge of a Police Station receives information about the deaths in an encounter between the Police party and others, he shall enter that information in the appropriate register. B. Where the police officers belonging to the same Police Station are members of the encounter party, whose action resulted in deaths, it is desirable that such cases are made over for investigation to some other independent investigating agency, such as State CB CID. C. Whenever a specific complaint is made against the police alleging commission of a criminal act on their part, which makes out a cognizable case of culpable homicide, an FIR to this effect must be registered under appropriate sections of the I.P.C. State CB CID shall invariably investigate such case. D. A Magisterial Inquiry must invariably be held in all cases of death, which occur in the course of police action. The next of kin of the deceased must invariably be associated in such inquiry. E. Prompt prosecution and disciplinary action must be initiated against all delinquent officers found guilty in the magisterial enquiry/ police investigation. F. Question of granting of compensation to the dependents of the deceased would depend upon the facts and circumstances of each case. G. No out-of-turn promotion or instant gallantry rewards shall be bestowed on the concerned officers soon after the occurrence. It must be ensured at all costs that such rewards are given/ recommended only when the gallantry of the concerned officer is established beyond doubt. H. The Director General of Police shall send a six monthly statement of all cases of deaths in police action in the State to the Commission, so as to reach its office by the 15th day of January and July respectively.

information about the deaths in an encounter between the Police party and others, needs to register the case in first instance.

ii) Investigation by some independent investigating agency.

iii) First Information Report of custodial death must be registered under appropriate sections of the Indian Penal Code and State Central Branch of Crime Investigation Department should investigate such case.

iv) A Magisterial Inquiry is to be held in all cases of custodial death, the next of kin of the deceased must be associated in such inquiry.

v) Prompt prosecution and disciplinary action must be initiated against all delinquent officers found guilty in the magisterial enquiry/ police investigation.

vi) Question of granting of compensation to the dependents of the deceased would depend upon the facts and circumstances of each case.

vii) No out-of-turn promotion or instant gallantry rewards shall be bestowed on the concerned officers soon after the occurrence

The Director General of Police shall send a six monthly statement of all cases of deaths in police action in the State to the Commission, so as to reach its office by the 15th day of January and July respectively[54]. The Commission further requested that the concerned authorities of the State are

---

[54] NHRC's Guidelines on encounter deaths (2003) provides: *The statement may be sent in the following format along with post-mortem reports and inquest reports, wherever available and also the inquiry reports:*

1. Date and place of occurrence
2. Police Station, District.
3. Circumstances leading to deaths:
i. Self defence in encounter
ii. In the course of dispersal of unlawful assembly
iii. In the course of effecting arrest.
4. Brief facts of the incident
5. Criminal Case No.
6. Investigating Agency
7. Findings of the magisterial Inquiry/enquiry by Senior Officers:
a. disclosing in particular names and designation of police officials, if found responsible for the death; and
b. whether use of force was justified and action taken was lawful.

given appropriate instructions in this regard so that these guidelines are adhered to both in letter and in spirit.

The National Human Rights Commission soon after its constitution in October 1993, called upon the law and order agencies at the district level throughout the country to report matters relating to custodial death and custodial rape within 24 hours of occurrence. Since then ordinarily reports of such incidents have been coming to the Commission through the official district agencies. The Commission is deeply disturbed over the rising incidents of death in police lock-up and jails. Scrutiny of the reports in respect of all these custodial deaths by the Commission very often shows that the postmortem in many cases has not been done properly. Usually the reports are drawn up casually and do not at all help in the forming of an opinion as to the cause of death. The Commission has formed an impression that a systematic attempt is being made to suppress the truth and the report is merely the police version of the incident. The post-mortem report was intended to be the most valuable record and considerable importance was being placed on this document in drawing conclusions about the death.

The Commission is of a prima-facie view that the local doctor succumbs to police pressure, which leads to distortion of the facts. The Commission would like that all postmortem examinations done in respect of deaths in police custody and in jails should be video-filmed and cassettes be sent to the Commission along with the post-mortem report. The Commission is alive to the fact that the process of video filming will involve extra cost but you would agree that human life is more valuable than the cost of video filming and such occasions should be very limited. State was instructed by the commission to immediately sensitise the higher officials in the state police to introduce video filming of post mortem examination with effect from 1st October 1995.

It was felt that the Autopsy Report forms now in use in the various States, are not comprehensive and, therefore, do not serve the purpose and also give scope for doubt and manipulation. The Commission, therefore, decided to revise the autopsy form to plug the loopholes and to make it more incisive and purposeful. The Commission, after ascertaining the views of the States and discussing with the experts in the field and taking into consideration, though not entirely adopting, the U.N. Model Autopsy protocol, has prepared a Model Autopsy form enclosed in the guidelines.

4. NHRC GUIDELINES REGARDING ARREST

Arrest involves restriction of liberty of a person arrested and therefore, infringes the basic human rights of liberty. Nevertheless the Constitution of India as well as International human rights law recognises the power of the State to arrest any person as a part of its primary role of maintaining law and order. The Constitution requires a just, fair and reasonable procedure established by law under which alone such deprivation of liberty is permissible.

Although *Article* 22(1) of the Constitution provides that every person placed under arrest shall be informed as soon as may be the ground of arrest and shall not be denied the right to consult and be defended by a lawyer of his choice and S.50 of the Code of Criminal Procedure, 1973 requires a police officer arresting any person to" forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest". In actual practice these requirements are observed more in the breach.

Likewise, the requirement of production of the arrested person before the court promptly which is mandated both under the Constitution[55] is also not adhered to strictly. A large number of complaints pertaining to Human Rights violations are in the area of abuse of police powers, particularly those of arrest

[55] Article 22(2)] and Section 57 of the Code.

and detention. It has, therefore, become necessary, with a view to narrowing the gap between law and practice, to prescribe guidelines regarding arrest even while at the same time not unduly curtailing the power of the police to effectively maintain and enforce law and order and proper investigation.

A. PRE-ARREST

- The power to arrest without a warrant should be exercised only after a reasonable satisfaction is reached, after some investigation, as to the genuineness and bonafide of a complaint and a reasonable belief as to both the person's complicity as well as the need to affect arrest.[56]
- Arrest cannot be justified merely on the existence of power, as a matter of law, to arrest without a warrant in a cognizable case.
- After *Joginder Kumar's*[57] pronouncement of the Supreme Court the question 54 whether the power of arrest has been exercised reasonably or not is clearly a justiciable one.
- Arrest in cognizable cases may be considered justified in one or other of the following circumstances:(i) The case involves a grave offence like murder, dacoity, robbery, rape etc. and it is necessary to arrest the suspect to prevent him from escaping or evading the process of law.(ii) The suspect is given to violent behaviour and is likely to commit further offences. (iii) The suspect requires to be prevented from destroying evidence or interfering with witnesses or warning other suspects who have not yet been arrested. (iv) The suspect is a habitual offender who, unless arrested, is likely to commit similar or further offences[58].
- Except in heinous offences, as mentioned above, an arrest must be avoided if a police officer issues notice to the person to attend the

[56] *Joginder Kumar v State of UP,* AIR 1994 SC 1349.
[57] *Ibid.*
[58] 3rd Report of National Police Commission

police station and not leave the station without permission.[59]

- The power to arrest must be avoided where the offences are bailable unless there is a strong apprehension of the suspect absconding.
- Police officers carrying out an arrest or interrogation should bear clear identification and name tags with designations. The particulars of police personnel carrying out the arrest or interrogation should be recorded contemporaneously, in a register kept at the police station.

B. ARREST

- As a rule use of force should be avoided while effecting arrest. However, in case of forcible resistance to arrest, minimum force to overcome such resistance may be used. However, care must be taken to ensure that injuries to the person being arrested, visible or otherwise, is avoided.
- The dignity of the person being arrested should be protected. Public display or parading of the person arrested should not be permitted at any cost.
- Searches of the person arrested must be done with due respect to the dignity of the person, without force or aggression and with care for the person's right to privacy. Other women with should only make searches of women strict regard to decency[60].
- The use of handcuffs or leg chains should be avoided and if at all, it should be resorted to strictly in accordance with the law repeatedly explained and mandated in judgement of the Supreme Court in *Prem Shanker Shukla v. Delhi Adminstration*[61] and *Citizen for Democracy v. State of Assam*[62].
- As far as is practicable women police officers should be associated

---

[59] *Ibid* note 4.
[60] Section 51 (2) of the Code.
[61] AIR 1980 SC 1535.
[62] AIR 1996 SC 2193.

where the person or persons being arrested are women. The arrest of women between sunset and sunrise should be avoided.

- Where children or juveniles are sought to be arrested, no force or beatings should be administered under any circumstances. Police Officers, may for this purpose, associate respectable citizens so that the children or juveniles are not terrorise and minimal coercion is used.
- Where the arrest is without a warrant, the person arrested has to be immediately informed of the grounds of arrest in a language, which he or she understands. Again, for this purpose, the police, if necessary may take the help of respectable citizens. These grounds must have already been recorded in writing in police records. The person arrested should be shown the written reasons as well and also given a copy on demand.[63]
- The arrested person can, on a request made by him or her, demand that a friend, relative or other person known to him be informed of the fact of his arrest and the place of his detention. The police should record in a register the name of the person so informed.[64]
- If a person is arrested for a bailable offence, the police officer should inform him of his entitlement to be released on bail so that he may arrange for sureties.[65]
- Apart from informing the person arrested of the above rights, the police should also inform him of his right to consult and be defended by a lawyer of his choice. He should also be informed that he is entitled to free legal aid at state expense.[66]
- When the person arrested is brought to the police station, he should, if he makes a request in this regard, be given prompt medical assistance. He must be informed of this right. Where the police officer finds that the arrested person is in a condition where he is unable to make such

[63] Section 50 (1) of the Code.
[64] *Ibid* note 4.
[65] Section 50 (2) of the Code.
[66] *D. K. Basu v State of West Bengal,* AIR 1997 SC 610.

request but is in need of medical help, he should promptly arrange for the same. This must also be recorded contemporaneously in a register. The female requesting for medical help should be examined only by a female registered medical practitioner.[67]

- Information regarding the arrest and the place of detention should be communicated by the police officer affecting the arrest without any delay to the police Control Room and District / State Headquarters. There must be a monitoring mechanism working round the clock.
- As soon as the person is arrested, police officer affecting the arrest shall make a mention of the existence or non-existence of any injury on the person of the arrestee in the register of arrest. If any injuries are found on the person of the arrestee, full description and other particulars as to the manner in which the injuries were caused should be mentioned in the register, which entry shall also be signed by the police officer and the arrestee. At the time of release of the arrestee, a certificate to the above effect under the signature of the police officer shall be issued to the arrestee.
- If the arrestee has been remanded to police custody under the orders of the court, the arrestee should be subjected to medical examination by a trained Medical Officer every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. At the time of his release from the police custody, the arrestee shall be got medically examined and a certificate shall be issued to him stating therein the factual position of the existence or nonexistence of any injuries on his person.

C. POST ARREST

- The person under arrest must be produced before the appropriate court

[67] Section 53 of the Code.

within 24 hours of the arrest.[68]

- The person arrested should be permitted to meet his lawyer at any time during the interrogation.
- The interrogation should be conducted in a clearly identifiable place, which has been notified for this purpose by the Government. The place must be accessible and the relatives or friend of the person arrested must be informed of the place of interrogation taking place.
- The methods of interrogation must be consistent with the recognised rights to life, dignity and liberty and right against torture and degrading treatment.

This is an incredibly worrying state if complaints are not registered they cannot be examined by the National Human Rights Commission and human rights issues cannot be resolved. If National Human Rights Commission does not examine all cases, its ability to protect human rights in India is seriously compromised. The National Human Rights Commission will be much more effective at protecting and promoting human rights if the following steps are taken:

1. All complaints must be registered. In the event of non-registration there must be some mechanism for complaints. A study should be undertaken as to find out why complaints are not always registered, and in this way the cause can be tackled effectively.
2. The National Human Rights Commission must make it compulsory for all State responses to be forwarded to the complainants. A mechanism should b established whereby this happens automatically. It is also important that the response be forwarded without censorship.
3. The National Human Rights Commission must follow up all its requests for information. If information is not given in a timely manner, they must pester the State authorities until they respond. They could also publicize the States schedule failings in order to pressure the concerned authorities.

[68] Section 56 and 57 of the Code.

4. The National Human Rights Commission must strongly encourage the State authorities to follow its recommendations. It should publicize its recommendations together with the authority's responsive action or inaction. In this way the State authorities may be pressurized to justify their actions.

6. Impunity

Members of the security services continued to enjoy virtual impunity for human rights violations. In Punjab a culture of impunity, developed within the criminal justice system during the period of widespread-armed political opposition in the mid-1990s, continued to prevail. This was strengthened by provisions contained in special security laws and the Protection of Human Rights Act, and by the frequent failure to implement recommendations issued by various commissions of inquiry[69].

In 1996 the Supreme Court had ordered the National Human Rights Commission to examine the findings of the Central Bureau of Investigations that police officials in Amritsar district had illegally cremated 2,097 people. The cremations took place following widespread "*disappearances*" in police custody and possible extrajudicial executions in the mid-1990s. Seven years after this decision, the State of Punjab had only just begun to file its affidavits on cases under examination by the National Human Rights Commission.

In Jammu and Kashmir the state government kept its promise made in the Common Minimum Programme to assimilate the Special Operations Group (SOG), a paramilitary division of the police accused of human rights violations, into the regular police. However, the Special Operations Group continued to operate as a cohesive unit and despite disciplinary action being taken against a few of its members, there continued to be regular reports of human rights violations being committed by the Special Operations Group. In May, the National Human Rights Commission asked the Chief Secretary of

---

[69] *Ibid.*

Jammu and Kashmir for specific information on the systems used by the state authorities to record and investigates allegations of "*disappearances*" and on measures taken to prevent further "*disappearances*".[70] A substantive response to the Commission's request remained outstanding at the end of 2003.

Civilians continued to be targeted for gross human rights violations in Jammu and Kashmir and scores of allegations of human rights violations were made against the security forces, paramilitaries and "*renegades*" (former members of armed opposition groups working with the security forces).

7. Abuses by Opposition Groups

There were continuing reports of human rights abuses by armed opposition groups against civilians[71]. In Jammu and Kashmir human rights abuses by militants persisted at a high level with a reported 344 civilians killed in targeted or indiscriminate violence by armed groups in the period from January to the end of November. In 2007 Incidents reported from January to March was 211, Security Forces Killed were 30, civilian killed were 37 and terrorist killed was 70[72]. In the states of the northeast, abuses included the torture and killings of non-combatants and attacks on civilians by *naxalites*[73] (armed left-wing groups) in areas of Andhra Pradesh, Bihar, Madhya Pradesh, Orissa and West Bengal.

8. Human Rights Defenders

Human rights defenders continued to face accusations of "*anti-national*" activities, harassment by state agents, political groups and private individuals, including threats, preventive arrest and detention, and violence.

---

[70] *Ibid.*

[71] Justice B. P. Jeevan Reddy, Report of the Committee to Review the Armed Forces (Special Powers) Act, 1958, 6th June 2005.

[72] *See,* Status Paper on Internal Security Situation As on March 31, 2007, Government of India.

[73] Annual Report of Ministry of Home Affairs 2006, Government of India.

There were reports that following an assassination attempt on the Chief Minister of Andhra Pradesh in Octoberl, 2003[74] allegedly by *naxalites*, retaliatory harassment was initiated against human rights defenders. At least six members of the Andhra Pradesh Civil Liberties Committee (APCLC) were detained for questioning in October in connection with the assassination attempt and Andhra Pradesh Civil Liberties Committee activists were put under constant surveillance and were repeatedly detained for questioning. In November there were growing concerns the Andhra Pradesh Civil Liberties Committee could face a ban following statements by the Director General of Police indicating that the organization was sympathetic to the *naxalites*[75].

9. Death Penalty

At least 33 people were sentenced to death in 2003[76]. No executions were reported. India's highest courts have ruled that the death penalty can only be applied in the "*rarest of rare*" cases[77]. In the absence of any more detailed definition, the interpretation of this phrase by judges varied greatly. The majority of those sentenced to death are poor and illiterate. The government of India does not publish statistical information about the implementation of the death penalty. Politicians continued to make statements favoring the extension of the death penalty. In mid-2003 the Law Commission issued a questionnaire asking citizens to indicate which mode of execution should be used when executing those on death row. The argument put forth by the 'abolitionist' that execution by any means for any offence is cruel, inhuman, barbaric and degrading punishment. Supreme Court of India has taken up the matter in many cases[78] and has observed that execution by

---

[74] Annual Report of Ministry of Home Affairs 2003-04, Government of India.
[75] *Ibid.*
[76] Report of Amnesty International, 2003.
[77] *See, Bachan Singh v State of Punjab,* AIR 1980 SC 898, *Machhi Singh Case,* AIR i983 SC 957, *Kehar Singh v. State (Delhi Admn.),* AIR 1998 SC 1883, *Afsan Guru Case,* AIR 2005 SC 3820.
[78] *Ibid. See,* also *Deena v Union of India,* AIR 1983 SC 115; Sashi *Nayar v Union of India,*

hanging is not cruel, inhuman, barbaric and unreasonable punishment.

10. States' Obligations Under Human Rights Law [79]

Human rights law has sought to strike a fair balance between legitimate national security concerns and the protection of fundamental freedoms. It acknowledges that States must address serious and genuine security concerns, such as terrorism. The balance is reflected in the International Covenant on Civil and Political Rights (ICCPR)[80], which has been ratified or acceded to by 151 States, as well as in regional human rights treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[81], the American Convention on Human Rights (ACHR)[82], and the African Charter on Human and Peoples' Rights. The "Guidelines on Human Rights and the Fight against Terrorism", adopted by the Committee of Ministers of the Council of Europe on 11 July 2002, usefully articulate the balances in the context of the European system.

Terrorism may, under very specific conditions that will be considered below, lead to a state of emergency. Human rights law, notably *Article* 4 of the International Covenant on Civil and Political Rights[83], *Article* 15 of the European Convention for the Protection of Human Rights and Fundamental

---

AIR 1992 SC 395.

[79] *See,* Digest of Jurisprudence of the United Nation and Regional Organizations on the Protection of Human Rights While Countering Terrorism, www.unorg.com.

[80] International Covenant on Civil and Political Rights.

[81] European Convention for the Protection of Human Rights and Fundamental Freedoms.

[82] ACHR.

[83] Article 4 (1) of ICCPR, *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*

Freedoms [84] and *Article* 27 of the American Convention on Human Rights [85], recognizes that some rights can be derogated from in time of public emergency. In contrast, the African Charter does not contain a derogation clause. The three conventions, however, mandate that certain rights are not subject to suspension under any circumstances. The three treaties catalogue these non-derogable rights. The list of non-derogable rights contained in the International Covenant on Civil and Political Rights includes the right to life; freedom of thought, conscience and religion; freedom from torture and cruel, inhuman or degrading treatment or punishment, and the principles of precision and of non-retroactivity of criminal law except where a later law imposes a lighter penalty.

Derogation from other rights is only permitted in the special circumstances defined in each of the three treaties. According to the International Covenant on Civil and Political Rights and American Convention on Human Rights, any such measures must be of exceptional character, strictly limited in time and to the extent required by the exigencies of the situation, subject to regular review, consistent with other obligations under international law and must not involve discrimination. European Convention for the Protection of Human Rights and Fundamental Freedoms requires that such measures be limited to the extent required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law. The three treaties further require informing the Secretary-General of the United Nations or the relevant regional organization of the provisions from which a State has derogated and the reasons for such derogation.

Building on States' other obligations under international law, the United Nations Human Rights Committee has developed a list of elements

[84] Article 15 of ECHR.
[85] Article 27 of ACHR.

that, in addition to the rights specified in *Article* 4[86], cannot be subject to lawful derogation. These elements include the following: all persons deprived of liberty must be treated with respect for their dignity; hostage-taking, abduction, and unacknowledged detention are prohibited; persons belonging to minorities are to be protected; unlawful deportations or transfers of population are prohibited; and "*no declaration of a state of emergency ... may be invoked as justification for a State party to engage itself ... in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence*". The Human Rights Committee is the body established to monitor the implementation by States Party of the International Covenant on Civil and Political Rights and its Protocols.

The right to a fair trial during armed conflict is explicitly guaranteed under international humanitarian law. Under the American Convention on Human Rights [87], the right to judicial guarantees essential for the protection of non-derogable rights cannot be suspended, even in time of war, public danger, or emergency. According to the Human Rights Committee[88] the same principle applies in the context of the International Covenant on Civil and Political Rights. As the Committee explained, the principles of legality and the rule of law require that fundamental requirements of fair trial be respected during a state of emergency. The Committee stressed that it is inherent in the protection of rights explicitly recognized as non-derogable that they be secured by procedural guarantees including, often, judicial guarantees.

The provisions of the International Covenant on Civil and Political Rights relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. In

[86] United Nations Human Rights Committee, Article 4 http://www.unhchr.ch/tbs/doc.nsf/ visited on 27.01.08.
[87] Article 27 of American Convention on Human Rights.
[88] General Comment No. 29 in General Comment No. 29; *See,* also Article 28 of International Covenant on Civil and Political Rights.

particular, any trial possibly leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the International Covenant on Civil and Political Rights, including those on fair trial. These include the right to equality before the courts and tribunals[89]; the right to a fair hearing by a competent, independent and impartial tribunal;[90] the presumption of innocence[91]; the right of the accused to be informed of the nature and cause of the charge against him or her promptly and in detail in a language which he or she understands[92]; the right to communicate with counsel of choice; the right to examine witnesses and secure the attendance and examination of witnesses on behalf of the accused; and the right not to be compelled to testify against oneself or to confess guilt[93].

In addition, the International Covenant on Civil and Political Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, American Convention on Human Rights, as well as the African Charter require that, in the exceptional circumstances where it is permitted to limit some rights for legitimate and defined purposes other than emergencies, the principles of necessity and proportionality must be applied. The measures taken must be appropriate and the least intrusive possible to achieve their objective. The discretion granted to certain authorities to act must not be unfettered. The principle of non-discrimination must always be respected and special effort made to safeguard the rights of vulnerable groups. Counter-terrorism measures targeting specific ethnic or religious groups are contrary to human rights and would carry the additional risk of an upsurge of discrimination and racism.

---

[89] Article 14 of ICCPR.
[90] Article 9 (3) of ICCPR.
[91] Article 14 (2) of ICCPR.
[92] Article 14 (3) of ICCPR.
[93] *Ibid.*

11. SPECIFIC RIGHTS[94]

I. Right to Life

The right not to be arbitrarily deprived of life is non-derogable in both the international and regional systems. The right to life is protected by *Article* 6 of the Covenant[95] and is one of the non-derogable rights mentioned in *Article* 4, paragraph 2[96]. The number of persons who have been killed by the security forces, as well as all persons who have been the victims of terrorist attacks, is of concern. The use of rubber-coated metal bullets by the security forces in the occupied territories in dispersing demonstrations is reported to have killed many persons, including children. The State party is urged to enforce rigorously the strict limitations on the operational rules as to the use of firearms and the use of rubber bullets against unarmed civilians[97].

In *Suarez de Guerrero* v. *Colombia*[98], the Human Rights Committee examined a case in which police killed the alleged victim and six other persons during a raid because they were suspected, as members of a guerrilla organization, of having kidnapped a former ambassador.[99] In the present case

---

[94] *See,* Digest of Jurisprudence of the United Nation and Regional Organizations on the Protection of Human Rights While Countering Terrorism, www.unorg.com.

[95] Article 6 of ICCPR.

[96] CCPR/C/79/Add.54, para. 27(1995), *With reference to the specific situation in public emergency, the Human Rights Committee expresses concern that article 4 of the Covenant, which specifies the provisions that are nonderogable even in times of public emergency, has not been complied with. It maintains that this article is applicable to the situation where the use of weapons by combatants has led to the loss of life and deprivation of freedom of large numbers of persons, regardless of the fact that a state of emergency has not been formally declare .*

[97] CCPR/C/79/Add.93, para. 17 (1998).

[98] *Suarez de Guerrero v. Colombia, Case No. 45/1979,* Views adopted on 31 March 1982 (paras. 12.2, 13.1 - 13.3).

[99] *The right enshrined in article 6 is the supreme right of the human being. It follows that the deprivation of life by the authorities of the State is a matter of the utmost gravity. This follows from the article as a whole and in particular is the reason why paragraph 2 of the article lays down that the death penalty may be imposed only for the most serious crimes. The requirements that law and that no one shall protect the right shall be arbitrarily deprived of his life mean that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State.*

it is evident from the fact that seven persons lost their lives as a result of the deliberate action of the police that the deprivation of life was intentional. Moreover, the police action was apparently taken without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions. There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to affect the arrest or prevent the escape of the persons concerned. Moreover, the victims were no more than suspects of the kidnapping which had occurred some days earlier and their killing by the police deprived them of all the protections of due process of law laid down by the Covenant. In the case of Mrs. Maria Fanny Suarez de Guerrero, the forensic report showed that she had been shot several times after she had already died from a heart attack. There can be no reasonable doubt that her death was caused by the police patrol.

For these reasons it is the Committee's view that the action of the police resulting in the death of Mrs. Maria Fanny Suarez de Guerrero was disproportionate to the requirements of law enforcement in the circumstances of the case and that she was arbitrarily deprived of her life contrary to *Article* 6 (1) of the International Covenant on Civil and Political Rights. Inasmuch as the police action was made justifiable as a matter of Colombian law by Legislative Decree No. 0070 of 20 January 1978, the right to life was not adequately protected by the law of Colombia as required by *Article* 6 (1)[100]

A. European Court of Human Rights

The duty of the States to protect the right to life is of utmost importance in the convention system. *Article* 2 should be interpreted as including an obligation for States to protect their population against terrorism[101]. Paragraph 2 does not primarily define instances where it is permitted intentionally to kill

[100] *Ibid.*
[101] Article 2 of ECHR.

an individual, but describes the situations where it is permitted to "*use force*" which may result, as an unintended outcome, in the deprivation of life. The use of the term "*absolutely necessary*" suggests that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "*necessary in a democratic society*" under paragraph 2 of *Articles* 8 to 11 of the Convention[102]. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of *Article* 2[103]. In keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination.

In the light of the above considerations, the European Human Rights Court agrees with the Commission that the responsibility of the State is not confined to circumstances where there is significant evidence that misdirected fire from agents of the State has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life[104]. The European Human Rights Court emphasised that an ambush on terrorist has to be planned an executed to avoid as much as possible risks on civilians, including counter firing by the terrorist[105]. Thus in this case, the planning of the ambush proved to be inadequate and in violation of *Article* 2.

The European Human Rights Court recalls that, according to its case-law, the obligation to protect the right to life under *Article* 2, read in

---

[102] Article 8 to 11 of ECHR.
[103] ECHR.
[104] *Ergi v. Turkey, ECHR,* 28 July 1998 (para. 79).
[105] *Ibid* at 79-81.

conjunction with the State's general duty under *Article* 1 to "*secure to everyone within its jurisdiction the rights and freedoms defined in the Convention*"[106], requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alia, agents of the State.... This obligation is not confined to cases where it has been established that the killing was caused by an agent of the State. Nor is it decisive whether members of the deceased's family or others have lodged a formal complaint about the killing with the relevant investigatory authority. In the case under consideration, the mere knowledge of the killing on the part of the authorities gave rise ipso facto to an obligation under *Article* 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death[107].

Proper procedures for ensuring the accountability of agents of the State are indispensable in maintaining public confidence and meeting the legitimate concerns that might arise from the use of lethal force. Lack of such procedures will only add fuel to fears of sinister motivations, as is illustrated inter alia by the submissions made by the applicant concerning the alleged shoot-to-kill policy[108].

Even if the death penalty were still permissible under *Article* 2, the Court considers that an arbitrary deprivation of life pursuant to capital punishment is prohibited. This flows from the requirement that "*Everyone's right to life shall be protected by law*". An arbitrary act cannot be lawful under the Convention.... It also follows from the requirement in *Article* 2 § 1 that the deprivation of life be pursuant to the "*execution of a sentence of a court*", that the "*court*" which imposes the penalty be an independent and impartial tribunal within the meaning of the Court's case-law ... and that the most rigorous standards of fairness are observed in the criminal proceedings

---

[106] Article 1&2 of ECHR.
[107] *Semse Onen v. Turkey, ECHR,* 14 May 2002 (para. 87).
[108] *McKerr v. the United Kingdom,* ECHR, 4 May 2001 (para. 160).

both at first instance and on appeal. Since the execution of the death penalty is irreversible, it can only be through the application of such standards that an arbitrary and unlawful taking of life can be avoided.... Lastly, the requirement in *Article* 2 § 1 that the penalty be "*provided by law*" means not only that there must exist a basis for the penalty in domestic law but that the requirement of the quality of the law be fully respected, namely that the legal basis be "*accessible*" and "*foreseeable*" as those terms are understood in the case-law of the Court.[109]

Cases regarding disappearances and unacknowledged detention of suspected terrorists were brought before the Court in respect of the terrorism context in Turkey. First in *Kurt v. Turkey*[110], under *Article* 2 the Court found no concrete evidence that the missing person could have been killed by the security forces and decided that the duty to protect the son's life would be considered under *Article* 5. However the cases decided in 2001[111], Court observed that very strong interference might be drawn from the Government's claim and the Courts considered that it had sufficient evidence to conclude beyond reasonable doubt that the suspected terrorists had died following their detention and apprehension by security forces. The European Human Rights Court found a violation of *Article* 2 for responsibility of the State in these deaths. The European Human Rights Court observed:

> *to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention. Having regard to the rejection by the Contracting Parties of capital punishment, which is no longer seen as having any legitimate place in a democratic society, the imposition of a capital sentence in such circumstances must be*

---

[109] *Ibid.*
[110] *Kurl v. Turkey,* 25 May 1998.
[111] *Cakici v. Turkey, Tas v. Turkey, Akdeniz and Others v. Turkey, 31 May 2001.*

considered, in itself, to amount to a form of inhuman treatment.[112]

B. Inter-American System

In situations where a state's population is threatened by violence, the state has the right and obligation to protect the population against such threats and in so doing may use lethal force in certain situations. This includes, for example, the use of lethal force by law enforcement officials where strictly unavoidable to protect themselves or other persons from imminent threat of death or serious injury ... or to otherwise maintain law and order where strictly necessary and proportionate. The Inter American Court has explained that, in such circumstances, states have the right to use force,

> *"even if this implies depriving people of their lives there is an abundance of reflections in philosophy and history as to how the death of individuals in these circumstances generates no responsibility whatsoever against the State or its officials."*[113]

The means that can be used by the state while protecting its security or that of its citizens are not unlimited, however. To the contrary, as specified by the Court, *"regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends."*[114]

Because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required by the State so that those guarantees are not violated and a human life is not arbitrarily taken as a result[115].

---

[112] *Ocalan v. Turkey,* ECHR, 12 March 2003 (paras. 202-203, 207), 42 ILM 257 (2003), 294-295.

[113] *Inter-American Commission on Human Rights, Report on Terrorism and Human Rights* (OEA/Ser.L/V/II.116, Doc. 5, rev. 1 corr., 22 October 2002) (paras. 87, 89), citing *Neira Alegria Case, I/A Court H.R.,* Judgment of January 19, 1995 (paras. 74-75).

[114] *Ibid.*

[115] I/A Court H.R., Advisory Opinion OC-16/99, The right to information on consular assistance, in the framework of the guarantees of the due process of law, October 1, 1999 (para. 136).

The Commission reiterates the fundamental significance of ensuring full and strict compliance with due process protections in trying individuals for capital crimes, from which there can be no derogation. The Commission has recognized previously that, due in part to its irrevocable and irreversible nature, the death penalty is a form of punishment that differs in substance as well as in degree in comparison with other means of punishment, and therefore warrants a particularly stringent need for reliability in determining whether death is the appropriate punishment in a given case. Further, the Inter-American Court of Human Rights recently noted:

> "*internationally recognized principle whereby those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases,*" such that "*if the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty and declaration recognizes and protects is at stake: human life.*"[116]

C. Indian Position

The concept of right to life and personal liberty as enshrined under *Article* 21[117] of the Constitution of India, being a guaranteed fundamental right undoubtedly is very wide in its scope and applicability and with the advent of the modern strides in jurisprudence, with revolutionary pronouncements by the Supreme Court in judgement after judgement over the past three decades or so has assumed wider connotations and amplifications. The existence of the Fundamental right of life and liberty is one thing but the extent of the obligation of the State to protect the life and liberty is slightly different matter. Undoubtedly, the existence of the fundamental right of life and liberty correspondingly does not create an obligation upon the State to ensure that this right is exercised in fairness and absolutely degree. The

---

[116] *Case 12.243, Report N° 52/01, Garza case, Annual Report of the IACHR 2000 (par. 100),* 39 ILM 100 (2000).

[117] Article 21 of Constitution of India, *No person shall be deprived of his life or personal liberty except according to procedure established by law.*

balance therefore, is to be struck between obligations of the State to protect life in the light of sources available as also the practical problems and difficulties faced in day-to-day administration of the State.

Almost three decades later in *Maneka Gandhi v Union of India*[118], the Supreme Court rejected its earlier its earlier interpretation and held that the procedure contemplated under *Article* 21 of the Constitution is a right, just and fair procedure, and not an arbitrary or oppressive procedure. Many statute since have been tested on this touchstone. In the famous case of *Kartar Singh v. State of Punjab,*[119] the validity of several sections of Terrorist Disruptive Activities Act, 1985 was tested in the light of *Article* 21of the Constitution. The Court reaffirmed that *Article* 21 of the Constitution asserts a basic human right to life and liberty. It is the State, which is prevented from taking away this right except in accordance with the procedure established by the law.

The right to life has a human reality even when frozen by death sentence. *Article* 21 is a testament of life's spiritual chemistry.[120]The Apex Court has referred to the classic judgement of Field., J on the meaning of the word 'Life', in *Munn v. Illinois*[121]*:*

> *Life is something more than mere animal existence and the inhibition against the deprivation of life extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world. By the term 'liberty' as used in the provision, something more is meant than mere freedom physical restrain or the bounds of person.*

A dynamic meaning must attach to life and liberty.[122]

---

[118] AIR 1978 SC 597.

[119] (1994) Cr. L. J. 3139.

[120] Ashwani Kant Gautam, *Human Rights and Justice System,* 2001, New Delhi, APH Publishing Corporation, at 240.

[121] (1876) 94 US 113: *Kharag Singh v. State of UP,* AIR 1963 SC 1295, *Sunil Batra v. Delhi Administration,* AIR 1978 SC 1675; *Olga Tellis v. Bombay Municipal Corporation,* AIR 1986 SC 180.

[122] Krishna Iyer, *Law Lawyer and Justice,* (1989),Delhi, B. R. Publishing Corporation at 93.

Accordingly, relying on this the case is a number of cases the Indian Supreme Court have tested various aspects of criminal justice and administration of prisons. *Article* 21 has come to the rescue of all persons, whether persons accused of an offence, under trial prisoners, prisoners under going prison sentence, etc. virtually all aspects of criminal justice took protection under the protective umbrella of *Article*s 14, 19 and 21.[123]

II. Prohibition of Torture or Cruel, Inhuman or Degrading Treatment

The right to freedom from torture and from cruel, inhuman or degrading treatment is, under both the universal and regional systems, absolute and non-derogable under all circumstances.

A. UNITED NATIONS

In United Nations *Article 7* of the Convention on Torture[124], the Human Rights Committee underlined the non-derogable nature of this provision. The text of *Article* 7 allows for no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in *Article* 4 of the Covenant, no derogation from the provision of *Article* 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of Article 7 for any reasons, including those based on an order from a superior officer or public authority.[125]

The Human Rights Committee of the United Nations of the Convention on Torture is aware of the difficulties that the State Party faces in its prolonged fight against terrorism, but recalls that no exceptional

---

[123] Sonia Hurra, *Public Interest Litigation in Quest of Justice,* 1993, Ahmedabad, Mishra & Co at 167.
[124] Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
[125] UN *General Comment No. 20, 10/3/1992 (para 3).*

circumstances whatsoever can be invoked as a justification for torture, and expresses concern at the possible restrictions of human rights which may result from measures taken for that purpose[126].

The Human Rights Committee of the United Nations of the Convention on Torture is deeply concerned that under the guidelines for the conduct of interrogation of suspected terrorists authority may be given to the security service to use "*moderate physical pressure*" to obtain information considered crucial to the "*protection of life*". The Human Rights Committee of the United Nations of the Convention on Torture notes that the part of the report of the Landau Commission that lists and describes authorized methods of applying pressure remains classified. The Committee notes also the admission by the State party delegation that the methods of handcuffing, hooding, shaking and sleep deprivation have been and continue to be used as interrogation techniques, either alone or in combination. The Committee is of the view that the guidelines can give rise to abuse and that the use of these methods constitutes a violation of Article 7 of the Covenant in any circumstances. If legislation is to be enacted for the purpose of authorizing interrogation techniques, such a law should explicitly prohibit all forms of treatment prohibited by *Article* 7.

A specific concern of the Human Rights Committee of the United Nations of the Convention on Torture is that at least some of the persons kept in administrative detention for reasons of State security ... do not personally threaten State security but are kept as "*bargaining chips*" in order to promote negotiations with other parties on releasing detained ... soldiers or the bodies of deceased soldiers. The Committee of the Convention on Torture considers the present application of administrative detention to be incompatible with *Article*s 7 and 16 of the Covenant, neither of which allows for derogation in times of public emergency[127].

---

[126] CCPR/CO/76/EGY, para. 4 (2002).
[127] CCPR/C/79/Add.93, paras. 19, 21 (1998).

The Committee against Torture has also referred to the non-derogable nature of the right to freedom from torture[128]. Convention against Torture[129] lays down that in no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture[130]. The Human Rights Committee observed, in its General Comment No. 20, that prolonged solitary confinement in itself may constitute a violation of the right to freedom from torture and from cruel, inhuman or degrading treatment:

> *The* Committee notes that *prisoners may be segregated in the State party as a preventive measure for the protection of security, the maintenance of order or to guarantee the safety of the prisoner. Noting that segregation involves substantial isolation and may be extended over long periods of time, the Committee recalls its General Comment 20 in which it noted that prolonged solitary confinement of a detained or imprisoned person may violate Article 7*[131].

B. European Court of Human Rights

Article 3 "*enshrines one of the most fundamental values of democratic societies*"[132], the European Court of Human Rights emphasised the absolute prohibition under *Article* 3 to resolve to torture or inhuman or degrading treatment or punishment in numerous cases regarding terrorism. The European Court of Human Rights is fully aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention[133] prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4,

---

[128] A/52/44, Para 258 (1997).

[129] Article 2, paragraph 2, of the CAT, *A State party to the Convention against Torture ... is precluded from rising before the Committee against Torture exceptional circumstances as justification for acts prohibited by article 1 of the Convention. This is plainly expressed in article 2 of the Convention.*

[130] A/51/44, paras.180-222 (1997), Inquiry under Article 20.

[131] *CCPR/C/79/Add.93, para. 20 (1998).*

[132] *Chahal v. United Kingdom,* 15 November1996, para 79*; Labita v. Italy,* 6 April 2000, Para 119.

[133] ECHR.

Article 3 ... makes no provision for exceptions and no derogation from it is permissible under *Article* 15 ... even in the event of a public emergency threatening the life of the nation.[134]

The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals[135].

The five techniques wall-standing, hooding, subjection to noise, deprivation of sleep, deprivation of food and drink were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of *Article* 3. The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance[136].

In *Dulus v. Turkey*[137], establish that the destruction of homes and property carried out during an anti terrorist operation in a brutal manner and leading to a suffering of a sufficient intensity can be interpreted as inhuman treatment and can engage State responsibility under *Article* 3. Even if such destruction has been made to prevent terrorists from using those homes or to discourage others, this would still not justify the ill treatment. If States were to attack their own fundamental values in fighting terrorism, when terrorism itself is aimed at seriously threatening democracies and attacking their fundamental values, then obviously the actions of he State could amount to

---

[134] *Ibid* note 126 at Para. 79.
[135] *Tomasi v. France, ECHR,* 27 August 1992 (para. 115).
[136] *Ireland v. the United Kingdom,* 18 January 1978 (para. 167).
[137] *Dulus v. Turkey,* 30 January 2001.

form of State terrorism. This is a strong argument as to why the European monitoring is essential in fight against terrorism. Otherwise there is no one left to protect the individuals and democracy from terrorism and State intimidation.[138]

C. Inter-American System

An essential aspect of the right to personal security is the absolute prohibition of torture, a peremptory norm of international law creating obligations lies on the State.[139]

The violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation. The Inter American Court of Human Rights has declared that, even in the absence of physical injuries, psychological and moral suffering, accompanied by psychic disturbance during questioning, may be deemed inhuman treatment. The degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance.... That situation is exacerbated by the vulnerability of a person who is unlawfully detained.... Any use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the person, in violation of *Article* 5 of the American Convention. The exigencies of the investigation and the undeniable difficulties encountered in the anti-terrorist struggle must not be allowed to restrict the protection of a person's

---

[138] Dominic Laferrier, *Fighting Terrorism And Respecting Human Rights Jurisprudence*, Fall 2002.at 34.

[139] *IACHR,* Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, *OEA/Ser.L/V/II.106, Doc. 40 rev., February 28, 2000* (para. 118).

right to physical integrity[140].

D. Indian position

The Constitution of India did not guarantee to the persons in police custody the needed effective safeguards to regulate the discretion of the police. The Constitution contained no specific rights against torture, cruel, inhuman treatment and degrading punishment. In the Country so familiar with police raj, the Courts evolved judicial process more appropriate in a police State than in a welfare State. Police assumed that the criminal process attached greater importance to the end than the means, to order than to law.[141] The Supreme Court of India in the Fifties glorified public order at the expense of individual rights[142], and declined to examine the righteousness of the procedure and whether it accorded with principles of natural justice.

Almost three decades later in *Maneka Gandhi v Union of India*[143], the Supreme Court rejected its earlier its earlier interpretation and held that the procedure contemplated under *Article* 21 of the Constitution is a right, just and fair procedure, and not an arbitrary or oppressive procedure. Many statute since have been tested on this touchstone. In the famous case of *Kartar Singh v. State of Punjab,*[144] the validity of several sections of Terrorist Disruptive Activities Act, 1985 was tested in the light of *Article* 21of the Constitution. The Court reaffirmed that Article 21 of the Constitution asserts a basic human right to life and liberty. It is the State, which is prevented from taking away this right except in accordance with the procedure established by the law. Right to life and personal liberty is the most precious, sacrosanct, inalienable and fundamental of all the fundamental right of citizens.[145]

---

[140] *Loayza Tamayo Case, I/A Court H.R.,* Judgment of September 17, 1997 (para. 57).
[141] *See,* Mohmmed Ghouse, *State lawlessness of Constitution in comparative Constitution,* Mahendra Singh, Ed.1989, at 253, referred in 1999 Cri. L J, Journal Section 36 at 37.
[142] *A. K. Gopalan v. State of Madras,* AIR 1950 SC 27.
[143] AIR 1978 SC 597.
[144] AIR 1993 SC 341.
[145] *M. C. Metha v. Union of India,* AIR 1987 SC 965.

The human rights savior Supreme Court has protected the prisoners from all type of torture. Supreme Court of India in *D.K. Basu v. State of West Bengal* [146] observed:

> *The right to interrogate the detenues, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. The latin maxim salus populi est suprema lex (the safety of the people is the supreme law) and salus republicae est suprema. lex)(safety of the State is the supreme law) co-exist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be "right, just and fair". Using any form of torture for extracting any kind of information would neither be 'right nor just nor fair' and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated-indeed subjected to sustained and scientific interrogation - determined in accordance with provisions of law. He cannot, however, be tortured or subjected to third degree methods or eliminated with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons etc. His Constitutional right cannot be abridged except in the manner permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal. Challenge of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to 'terrorism'. That would be bad for the State, the community and above all for the Rule of law.*

In this case it was held that a suspect couldn't be tortured even if there is a prospect of the crime going unpunished.[147] In Nilabati Behera's case[148], it was held:

> *Adverting to the grant of relief to the heirs of a victim of custodial death for the infraction or invasion of his rights guaranteed under Article 21 of Constitution of India, it is not always enough to relegate him to the ordinary remedy of a civil suit to claim damages for the tortious act of the State as that remedy in private law indeed is available to the aggrieved party. The citizen complaining of the infringement of the indefeasible right under Article 21 of the Constitution cannot be told that for the established violation of the fundamental right to life, he cannot get any relief under the public law by the courts exercising writ jurisdiction*

---

[146] AIR 1997 SC 610.
[147] *Ibid.*
[148] AIR 1993 SC 1960.

III. Conditions of detention

The question of conditions of detention has been a matter of concern for both the UN and regional systems. They have considered it with respect both to the right to freedom from torture and other cruel, inhuman or degrading treatment, and the right to respect for the inherent dignity of the human person.[149]

A. UNITED NATIONS

Although *Article* 10 of the Covenant[150] is not specified as non-derogable in *Article* 4 of the same treaty, the Human Rights Committee has taken the view that the right of persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person is nevertheless not subject to derogation.

In those provisions of the Covenant[151] that are not listed in *Article* 4, paragraph 2, there are elements that cannot be made subject to lawful derogation under *Article* 4, such as:

> *All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Although this right, prescribed in Article 10 of the Covenant, is not separately mentioned in the list of non-derogable rights, the Committee believes that here the Covenant expresses a norm of general international law not subject to derogation. This is supported by the reference to the inherent dignity of the human person in the preamble to the Covenant and by the close connection between Articles 7 and 10*[152].

In *Polay Campos v. Peru*[153], the Human Rights Committee examined a

---

[149] *See,* Digest Of Jurisprudence Of The United Nation And Regional Organizations On The Protection Of Human Rights While Countering Terrorism, www.unorg.com.

[150] ICCPR.

[151] *Ibid.*

[152] *General Comment of the Committee,* No. 29, CCPR/C/21/Rev.1/Add.11, para. 13 (2001).

[153] *Polay Campos v. Peru,* Case No. 577/1994, Views adopted on 6 November 1997 (paras. 8.4, 8.6 and 8.7).

case where the victim had been detained in relation to alleged terrorist activities:

> *Victor Polay Campos was detained incommunicado from the time of his arrival at the prison in Yanamayo until his transfer to the Callao Naval Base detention centre. The State party has not refuted this allegation; nor has it denied that Mr. Polay Campos was not allowed to speak or to write to anyone during that time, which also implies that he would have been unable to talk to a legal representative, or that he was kept in his unlit cell for 23 and a half hours a day in freezing temperatures. In the Committee's opinion, these conditions amounted to a violation of Article 10, paragraph 1, of the Covenant*[154].

B. European Court of Human Rights

The European Court of Human Rights reiterates that under *Article* 3 of the Convention[155] the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.[156]

The European Court of Human Rights notes also that complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment, which cannot be justified by the requirements of security or any other reason.[157]

C. Inter-American System

One of the reasons that incommunicado detention is considered to be an exceptional instrument is the grave effect it has on the detained person.

---

[154] *Ibid.*
[155] European Court on Human Rights and Fundamental Freedoms, 1950.
[156] *Ocalan v. Turkey, ECHR, 12 March 2003 (para 231- 232),* 42 ILM 257 (2003).
[157] *Ibid* at 298- 299.

Indeed, isolation from the outside world produces moral and psychological suffering in any person, places him in a particularly vulnerable position, and increases the risk of aggression and arbitrary acts in prisons.

The mere fact that the victim was for 36 days deprived of any communication with the outside world, in particular with his family, allows the Court to conclude that Mr. Suarez Rosero was subjected to cruel, inhuman and degrading treatment, all the more so since it has been proven that his incommunicado detention was arbitrary and carried out in violation of Ecuador's domestic laws. The victim told the Court of his suffering at being unable to seek legal counsel or communicate with his family. He also testified that during his isolation he was held in a damp underground cell measuring approximately 15 square meters with 16 other prisoners, without the necessary hygiene facilities, and that he was obliged to sleep on newspaper; he also described the beatings and threats he received during his detention. For all those reasons, the treatment to which Mr. Suarez-Rosero was subjected may be described as cruel, inhuman and degrading[158].

Prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates *Article* 5 of the Convention.[159]

D. Indian Position

Right to life is not only a mere animal existence and its attributes are manifold as life itself. The right to life and liberty as enshrined under in *Article* 21 of the Constitution of India guaranteed fundamental right undoubtedly is very wide in its scope and applicability and with the advent of

[158] Suarez Rosero Case, I/A Court H.R., Judgment of 12 November 1997 (paras. 90-91).
[159] *Velásquez Rodríguez Case, I/A Court H.R.*, Judgment of 28 July 1988 (para 156).

the modern strides in jurisprudence, with revolutionary pronouncements by the Apex Court in judgments after judgments year after years in the last two decades.

Under the noble concept, everyone, in this country has been guaranteed the right to life and liberty. The existence of the fundamental right of life and liberty of course is one thing but the extent of the obligation of the State to protect the life and liberty of its citizens is slightly different thing. Undoubtedly, the existence of the fundamental right of life and liberty correspondingly does not create any obligation upon State to ensure that this exercise in all its fairness and absolute degree, yet the question may arise whether any abstract and absolute obligation exist in so far as the State is concerned to ensure that by all means and methods, the State is under an obligation to protect the life and methods, the state is under an absolute obligation to protect the life and liberty of the citizens.[160]

"Life" in *Article* 21 of the Constitution has the extended meaning given to the world and those citizens who are detained in prisons either as under trial or as convicts are also entitled to the benefit of the Guarantees subject to reasonable restriction.[161]

In *Charles Sobraj v Supdt. Central Jail*[162], *Tihar, New Delhi,* the Apex Court observed:

> *Imprisonment does not spell farewell to fundamental rights although, by a realistic re- appraisal, courts will refuse to recognise the full panoply or Part enjoy ed by a free citizen under Article 21, read with Article 19 (1) (d) and (5), is capable of wider application than the imperial mischief which gave its birth and must draw its meaning from the progress of a mature society*[163].

---

[160] Palok Basu, *Law Relating to Protection of Human Rights under the Indian Constitution And Allied Laws,* 2002 Modern Law Publications, at 188.
[161] *Sheela Barse v. State of Maharashtra,* AIR 1983 SC 378.
[162] AIR 1978 SC 1514.
[163] *Ibid* note 153 at 1516.

In *Sunil Batra v Delhi Administration*[164], the Supreme Court stated:

> *In our constitutional order it is axiomatic that the prison laws do not swallow up the fundamental rights of the legal unfree and as sentinels on the qui vive, courts will guard freedom behind bars, tempered, of course by environmental realism but intolerant of torture by executive echelons. The policy of law is beyond purchase by authoritarians glibly invoking 'dangerness' of inmates and peace in prison*[165]*s.*

Court further observed:

> *Part III of the Constitution does not part company with the prisoners at the gates, and judicial oversight protects the prisoners shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority.*[166]

According to Supreme Court all fundamental rights of the prisoner cannot be infringed its reasonableness should be tested in the light of the procedure for restrictions.[167]

The Supreme Court has favoured the application of fair procedure in the prisons and held that, "whether inside prison or outside, a person shall not be deprived of his guaranteed freedoms save by methods, right, just and fair."[168]

'Solitary Confinement'[169] has its dehumanizing effect. Supreme Court in *Sunil Batra* (I)[170] held that it could be imposed only in exceptional cases. It was argued that Batra was put in 'statutory confinement' and not 'solitary confinement' and the Justice Krishns Iyer accurately responded to this argument:

---

[164] AIR 1978 SC 1675 at 1679.
[165] *Ibid* at 1682.
[166] *Ibid* at 1690.
[167] Paramjit S. Jaswal and Nistha Jaswal, *Human Rights and the Law,* (1996) APH Publishing Corporation, at 183.
[168] *Rakesh Kumar v B. L. Vig. Supdt., Central Jail, New Delhi,* AIR 1981 SC 1767 at 1769.
[169] *See,* For meaning of Solitary Confinement, Black's Dictionary, 1249 (1979), as *in general sense, means the separate confinement of a prisoner, with only occasional access of any other person, and that too only at the discretion of the jail authorities and in stricter sense, it means the complete isolation of a prisoner from all human society and his confinement in a cell so arranged that he has no direct intercourse with or sight of any human being or no employment or instruction.*
[170] AIR 1978 SC 1675 at 1693.

If solitary confinement is a revolt against society's human essence, there is no reason to permit the same punishment to be smuggled into the prison system by naming it differently. Law is not a formal label, nor logomachies but a working technique of justice.[171]

Justice Desai' Judgement is of more importance he delivered a separate judgment he observed:

Solitary confinement has a degrading and dehumanizing effect on prisoners. Constant and unrelieved isolation of a prisoner is so unnatural that it may breed insanity. Social isolation represents the most destructive abnormal environment. Results of long solitary confinement are disastrous to the physical and mental health of those subjected to it[172].

In *Kishore Singh v State of Rajasthan*[173] court held that solitary confinement could be imposed only in 'rarest of rare cases' only. The Apex Court keeping in view the human rights and recognizing human dignity forbade putting prisoners in bar fetters.[174] The human rights conscious Supreme Court took the matter of bar fetter to a reasonable extent in *Prem Shankar Shukla v Delhi Administration.*[175] Justice Krishna Iyer Rightly observed:

Handcuffing in prima facie inhuman and, therefore, unreasonable, is over- harsh and at he first flush, arbitrary. Absent of fair procedure and objective monitoring, to inflict 'irons' is resort to zoological strategies repugnant to Article 21.[176]

---

[171] *Ibid* at 1700.

[172] *Ibid* at 1728.

[173] AIR 1981 SC 625. *See* also *Rakesh Kumar* Case, AIR 1981 SC 1767.

[174] *Sunil Batra v Delhi Administration,* AIR 1978 SC 1675, See also , *Kadra Pahadiya v State of Bihar,* AIR 1981 SC 939, where four young tribal boys were put in leg irons, the court held it a gross violation of human rights, *Kishore Singh v State of Rajasthan,* AIR 1981 SC 625 where three prisoners were kept in bar fetters.

[175] AIR 1980 SC 1535.

[176] *Ibid* at 1541, *See* also *Aeltemesh Rein v Union of India,* AIR 1988 SC 1768, where advocates practicing in Delhi were handcuffed, *Delhi Judicial Service Asson. Tis Hazari Court v State of Gujarat,* AIR 1991 SC 2176, where Inspector of Police of Nadiad PS arrested, assaulted and handcuffed the Chief Judicial Magistrate. The guilty police was given simple imprisonment of six month and fine of Rs. 200.

The problem of police violent incident, agony and handcuffing squarely reached the court in *Khedat Mazdoor Chetna Sangath*,[177] where the lower judiciary joined hands with the police. It is important to note that the legitimate option to hand cuffing in extraordinary cases were never prohibited by the court and it is illegitimate handcuffing without judicial order which was hit by *Article* 21.[178] To curb terrorism handcuffing may be felt necessary the court tried to make balance between liberty and security of the person.

IV. Pre-trial and administrative detention

Pre-trial and administrative detention raises a number of concerns in the context of state action against terrorism. The United Nations and regional systems all emphasize certain core principles including the necessity of judicial control, the right of accused persons to know the charges at issue, and limits on the length of pre-trial detention.

A. UNITED NATIONS[179]

The Human Rights Committee addressed the question of pre-trial and administrative detention on grounds of public security in its General Comment No. 8 on *Article* 9 of the Covenant:

If so-called preventive detention is used, for reasons of public security, it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal

---

[177] *Khedat Mazdoor Chetna Sangath v State of M. P,* AIR 1995 SC 31, in this case the police officials handcuffed tribal's, *See, State of Maharashtra v Ravi Kant S. Patil,* (1991) 2 SCC 373, an under- trial prisoner was handcuffed and taken through streets in a procession by police during investigation.

[178] B. P. Dwivedi, *The Changing Dimension of Personal Liberty in India,* 1998, Wadhwa & Company, Allahabad, at 157-158.

[179] *See,* Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights While Countering Terrorism, www.unorg.com.

charges are brought in such cases, the full protection of *Article* 9(2) and (3), as well as *Article* 14, must also be granted.[180]

i. Judicial control and prohibition of arbitrary detention

Although *Article* 9 of the Covenant[181], including its provisions for judicial control, is not specified as non-derogable under states of emergency in Article 4, paragraph 2, the Human Rights Committee has opined there is no justification for derogation from these guarantees during the emergency situation. The presumption of innocence should be respected.[182] In *Fals Borda v. Colombia*[183], the Human Rights Committee considered a case where the alleged victims had been detained under an emergency law:

> *On 21 January 1979, Mr. Fals Borda and his wife, Maria Cristina Salazar de Fals Borda, were arrested by troops of the Brigade de Institutos Militates under Decree No. 1923. Mr. Fals was detained incommunicado at the Cuartel de Infanteria de Usaquin, from 21 January to 10 February 1979 when he was released without charges. Mrs. Fals continued to be detained for over one year. Mr. and Mrs. Fals Borda were released as a result of court decisions that there was no justification for their continued detention. They had not, however, had a possibility themselves to take proceedings before a court in order that that court might decide without delay on the lawfulness of their detention.*

A. European Court of Human Rights

The European Court of Human Rights has already noted on a number of occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems. This does not mean, however, that the investigating authorities have carte blanche under *Article* 5 to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, the Convention supervisory institutions involve whenever they

---

[180] *General Comment No. 8, para 4 (1982).*
[181] *ICCPR.*.
[182] *General Comment No. 29, CCPR/C/21/Rev.1/Add.11, 2001 (para. 16).*
[183] *Fals Borda v. Colombia, Case No. 46/1979, Views adopted on 27 July 1982 (para. 12.3).*

choose to assert that terrorism.[184]

B. Inter-American System

Article 7 of the Convention[185] contains specific guarantees against illegal or arbitrary detentions or arrests, as described in clauses 2 and 3, respectively. Pursuant to the first of these provisions, no person may be deprived of his or her personal freedom except for reasons, cases or circumstances expressly defined by law (material aspect) and, furthermore, subject to strict adherence to the procedures objectively set forth in that law (formal aspect). The second provision addresses the issue that no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality.[186] The American Convention on Human Rights, at *Article* 27(2), expressly includes "*judicial guarantees essential for the protection of non-derogable rights*", in its list of non-derogable rights.[187]

C. African Commission on Human and Peoples' Rights

All the victims were arrested and kept in detention for a lengthy period under the State Security (Detention of Persons) Act of 1984 and State Security (Detention of Persons) Amended Decree No. 14 (1994), that stipulates that the government can detain people without charge for as long as three months in the first instance. The decree also states that the courts cannot question any such detention or in any other way intervene on behalf of the detainees. This decree allows the government to arbitrarily hold people critical of the

---

[184] *Ocalan v. Turkey, ECHR, 12 March 2003 (para. 106); 42ILM 257 (2003) at 278.*
[185] American Convention of Human Rights, 1969.
[186] *Gangaram Panday Case, I/A Court H.R., Judgment of January 21, 1994 (para46- 47).*
[187] *It must be understood that the declaration of a state of emergency --whatever its breadth or denomination in internal law -- cannot entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires the States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency.*

government for up to 3 months without having to explain themselves and without any opportunity for the complainant to challenge the arrest and detention before a court of law. The decree therefore prima facie violates the right not to be arbitrarily arrested or detained protected in *Article* 6 of the African Charter on Human and Peoples' Rights[188].

D. Indian Position

The Preventive Detention Act, 1950 was originally passed for one year but was extended periodically upto 1969. During this period the Act was challenged for its validity and Parliament continued to amend it. Again in 1971, need was felt to frame another Preventive Detention Act with object to *"maintain internal security"*. And this was the infamous Maintenances of International Security Act,[189] which was later grossly misused to scuttle all political opposition during emergency (1975 1977). The Act gave extraordinary powers to the executives, the misuse of which was observed by the Supreme Court:

> *"It turned into an engine of oppression posing threat to democratic way of life"*[190]

The total route to the Congress Party, during the March, 1977General Election could be taken as a *"measure of public resentment against the abuse of* Maintenances of International Security Act*"*. Janata Party Government fulfilling one promise of its poll- promise and repealed Maintenances of International Security Act on July 3, 1978. Though Maintenances of International Security Act was gone, yet the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 along with Prevention of Black marketing and Maintenance of Supplies of Essential

---

[188] *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation case, Comm. No. 137/94, 139/94, 154/96 and 161/97, 12th Annual Activity report 1998 - 1999 (para. 83).*

[189] Maintenance of Internal Security Act, 1971.

[190] *Bankhat Lal v. State of Rajasthan,* AIR 1975 SC 522.

Commodities Act, 1980 continued. Soon the need was felt to frame another Preventive Detention Act, to tackles communalism and extremist activities. The National Security Act (NSA) was formulated in 1980 with the object to "*cope with extremist activities, industrialist unrest and increasing tendency on the part of various interested parties to engineer agitations on different issues*"[191]

Terrorist And Disruptive Activities Act allowed for people to be detained in police custody for up to six months without charge or trial. While Prevention of Terrorism Ordinance limits this period to three months, the potential for abuse and arbitrary detention is just as high. Prevention of Terrorism Ordinance also lacks any provision to challenge the sufficiency of evidence cited by the prosecution for trial. As with Terrorist and Disruptive Activities Act, detainees are therefore likely to languish in prison without any evidence or formal charges being brought against them. In fact, detention of persons under Terrorist and Disruptive Activities Act continues to this day for offences allegedly committed before the law lapsed – a practice that authorities reportedly abuse through the spurious backdating of violations. Those newly detained join thousands of others who continue to be held under a provision authorizing their continued detention, even though the law itself is no longer in force. The period of police remand has been increased to 30 days from 15 days, and the period of judicial remand of 60 days has been increased to 90 days. The special court can even extend the period of investigation to 180 days whereas the law at present is that every accused gets bail after 90 days if the charge sheet is not presented and he is in custody. The right of anticipatory bail has been taken away and the right to bail is only available if the court is satisfied that there are grounds for believing that the suspect is innocent and not guilty of committing such offence. In practice, this is virtually an impossible condition to fulfill.

[191] 1996 Cri. LJ Journal Section 17 at 19.

ii. Charges and right to be informed of the reasons for arrest

A. UNITED NATIONS

The periods of detention without charge under the Offences against the State Act have been increased, that persons may be arrested on suspicion of being about to commit an offence, and that the majority of persons arrested are never charged with an offence. The application of the Act raises problems of compatibility with *Articles* 9 and 14, paragraph 3 (g), of the Covenant.[192] While noting the State party's reservation to *Article* 9 of the Covenant, the Committee considers that this reservation does not exclude, *inter alia*, the obligation to comply with the requirement to inform promptly the person concerned of the reasons for his or her arrest.[193]

B. European Court of Human Rights

Because of the attendant risk of loss of life and human suffering, the police are obliged to act with utmost urgency in following up all information, include information from secret sources. Further, the police may frequently have to arrest a suspected terrorist on the basis of information which is reliable but which cannot, without putting in jeopardy the source of the information, be revealed to the suspect or produced in court to support a charge.

C. Indian position

The Supreme Court has recognized certain rights, which are fundamental to the person arrested. For example the right to be informed of the ground for arrest, right to be informed of right to bail, right to be produced before a magistrate without delay, right not to be detained for more than 24 hours without judicial scrutiny, right to consult a legal practitioner, right of an

---

[192] *A/55/40, para 422-451 (2000).*
[193] *CCPR/C/79/Add.81, para. 24 (1997).*

arrested indigent person to free legal aid and to be informed about it[194]. It leads to an irresistible conclusion that the power to arrest a person accused of a cognizable offence is not unfettered and registration of a cognizable offence ipso facto does not necessitate arrest. The question of arrest would not arise until the police officer has reasons to suspect commission of an offence. Normally the Court should not interfere with the process of investigation or the power of the police officer to arrest a person accused of a cognizable offence offences except in rare of the rarest cases and on proof of the fact that the police has not acted reasonably and honestly the court can inquire into the matter. Despite all these safeguards there are innumerable cases of police atrocities. Torture is regarded by the police officer as normal practice to check information regarding crime to extract confession. Police officer who is supposed to be protectors of the civil liberties of citizens themselves violates precious rights of citizens. It is committed under the shield of uniform, and the authority in the four walls of the police station at lock up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law enforcing officers is a matter of deep concern. There has been increasing domain of the police in India, from Social, Political, Games, Religion and the same. The justification that is always forwarded is that of the social justice, but these delicate issues can be determined by the bodies like that of tribunal, Courts and the same. The increasing policing are never questioned until the matters reach the Court. All this reflects on one need and that is of increasing regulations over the use of the power by the police.

Terrorists and Disruptive Activities Act, 1985 Under Terrorist and Disruptive Activities Act, similar procedure as Cr.P.C. is to be followed. The courts however had cautioned that Terrorist and Disruptive Activities Act, being a special act, arrest under it should be made only in exceptional circumstances. Legislative intention for enacting the Terrorist and Disruptive Activities Act was to confine the applicability of the Act to secessionist or

[194] *D. K. Basu v State of West Bengal,* AIR 1997 SC 610.

insurgency activities against the State and not to ordinary crimes for which provisions exist. It does not matter if there is a delay between arresting a person and filling a charge sheet under Terrorist and Disruptive Activities Act. Under Section 12(4) of the Terrorist and Disruptive Activities Act a Designated Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before a Court of Session, albeit subject to the other provisions of the Act, and therefore the same guidelines and procedure as under Chapter XVII of the court can be followed. If a person is arrested and convicted along with Terrorist and Disruptive Activities Act, under the provisions of any penal code, it is open for the designated court to award sentences as in provided by penal code. If the accused is charge sheeted under Terrorist and Disruptive Activities Act, but becomes the duty of the prosecution to prove all charges beyond all reasonable doubt.

The following guidelines have been laid by the Supreme Court as to the process of arrest[195]:

I. Inform the arrested person as to the grounds of his arrest. As and when the person is arrested he should be informed as to the grounds of his arrest so that he may take up a reasonable defence about the same. There is a duty on the part of the arresting authority to do the same.

II. Present before the Magistrate within 24 hours: In case the arrested person is not presented before the Magistrate within 24 hours, it would be considered as illegal arrest.

III. When the police arrest a person, the police will govern intimation of the fact of such arrest to legal aid cell of the district concerned.

IV. Whenever any illegal detention is brought to the notice of sessions judge of the district by any person, the session judge of the district shall make a surprise visit of the police lock-up to find out whether

[195] *Ibid.*

any person is detained in the police lock up without being produced before the concerned Magistrate in contravention of section 57 of Cr.P.C and section 55 of the Cr.P.C.

V. As far as the identification is concerned: (i) At the time of arrest of any person for a crime, while noting his ID marks, photos must be taken and made of records. (ii) Such photographs should be submitted to court while filing charge sheet. (iii) The same procedure should be followed while filing appeals (iv) Concerned arresting officer who arrested the accused should authenticate the photograph taken. (v) In all sessions case when warrant of arrest is issued the photographs and marks to be crossed checked.

To lay down the guidelines is one thing, and it is totally different to have the policies and guidelines implemented by the Judiciary. The Magistrate can use the following tools to get the guidelines by the Court implemented in a more effective manner:

- When a complaint is made to the Magistrate that any person has been in the custody for more than 24 hours, then, he shall call upon the concerned police officer to state in affidavit whether the allegations made are true?
- Police officer has to state whether he had arrested any person or not? And where is the arrested person at the time of filing of the affidavit?
- Such affidavit be filed within two days, as the police officer is aware of the fact where the arrested person is.
- Such arrested person should be presented before the Magistrate within 24 hours, and the Magistrate should then take appropriate action against the arrested person.
- If no such affidavit is filed, then it is to be regarded as Contempt of Court, and such officer is guilty of Criminal Contempt of Court

iii. Prolonged pre-trial or administrative detention

A. UNITED NATIONS

Concerning special legislation on armed groups, the Human Rights Committee notes with concern that the duration of pretrial detention can continue for several years and that the maximum duration of such detention is determined according to the applicable penalty. The Committee invites the State party to reduce the duration of pretrial detention and to stop using duration of the applicable penalty as a criterion for determining the maximum duration of pretrial detention.[196]

B. Inter-American System

The purpose of the principle of "*reasonable time*" to which *Articles* 7(5) and 8(1) of the American Convention refer is to prevent accused persons from remaining in that situation for a protracted period and to ensure that the charge is promptly disposed of.[197]

The right to the presumption of innocence requires that the duration of preventive detention not exceed the reasonable period of time cited in *Article*. Otherwise, such imprisonment takes on the nature of premature punishment, and thus constitutes a violation of *Article* 8.2 of the American Convention.

The principle of the rule of law that establishes the need for criminal prosecution of all crimes by the State, cannot justify an unlimited length of time to resolve the criminal matter. Otherwise, there would be an implicit assumption that the State always prosecutes guilty people and that thus the length of time taken to convict the accused is irrelevant. By international standards, all persons accused of a criminal offense must be considered innocent until proven guilty.

---

[196] *CCPR/C/79/Add.61, paras. 12, 18 (1996).*

[197] Suárez Rosero Case, I/A Court H.R., Judgment of November 12, 1997 (paras. 70, 72).

The right to defense also guaranteed in the Convention under *Article* 8(2)(f) is threatened by lengthy incarceration without conviction because, in some cases, it increases the defendant's difficulty in mounting a defense. With the passing of time, the limits of acceptable risks that are calculated into the defendant's ability to present evidence and counterarguments are enhanced. The possibility to convene witnesses diminishes as well as the strength of any counterarguments[198].

C. Indian position

In *Hussainara Khatoon v State of Bihar,*[199] Justice Bhagwati observed:

> *"A procedure which keeps large number of people behind bars without trial for long, cannot possibly be regarded as "reasonable, just or fair" so as to be in conformity with the requirement of Art. 21. It is necessary, therefore, that the law as enacted by the Legislature and as administered by the courts must radically change its approach to pre-trial detention and ensure `reasonable, just and fair' procedure which has a creative connotation after the decision of the Supreme Court in Maneka Gandhi's case."*[200]

Article 21 confers fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that *Article* that some semblance of a procedure should be prescribed by law, but that the procedure should be "reasonable, fair and just". If a person is deprived of his liberty under a procedure which is not "reasonable fair or just", such deprivation would be violative of his fundamental right under Art. 21 and he would be entitled to enforce such fundamental right and secure his release. Any procedure prescribed by law for depriving a person of his liberty cannot be "reasonable, fair or just" unless that procedure ensures a speedy trial for determination of the guilt of such person. According to PATHAK, J's Observation:

> *"It is indisputable that an unnecessarily prolonged detention in prison of under trials before being brought to trial is an affront to all civilized*

---

[198] *Case 11.245, Report N° 12/96, Giménez case, Annual Report of the IACHR 1995 (paras.* 78-81).
[199] AIR 1979 SC 1360.
[200] *Ibid.*

norms of human liberty. Any meaningful concept of individual liberty that forms the bedrock of a civilized legal system must view with distress patently long periods of imprisonment before persons awaiting trial can receive the attention of the administration of justice. The primary principle of criminal law is that imprisonment may follow a judgment of guilt. But should not precede it."

iv. Incommunicado Detention

A. UNITED NATIONS

The Human Rights Committee has expressed concern over the risks inherent in the practice of incommunicado pre-trial detention, including the possibility of infliction of torture or ill treatment:

The Committee expresses concern at the maintenance on a continuous basis of special legislation under which persons suspected of belonging to or collaborating with armed groups may be detained incommunicado for up to five days ... [and] emphasizes that those provisions are not in conformity with Articles 9 and 14 of the Covenant. It urges the State party to abandon the use of incommunicado detention[201].

B. Inter-American System

The Inter-American Commission and Court have consistently indicated that, not only may no one be deprived of liberty except in the cases or circumstances expressly provided by law, but further, any deprivation of liberty must strictly adhere to the procedures defined there under. The failure to comply with such procedures creates the possibility, and eventually the probability of abuse of the rights of detainees. Where detention is not ordered or properly supervised by a competent judicial authority, where the detainee may not fully understand the reason for the detention or have access to legal counsel, and where the detainee's family may not be able to locate him or her promptly, there is clear risk, not just to the legal rights of the detainee, but also to his or her personal integrity[202].

---

[201] *CCPR/C/79/Add.61, paras. 12, 18 (1996).*

202 IACHR, OEA/Ser.L/V/II.111 doc. 21 rev., 6 April 2001, Chapter VII (para. 37).

C. Indian position

"Significant human rights abuses included: Extra-judicial killings, including faked encounter killings, custodial deaths throughout the country, and excessive use of force by security forces combating active insurgencies in Jammu and Kashmir and several north-eastern states; torture and rape by police and other agents of the government; poor prison conditions; arbitrary arrest and incommunicado detention in Jammu and Kashmir and the northeast; continued detention throughout the country of thousands arrested under special security legislation; lengthy pre-trial detention without charge; prolonged detention while undergoing trial; occasional limits on freedom of the Press and freedom of movement; harassment and arrest of human rights monitors; extensive societal violence against women; legal and societal discrimination against women; forced prostitution; child prostitution and female infanticide; discrimination against persons with disabilities; serious discrimination and violence against indigenous people and scheduled castes and tribes; widespread intercaste and communal violence; religiously motivated violence against Muslims and Christians; widespread exploitation of indentured, bonded, and child labour; and trafficking in women and children."[203]

The report says: "The concerted campaign of execution-style killings of civilians by Kashmiri and foreign-based militant groups continued and included several killings of political leaders and party workers. Separatist guerrillas were responsible for numerous, serious abuses, including killing of armed forces personnel, police, government officials, and civilians; torture; rape; and other forms of brutality."[204]

The criminalization of "abetting" a terrorist, which had been struck down in TADA by the Indian Supreme Court, was revived under Prevention of Terrorism Act. It criminalizes the membership of an organization labeled "terrorist" by the Central Government, regardless of criminal intent or activity.

---

203 Ranabir Ray Choudhury, *India Scores in Human Rights Report*, Hindu Business Line, Monday, Mar 01, 2004.

204 *Ibid.*

The statute, however, was silent as to how the State must prove that a person indeed is part of such a terrorist organization. Section 20 of Prevention of Terrorism Act presumes that an individual charged with being a member of a terrorist organization is a terrorist unless that person can show that he or she has not participated in terrorist activities and that the organization itself was not declared illegal by the State at the time when the person joined. Hence by placing this type of onus on the individual, the State inevitably inhibits those peaceful persons who might wish to join a non-mainstream association but fear that doing so could subject them to potential arrest, or at the very least to the hassle of having to prove their innocence.

Furthermore, Section 57 of the Prevention of Terrorism Act gives governmental authorities immunity from prosecution under Prevention of Terrorism Act, as long as the actions taken to combat terrorism are done in good faith. Prevention of Terrorism Act had also retained the admissibility of confessions, a provision that many had pointed to as one of the sources of the high incidences of torture and brutality during Terrorist and Disruptive Act interrogations. Terrorist acts were placed outside the parameters of the criminal procedure code, which has been established to balance the rights of criminal defendants with the interests of the State. Moreover, Prevention of Terrorism Act had established special Courts to handle cases of terrorism. These special Courts were vested with the discretion to hold trials in non-public places such as prisons and would have the power to withhold trial records from the public.

Under section 49(2), of Prevention of Terrorism Act the police may place a suspected terrorist in jail for up to ninety days without any Court proceedings. The abovementioned period may be extended by another three months if the prosecution submits a report to the Court explaining the State's need for additional time. When an individual is charged under Prevention of Terrorism Act, section 49(7) permits the denial of bail to the accused for up to one year, as long as the prosecution's opposition to the bail request satisfies

the Court.

Section 52(4) States that the accused is not entitled to have a lawyer "present throughout the period of the police interrogation." Section 14 additionally States that "any individual" (not excluding defense lawyers) is obligated to provide to the State information of anyone who may be in violation of Prevention of Terrorism Act. These limitations contravene the spirit of the United Nations Basic Principles on the Role of Lawyers [hereinafter BPRL] in two major ways. Firstly, *Article* 1 of the BPRL mandates that clients should have access to their lawyers during an entire police interrogation. Secondly, *Article* 22 of the BPRL emphasizes that the confidentiality between a lawyer and a client must be respected by the State; any effort to undermine this relationship is incompatible with international norms on the rights of the detained. On the 11th of July, 2002, in the State of Tamil Nadu, Vaiko, a leader of the opposition political party, was arrested and charged for the violation of section 21 of Prevention of Terrorism Act which prohibits the promotion of any terrorist group explicitly banned by the statute. Viko had made remarks in support of the Liberation Tigers of Tamil Eelam, an organization deemed terrorist by the central government.

In *Gulam Sarwar v Union of India,*[205] Supreme Court has stated that the principle of *res judicata* does not apply to writ of *habeas corpus* as this writ is directed against a "fundamentally lawless order".

V. Right to fair trial

The concept of fair trial is a constitutional 'imperative and is explicitly recognized as such in the specific provisions of the Constitution including *Article*s 14, 19, 21, 22 and 39A of the Constitution as well as the various provisions of the Code of Criminal Procedure 1973 (Cr.P.C). The right to fair trial is also explicitly recognized as a human right in terms of *Article* 14 of the

[205] AIR 1967 SC 335.

International Covenant on Civil and Political Rights (ICCPR) which has been ratified by India and which now forms part of the statutory legal regime explicitly recognized as such under Section 2(1) (d) of the Protection of Human Rights Act, 1993. Violation of a right to fair trial is not only a violation of fundamental right under our Constitution but also violative of the internationally recognized human rights as spelt out in the International Covenant on Civil and Political Rights to which India is a party. Whenever a criminal goes unpunished, it is the society at large, which suffers because the victims become demoralized, and criminals encouraged. It therefore, becomes duty of the Court to use all its powers to unearth the truth and render justice so that the crime is punished. It is, therefore, imperative in the interests of justice for the Hon'ble Supreme Court, in exercise of its powers under *Article* 142 of the Constitution, to lay down guidelines and directions in relation to protection of witnesses and victims of crime in criminal trials which can be adhered to both by the prosecuting and law enforcement agencies as well as the subordinate judiciary. This is essential in order to enhance the efficacy of the criminal justice delivery system.

The Commission has also filed a separate application under Section 406 Cr.P.C. before the Supreme Court for transfer of four other serious cases, namely, the Godhra incident, Chamanpura (Gulburga society) incident, Naroda Patiya incident and the Sadarpura case in Mehsana district, for their trial outside the State of Gujarat.

The Supreme Court of India has considered the right to silence in a three-Judge Bench in *Nandini Satpati vs. P.L. Dani*[206] where the Supreme Court followed the earlier English law and the judgment of the American Supreme Court in Miranda. Krishna Iyer J observed that the accused was entitled to keep his mouth shut and not answer any questions if the questions were likely to expose him to guilt. This protection was available before the trial and during the trial. The learned Judge observed as follows:

> *"...Whether we consider the Talmudic Law or the Magna Carta, the Fifth Amendment, the provisions of other constitutions or Article 20(3), the driving force behind the refusal to permit forced self*

[206] AIR 1978 SC 1025.

incrimination is the system of torture by investigators and courts from medieval times to modern days. Law is response to life and the English rule of the accused privilege of silence may easily be traced as a sharp reaction to the Court of Star Chamber when self-incrimination was not regarded as wrongful. Indeed then the central feature of the criminal proceedings, as Holdsworth noted, was the examination of the accused."

Supreme Court of India in *People's Union for Civil Liberties v. Union of India*, observed[207]:

> "The protection and promotion of human rights under the rule of law is essential in the prevention of terrorism. Here comes the role of law and court's responsibility. If human rights are violated in the process of combating terrorism, it will be self-defeating. Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights. The lack of hope for justice provides breeding grounds for terrorism. Terrorism itself should also be understood as an assault on basic rights. In all cases, the fight against terrorism must be respectful to the human rights. Our Constitution laid down clear limitations on State actions within the context of the fight against terrorism. To maintain this delicate balance by protecting "core" human rights is the responsibility of court in a matter like this. Constitutional soundness of POTA needs to be judged by keeping these aspects in mind."[208]

Key aspects of the right to fair trial are essential to respecting human rights while countering terrorism, including in states of emergency. All systems have stressed the fundamental importance of the presumption of innocence. In addition, all systems have expressed deep concern about the trial of civilians before military and other special tribunals.

1. Presumption of innocence and other rights

A. United Nations

Safeguards related to derogation, as embodied in *Article* 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these

---

[207] (2004) 9 SCC 580.

[208] *Ibid* at 596.

guarantees during other emergency situations. The principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected.[209]

B. European Court of Human Rights

In the *Brogan case*, the Court concluded that the fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism was not, on its own, sufficient to ensure compliance with the specific requirements of *Article* 5 § 3 of the Convention.

C. Inter-American System

The right of every person accused of a criminal offense to be presumed innocent until his guilt is fully proven is a principle set forth ... in the American Convention on Human Rights.[210]

2. Military and other Special Courts

A. UNITED NATIONS

The Human Rights Committee has considered, in a number of cases and concluding observations, the nature of tribunals with competence to try offences related to terrorism or state security. In this regard, the Committee has often addressed the role of the military and military courts.

> *The Committee is concerned that the military and members of security or other forces allegedly continue to exercise special powers over civilians and civilian authorities, including judicial authorities, granted to them through the establishment of Special Public Order Zones by decrees no longer in force. The Committee is particularly concerned that the military exercise the functions of investigation, arrest, detention*

---

[209] *General Comment No. 29,CCPR/C/21/Rev.1/Add.11, para 11, 16 (2001), See also General Comment No. 13 (on article 14 of the Covenant).*

[210] IACHR, OEA/Ser.L/V/II.53, doc. 25, ch. IV, 30 June 1981 (para. 9).

and interrogation.[211]

The Committee notes with concern that military courts have broad jurisdiction. It is not confined to criminal cases involving members of the armed forces but also covers civil and criminal cases when, in the opinion of the executive, the exceptional circumstances of a particular case do not allow the operation of the courts of general jurisdiction. The Committee notes that the State party has not provided information on the definition of "exceptional circumstances" and is concerned that these courts have jurisdiction to deal with civil and criminal cases involving non-military persons, in contravention of *Articles* 14 and 26 of the Covenant. The State party should adopt the necessary legislative measures to restrict the jurisdiction of the military courts to trial of members of the military accused of military offences[212].

Under the decree in question, military courts, regardless of whether the defendant is a civilian or a member of the military or security forces, try cases of treason. In this connection, the Committee expresses its deep concern that persons accused of treason are being tried by the same military force that detained and charged them, that the members of the military courts are active duty officers, that most of them have not received any legal training and that, moreover, there is no provision for sentences to be reviewed by a higher tribunal. These shortcomings raise serious doubts about the independence and impartiality of the judges of military courts[213].

The Committee expresses concern about the broad scope of the jurisdiction of military courts in [the State party], especially its extension beyond disciplinary matters and its application to civilians. It is also concerned about the procedures followed by these military courts, as well as the lack of supervision of the military courts' procedures and verdicts by the ordinary courts.[214]

The Committee ... notes with concern that military courts in certain cases may try civilians, including betrayal of State secrets, espionage and

---

[211] *CCPR/C/79/Add.76, para. 19 (1997)*
[212] *CCPR/CO/71/UZB, para. 15 (2001)*
[213] *CCPR/C/79/Add.67, para. 350 (1996)*
[214] *CCPR/C/79/Add.78, para. 14 (1997)*

State security. Therefore, the Committee recommends that the Criminal Code be amended so as to prohibit the trial of civilians by military tribunals in any circumstances.[215]

B. European Court of Human Rights

The Court points out that in several previous judgments..., it noted that certain aspects of the status of military judges sitting in the State Security Courts that had convicted the applicants in those cases raised doubts as to the independence and impartiality of the courts concerned. The applicants in those cases had had legitimate cause to fear that the presence of a military judge on the bench might have resulted in the courts allowing themselves to be unduly influenced by considerations that were not relevant to the nature of the case.[216]

What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. In deciding whether there is a legitimate reason to fear that a particular court lacks independence and impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts could be held justified.[217]

C. Inter-American System

Transferring jurisdiction from civilian courts to military courts, thus allowing military courts to try civilians accused of treason, means that the competent, independent and impartial tribunal previously established by law is precluded from hearing these cases. In effect, military tribunals are not the tribunals previously established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviors that violate military duties. When a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, a fortiori, his right to due process is violated. That right to due process, in turn, is intimately linked to the very right of access to the courts.

---

[215] *CCPR/C/79/Add.79, para. 20 (1997)*
[216] *Ocalan v. Turkey, ECHR, 12 March 2003 (para. 114).*
[217] *Ibid.*

A basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law. States are not to create "*tribunals that do not use the duly established procedures of the legal process ... to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.*"

D. African Commission on Human and Peoples' Rights

Regarding the issue of the Special Military Tribunal, the Commission is not taking an issue with the history and origin of the laws nor the intention why they were promulgated. What is of concern here to the Commission is whether the said trial conforms to the fair hearing standards under the Charter. The Commission is of the opinion that to answer this question, it must necessarily consider the merits or demerits of the trial, an issue the Government does not want to be involved in.

In the same vein, the Commission considers the arraignment, trial and conviction of Malaolu[218], a civilian by a Special Military Tribunal, presided over by serving military officers, who are still subject to military commands, without more, prejudicial to the basic principles of fair hearing guaranteed by *Article* 7 of the Charter.

E. Indian Position

Terrorist and Disruptive Activities Act, 1985 and 1987 also relied upon the system of established a system of Special Courts ("Designated Courts") and placed restriction on the grant of bail unless the Court recorded the existence of "reasonable grounds for believing" that the accused was "not guilty". The police were given enhanced powers of detention of suspects; provision was made for protection of witnesses and at the same time it was provided that trials under the law shall be speedy by being accorded "precedence" over other cases.

It gave enhanced powers to the investigating police officers in the

---

[218] *Media Rights Agenda case, Comm. No. 224/98, 14th Annual Activity report 2000 - 2001* (paras. 59-62).

matter of seizure of property regarding which there was "reason to believe" to have been derived as a result of terrorist acts, besides provision for attachment and forfeiture of such property. It extended the possible period of detention of a suspect in police custody pending investigation. It made a significant departure from the general law by rendering admissible confession made before a police officer not below the rank of Superintendent of Police.

The Act gave rise to protests by human rights groups questioning the validity of the law on various grounds, mainly that it encroached on certain fundamental rights of the persons arrested and it being an unnecessary departure from the general law arming the executive (police) with unbridled and oppressive powers, without sufficient accountability.

Prevention of Terrorism Act, 2002 was a measure introduced by the State to adopt twin-legged strategy, one dealing with the terrorism as a crime, and the other for steps that could be termed as preventive in nature. Learning from past experience in the enforcement of Special anti-terrorism legislation adopted earlier in the country, and conscious of the fact that the extra-ordinary nature of the powers and procedure provided by this new special law were prone to abuse for ulterior purposes by law enforcing agencies and pressure groups, the Legislature declared its intent to prevent such misuse by referring to the fact that "sufficient safeguards" were being engrafted in the law.

Prevention of Terrorism Act, 2002 would confer special powers of arrest or detention of suspected terrorists, of seizure and forfeiture of terrorist property, for prohibiting and penalizing terrorist funding, the interception of communication amongst suspects and for dealing with terrorist organizations by, *inter alia*, making their membership an offence. Prevention of Terrorism Act, 2002 contained revised form of definition of the offence of "terrorist act" requiring, as the first and foremost ingredient, the "intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people".

While reintroducing the related offences of conspiracy, abetment, harboring etc., Prevention of Terrorism Act, 2002 also provided for the offence of "possession" in "notified areas" of unauthorized arms (mainly "prohibited arms and ammunition") or bombs etc and retained enhanced penalty for certain offences under Arms Act, Explosives Act etc., if committed "with intent to aid any terrorist". Prevention of Terrorism Act, 2002 also gave enhanced powers to investigating police officers in the matter of seizure & attachment of property regarding which there was "reason to believe" to be "proceeds of terrorism", giving the power to order "forfeiture". It permitted police custody for a period double than that permissible under the general law and would also moot setting up of Special Court for trial of offences under the Act. The stringent bail provisions were reintroduced.

The law under Prevention of Terrorism Act, 2002 would also permit use of confession made before the police officer rather than a judicial authority. It is significant to note that the safeguards in such regard, which had been introduced by the Supreme Court through the judgment in *Kartar Singh*[219], now found adoption by the legislature as statutory requirements.

Prevention of Terrorism Act, 2002 also provided for measures to deal with organization declared by the executive to be "terrorist organization" making membership of, support to, or activities connected therewith-penal offences. It also made elaborate provisions for interception of communication, authorization for and control/use of intercepted communication.

Besides introduction of statutory safeguards for abuse of power relatable to confession before the police, Prevention of Terrorism Act, 2002 also provided for speedy trials, and introduced the concept of quasi judicial review of the State action vis-à-vis organizations declared to be terrorist organizations besides review of arrest or prosecution of a person for offences under Prevention of Terrorism Act, 2002, thus again respecting the view of

[219] (1994) Cr. L J 3139; (1994) 3 SCC 596.

the judiciary for need for adequate safeguards against abuse of powers by the executive, as declared in *Kartar Singh*[220]. It bears special mention here that the Central Government put the mechanism to use by constituting a Review Committee, under the chairmanship of a former Chief Justice of High Court, and thereby giving to it a High-power status, calling it upon not only to "entertain complaints or grievances" with regard to the "enforcement of" Prevention of Terrorism Act, 2002 and accordingly "give its findings" but also for making suggestions "for removing the shortcomings, if any, in (its) implementation" and measures "to ensure" that provisions of Prevention of Terrorism Act, 2002 were "invoked for combating terrorism only".

It may be added that Prevention of Terrorism Act, 2002 also came with a 'sunset clause' for expiry at the end of three years but came to be repealed ahead of its time with effect from 21st September 2004.

The constitutionality of Prevention of Terrorism Act, 2002 was also challenged before the Supreme Court of India, but found without merit. The judgment on the point is known as *People's Union for Civil Liberties v UOI*[221]. The challenge was on the ground the basic human rights were being violated. The view of the Court in this regard is now well known, namely, that the "protection and promotion of human rights under the rule of law is essential in the prevention of terrorism", involving "court's responsibility" and that if human rights are violated in the process, it will be "self-defeating". It would also voice concern that "lack of hope for justice provides breeding grounds for terrorism" and, therefore, in the fight against terrorism "human rights" will have to be respected.

The Court upheld the constitutional validity of Prevention of Terrorism Act, 2002 in *People's Union for Civil Liberties*[222], but again proceeded to temper the law so as to obviate the vice of arbitrary use by

---

[220] *Ibid.*
[221] AIR 2004 SC 456.
[222] *Ibid.*

giving certain directions. It insisted on the element of *mens rea* for the offence of 'abetment' and on the element of "knowledge of the terrorist act" for the offence of "possession of unauthorized arms". It further added the ingredient of "intent" in the offences relating to membership of, support to, or raising of funds for a terrorists organization.

3. Right to appeal

A. UNITED NATIONS

The Human Rights Committee has addressed the question of the right to appeal under *Article* 14, paragraph 5 of the Covenant, with respect to proceedings conducted by special tribunals. For example:

> *The Human Rights Committee is concerned that there is no appeal provided for against the decisions of the special court.*[223]

The Human Rights Committee expresses concern that persons suspected of belonging to or the Audiencia Nacional without the possibility of appeal judges collaborating with armed groups. [224]

The Human Rights Committee against Torture has also addressed the right to appeal with respect to terrorist offences:

> *The Human Rights Committee against Torture recommends that the State party ... ensure that all persons convicted by decisions of military courts in terrorism cases shall have the right to their conviction and sentence being reviewed by a higher tribunal according to law.*[225]

B. Inter-American System

The right to appeal the judgment, also recognized in the Convention, is not satisfied merely because there is a higher court than the one that tried and convicted the accused and to which the latter has or may have recourse. For a true review of the judgment, in the sense required by the Convention, the

---

[223] *CCPR/C/79/Add.80, para. 23 (1997)*
[224] *CCPR/C/79/Add.61, para. 12 (1996).*
[225] *CAT/C/XXIX/Misc.4, para. 6 (2002).*

higher court must have the jurisdictional authority to take up the particular case in question. It is important to underscore the fact that from first to last instance, a criminal proceeding is a single proceeding in various stages. Therefore, the concept of a tribunal previously established by law and the principle of due process apply throughout all those phases and must be observed in all the various procedural instances. If the court of second instance fails to satisfy the requirements that a court must meet to be a fair, impartial and independent tribunal previously established by law, then the phase of the proceedings conducted by that court couldn't be deemed to be either lawful or valid.[226]

C. Indian Position

The Supreme Court has original, appellate and advisory jurisdiction. Its exclusive original jurisdiction extends to any dispute between the Government of India and one or more States or between the Government of India and any State or States on one side and one or more States on the other or between two or more States, if and insofar as the dispute involves any question (whether of law or of fact) on which the existence or extent of a legal right depends. In addition, *Article* 32 of the Constitution gives an extensive original jurisdiction to the Supreme Court in regard to enforcement of Fundamental Rights. It is empowered to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari to enforce them. The Supreme Court has been conferred with power to direct transfer of any civil or criminal case from one State High Court to another State High Court or from a Court subordinate to another State High Court. The Supreme Court, if satisfied that cases involving the same or substantially the same questions of law are pending before it and one or more High Courts or before two or more High Courts and that such questions are substantial questions of general importance, may withdraw a case or cases pending before the High Court or High Courts and dispose of all

[226] *Castillo Petruzzi et al. Case, I/A Court H.R., Judgment of May 30, 1999 (para. 161).*

such cases itself. Under the Arbitration and Conciliation Act, 1996, International Commercial Arbitration can also be initiated in the Supreme Court.

The appellate jurisdiction of the Supreme Court can be invoked by a certificate granted by the High Court concerned under *Article* 132(1), 133(1) or 134 of the Constitution in respect of any judgement, decree or final order of a High Court in both civil and criminal cases, involving substantial questions of law as to the interpretation of the Constitution. Appeals also lie to the Supreme Court in civil matters if the High Court concerned certifies : (a) that the case involves a substantial question of law of general importance, and (b) that, in the opinion of the High Court, the said question needs to be decided by the Supreme Court. In criminal cases, an appeal lies to the Supreme Court if the High Court (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to imprisonment for life or for a period of not less than 10 years, or (b) has withdrawn for trial before itself any case from any Court subordinate to its authority and has in such trial convicted the accused and sentenced him to death or to imprisonment for life or for a period of not less than 10 years, or (c) certified that the case is a fit one for appeal to the Supreme Court. Parliament is authorised to confer on the Supreme Court any further powers to entertain and hear appeals from any judgement, final order or sentence in a criminal proceeding of a High Court.

The Supreme Court has also a very wide appellate jurisdiction over all Courts and Tribunals in India in as much as it may, in its discretion, grant special leave to appeal under *Article* 136 of the Constitution from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or Tribunal in the territory of India.

The Supreme Court has special advisory jurisdiction in matters which may specifically be referred to it by the President of India under *Article* 143 of the Constitution. There are provisions for reference or appeal to this Court

under *Article* 317(1) of the Constitution, Section 257 of the Income Tax Act, 1961, Section 7(2) of the Monopolies and Restrictive Trade Practices Act, 1969, Section 130-A of the Customs Act, 1962, Section 35-H of the Central Excises and Salt Act, 1944 and Section 82C of the Gold (Control) Act, 1968. Appeals also lie to the Supreme Court under the Representation of the People Act, 1951, Monopolies and Restrictive Trade Practices Act, 1969, Advocates Act, 1961, Contempt of Courts Act, 1971, Customs Act, 1962, Central Excises and Salt Act, 1944, Enlargement of Criminal Appellate Jurisdiction Act, 1970, Trial of Offences Relating to Transactions in Securities Act, 1992, Terrorist and Disruptive Activities (Prevention) Act, 1987 and Consumer Protection Act, 1986. Election Petitions under Part III of the Presidential and Vice Presidential Elections Act, 1952 are also filed directly in the Supreme Court.

Under *Article*s 129 and 142 of the Constitution the Supreme Court has been vested with power to punish for contempt of Court including the power to punish for contempt of itself. In case of contempt other than the contempt referred to in Rule 2, Part-I of the Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975, the Court may take action (a) Suo motu, or (b) on a petition made by Attorney General, or Solicitor General, or (c) on a petition made by any person, and in the case of a criminal contempt with the consent in writing of the Attorney General or the Solicitor General. Under Order XL of the Supreme Court Rules the Supreme Court may review its judgment or order but no application for review is to be entertained in a civil proceeding except on the grounds mentioned in Order XLVII, Rule 1 of the Code of Civil Procedure and in a criminal proceeding except on the ground of an error apparent on the face of the record.

i. PUBLIC INTEREST LITIGATION

Although the proceedings in the Supreme Court arise out of the judgments or orders made by the Subordinate Courts including the High

Courts, but of late the Supreme Court has started entertaining matters in which interest of the public at large is involved and the Court can be moved by any individual or group of persons either by filing a Writ Petition at the Filing Counter of the Court or by addressing a letter to Hon'ble the Chief Justice of India highlighting the question of public importance for invoking this jurisdiction. Such concept is popularly known as 'Public Interest Litigation' and several matters of public importance have become landmark cases. This concept is unique to the Supreme Court of India only and perhaps no other Court in the world has been exercising this extraordinary jurisdiction. A Writ Petition filed at the Filing Counter is dealt with like any other Writ Petition and processed as such. In case of a letter addressed to Hon'ble the Chief Justice of India the same is dealt with in accordance with the guidelines framed for the purpose.

ii. PROVISION OF LEGAL AID

If a person belongs to the poor section of the society having annual income of less than Rs. 18,000/- or belongs to Scheduled Caste or Scheduled Tribe, a victim of natural calamity, is a woman or a child or a mentally ill or otherwise disabled person or an industrial workman, or is in custody including custody in protective home, he/she is entitled to get free legal aid from the Supreme Court Legal Aid Committee. The aid so granted by the Committee includes cost of preparation of the matter and all applications connected therewith, in addition to providing an Advocate for preparing and arguing the case. Any person desirous of availing legal service through the Committee has to make an application to the Secretary and hand over all necessary documents concerning his case to it. The Committee after ascertaining the eligibility of the person provides necessary legal aid to him/her. Persons belonging to middle income group i.e. with income above Rs. 18,000/- but under Rs. 1,20,000/- per annum are eligible to get legal aid from the Supreme Court Middle Income Group Society, on nominal payments.

iii. AMICUS CURIAE

If a petition is received from the jail or in any other criminal matter if the accused is unrepresented then an Advocate is appointed as amicus curiae by the Court to defend and argue the case of the accused. In civil matters also the Court can appoint an Advocate as amicus curiae if it thinks it necessary in case of an unrepresented party; the Court can also appoint amicus curiae in any matter of general public importance or in which the interest of the public at large is involved.

iv. HIGH COURTS

The High Court stands at the head of a State's judicial administration. There are 18 High Courts in the country, three having jurisdiction over more than one State. Among the Union Territories, Delhi alone has a High Court of its own. Other six Union Territories come under the jurisdiction of different State High Courts. Each High Court comprises of a Chief Justice and such other Judges as the President may, from time to time, appoint. The Chief Justice of a High Court is appointed by the President in consultation with the Chief Justice of India and the Governor of the State. The procedure for appointing *puisne* Judges is the same except that the Chief Justice of the High Court concerned is also consulted. They hold office until the age of 62 years and are removable in the same manner as a Judge of the Supreme Court. To be eligible for appointment as a Judge one must be a citizen of India and have held a judicial office in India for ten years or must have practiced as an Advocate of a High Court or two or more such Courts in succession for a similar period.

Each High Court has power to issue to any person within its jurisdiction directions, orders, or writs including *writs* which are in the nature of habeas corpus, mandamus, prohibition, *quo warranto* and certiorari for enforcement of Fundamental Rights and for any other purpose. This power

may also be exercised by any High Court exercising jurisdiction in relation to territories within which the cause of action, wholly or in part, arises for exercise of such power, notwithstanding that the seat of such Government or authority or residence of such person is not within those territories.

Each High Court has powers of superintendence over all Courts within its jurisdiction. It can call for returns from such Courts, make and issue general rules and prescribe forms to regulate their practice and proceedings and determine the manner and form in which book entries and accounts shall be kept.

v. ADVOCATE GENERAL

There is an Advocate General for each State, appointed by the Governor, who holds office during the pleasure of the Governor. He must be a person qualified to be appointed as a Judge of High Court. His duty is to give advice to State Governments upon such legal matters and to perform such other duties of legal character, as may be referred or assigned to him by the Governor. The Advocate General has the right to speak and take part in the proceedings of the State Legislature without the right to vote.

vi. LOK ADALATS

Lok Adalats, which are voluntary agencies monitored by the State Legal Aid and Advice Boards. They have proved to be a successful alternative forum for resolving of disputes through the conciliatory method.

The Legal Services Authorities Act, 1987 provides statutory status to the legal aid movement and it also provides for setting up of Legal Services Authorities at the Central, State and District levels. These authorities will have their own funds. Further, Lok Adalats, which are at present informal agencies, will acquire statutory status. Every award of Lok Adalats shall be deemed to be a decree of a civil court or order of a Tribunal and shall be final and

binding on the parties to the dispute. It also provides that in respect of cases decided at a Lok Adalat, the court fee paid by the parties will be refunded.

VI. Principle of legality (*nullum crimen, nulla poena sine lege*)

International jurisprudence uniformly emphasizes the importance of the principle of *nullum crimen, nulla poena sine lege*, according to which criminal conduct must be defined in law before an offense can be committed, and with sufficient precision so as to prevent arbitrary enforcement. In this connection, it should be noted that the Covenant (at *Article* 4) includes among its non-derogable provisions *Article* 15, under which no one shall be held guilty of any criminal offence on account of any act which did not constitute a criminal offence at the time it was committed.

A. UNITED NATIONS

The Committee is concerned that the relatively broad definition of the crime of terrorism and of membership of a terrorist group under the State party's Criminal Code may have adverse consequences for the protection of rights under *Article* 15 of the Covenant, a provision which significantly is non-derogable under Article 4, paragraph 2.[227]

B. European Court of Human Rights

The Court recalls that the guarantee enshrined in *Article* 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under *Article* 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.[228]

C. Inter-American System

The Court considers that crimes must be classified and described in

---

[227] CCPR/CO/77/EST, *para. 8 (2003).*
[228] *Ecer and Zeyrek v. Turkey, ECHR, 27 February 2001 (para. 29).*

precise and unambiguous language that narrowly defines the punishable offense, thus giving full meaning to the principle of *nullum crimen nulla poena sine lege praevia* in criminal law. This means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behavior with penalties that exact their toll on the things that are most precious, such as life and liberty. Laws of the kind applied in the instant cases, that fail to narrowly define the criminal behaviors, violate the principle of *nullum crimen nulla poena sine lege praevia* recognized in *Article* 9 of the American Convention.[229]

D. Indian Position

The constructional foundations of the crime, including the actus reus, mens rea and legal base are discussed in the Criminal Law. In this discussion, the necessity of approving laws related to the criminal titles is emphasized, and this notion is introduced in the legality principle of crimes and punishments in Criminal Law. This principle is obtained from Latin phrase "nullum crimen, nulla poena sine lege".

Thus, no act whether immoral or against public interest or public order is not considered a crime, if it is not specified by law before. As a result, the criminal judge cannot construe the individuals' acts as crime and assign punishment, even if he proves that it is worthy and useful in respect of the social interests; because the Legislator is the only authority who is able to assign the criminal titles and predict the appropriate punishments as he is the representative of the community and is elected by the individuals of the society. If the Legislator is negligent or inattentive, we cannot let the criminal judge consider as a crime whatever he recognizes to be against the public

[229] *Castillo Petruzzi et al. Case, I/A Court H.R., Judgment of May 30, 1999 (para. 121).*

interest or order, and he should not assign a punishment to it. Moreover, if he does so, he can't interfere with it within the scope of the minimum or maximum of punishment; so he is bound to exert the punishment according to the legal texts.

VII. Access to counsel

The United Nations and regional systems all emphasize the right of access to counsel. It is right of an accused to defend himself by a counsel. The International Commission of Jurists met in Delhi in 1959, stressing the importance of legal representation on behalf of the accused, suspect or under-trial prisoners, observed:

> *Equal access to law for rich and poor alike is essential to the maintenance of the Rule of Law. It is, therefore, essential to provide adequate legal advice and representation to all those threatened as to their life, liberty, property or reputation who are not able to pay for it.*

It is essential that an accused person must be given an opportunity to call and examine witnesses in his defence. He should be permitted to exercise this right in person or through his counsel. Denial of counsel to the accused is tantamount to compel him to face unfair trial.[230]

A. UNITED NATIONS

The Human Rights Committee has addressed the question of access to counsel with respect to pre-trial and administrative detention:

> *The Committee notes with concern that, under the general Terrorism Act 2000, suspects may be detained for 48 hours without access to a lawyer if the police suspect that such access would lead, for example, to interference with evidence or alerting another suspect. Particularly in circumstances where these powers have not been used ... for several years, where their compatibility with Articles 9 and 14, inter alia, is suspect, and where other less intrusive means for achieving the same ends exist, the Committee considers that the State party has failed to justify these powers.*[231]

---

[230] K. I. Vibhuti, *Criminal Justice: A Human Right Perspective of the Criminal Justice Process in India,* (2004), Eastern Book House, at 133.

[231] *CCPR/CO/73/UK, para. 13 (2001).*

The Committee regrets that legal assistance and advice may not be available until a person has been charged.... Steps should be taken to ... ensure that all criminal procedures are brought into compliance with *Articles* 9 and 14 of the Covenant[232].

The Committee is concerned that the accused has no right to contact a lawyer during the initial 72 hours of detention in police custody[233].

B. European Court of Human Rights

The Court ... notes that the applicant was not tried by an independent and impartial tribunal, was not assisted by his lawyers when questioned in police custody, was unable to communicate with them out of hearing of third parties and was unable to gain direct access to the case file until a very late stage in the proceedings. Furthermore, restrictions were imposed on the number and length of his lawyers' visits and his lawyers were not given proper access to the case file until late in the day. The Courts finds that the overall effect of these difficulties taken as a whole, is so restricted that the rights of the defence that the principle of a fair trial, as set out in *Article* 6, was contravened. There has therefore been a violation of *Article* 6 § 1, taken together with *Article* 6 § 3 (b) and (c)[234].

In the Court's opinion, to deny access to a lawyer for such a long period [48 hours] and in a situation where the rights of the defence were irretrievably prejudiced is – whatever the justification for such denial – incompatible with the rights of the accused under *Article* 6.[235]

C. Inter-American System

In the Basic Principles on the Role of Lawyers, number 8 under the heading of "*Special safeguards in criminal justice matters*" sets out the proper standards for an adequate defense in criminal cases. It reads as follows:

---

[232] A/55/40, paras.422-451 (2000).
[233] *CCPR/C/79/Add.80, para. 23 (1997).*
[234] *Ocalan v. Turkey, ECHR, 12 March 2003 (para. 169).*
[235] *Magee v. the United Kingdom,* ECHR, 6 June 2000 (para. 44).

All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials....

Mr. Astorga Valdez' conviction illustrates even more vividly what little chance the accused had of putting on an effective defense. In his case, the accused was convicted in the court of last instance, based on new evidence that his defense attorney had not seen and consequently could not rebut.[236]

This particular case illustrates how the work of the defense attorneys was shackled and what little opportunity they had to introduce any evidence for the defense. In effect, the accused did not have sufficient advance notification, in detail, of the charges against them; the conditions under which the defense attorneys had to operate were wholly inadequate for a proper defense, as they did not have access to the case file until the day before the ruling of first instance was delivered. The effect was that the presence and participation of the defense attorneys were mere formalities. Hence, it can hardly be argued that the victims had adequate means of defense.

Article 8(2) (d)-(e) of the American Convention establishes the right of the accused to have the representation of a lawyer. The Commission has interpreted this provision to include the right to have a lawyer present for all important stages of the proceedings, particularly where the defendant is held in detention. Thus, for example, the Commission has noted that procedures which do not allow for the presence of an attorney "*during the first part of the proceeding, in which decisive evidence against the defendant may be produced, could seriously affect his right to a defence*" The Commission has also established the right of a defendant, in general, to have an attorney present when giving a statement or undergoing interrogation.[237]

D. Indian Position

Article 39A of the Constitution of India provides that State shall secure that the operation of the legal system promotes justice on a basis of equal

---

[236] *Castillo Petruzzi et al. Case, I/A Court H.R., Judgment of May 30, 1999 (paras. 139-141).*
[237] IACHR, OEA/Ser.L/V/II.102 doc. 9 rev. 1, 26 February 1999 (para. 97)

opportunity, and shall in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disability. *Article*s 14 and 22(1) also make it obligatory for the State to ensure equality before law and a legal system, which promotes justice on a basis of equal opportunity to all. Legal aid strives to ensure that constitutional pledge is fulfilled in its letter and spirit and equal justice is made available to the poor, downtrodden and weaker sections of the society. Sec. 304, Criminal Procedure Code: The Constitutional duty to provide legal aid arises from the time the accused is produced before the Magistrate for the first time and continues whenever he is produced for remand.

Since 1952, the Govt. of India also started addressing to the question of legal aid for the poor in various conferences of Law Ministers and Law Commissions. In 1960, some guidelines were drawn by the Govt. for legal aid schemes. In different states legal aid schemes were floated through Legal Aid Boards, Societies and Law Departments. In 1980, a Committee at the national level was constituted to oversee and supervise legal aid programmes throughout the country under the Chairmanship of Hon. Mr. Justice P.N. Bhagwati then a Judge of the Supreme Court of India. This Committee came to be known as CILAS (Committee for Implementing Legal Aid Schemes) and started monitoring legal aid activities throughout the country. The introduction of Lok Adalats added a new chapter to the justice dispensation system of this country and succeeded in providing a supplementary forum to the litigants for conciliatory settlement of their disputes. In 1987 Legal Services Authorities Act was enacted to give a statutory base to legal aid programmes throughout the country on a uniform pattern. This Act was finally enforced on 9th of November 1995 after certain amendments were introduced therein by the Amendment Act of 1994.

Section 12 of the Legal Services Authorities Act, 1987 prescribes the criteria for giving legal services to the eligible persons. Section 12 of the Act

reads as under:

Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is-

(a) a member of a Scheduled Caste or Scheduled Tribe;

(b) a victim of trafficking in human beings or Begar as referred to in Article 23 of the Constitution;

(c) a woman or a child;

(d) a mentally ill or otherwise disabled person;

(e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or

(f) an industrial workman; or

(g) in custody, including custody in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act, 1956 (104 of 1956); or in a juvenile home within the meaning of clause

(h) of section 2 of the Juvenile Justice Act, 1986 (53 of 1986) or in a psychiatric hospital or psychiatric nursing home within the meaning of clause

(g) of section 2 of the Mental Health Act, 1987 (14 of 1987); or

(i) In pursuance of the resolutions passed in the First Annual Meet of the State Legal Services Authorities, the income ceiling for eligibility for legal aid and assistance has been already enhanced to Rs.50, 000/- p.a. for legal aid before the Supreme Court of India. Many States have already framed rules enhancing this income ceiling to Rs.25, 000/- p.a. for legal aid up to High Courts. Other States are also taking steps for the amendment of rules in this regard. Rules are also being framed in all the States for the refund of court fees in the suits compromised in Lok Adalats in terms of section 21 of the Legal Services Authorities Act, 1987.[238]

(j) Rules regarding execution of Awards passed by Lok Adalats have been framed in some of the States.

The linkage between *Article* 21 and the right to free legal aid was forged in the decision in *Hussainara Khatoon v. State of Bihar*[239] where the court was appalled at the plight of thousands of undertrials languishing in the jails in Bihar for years on end without ever being represented by a lawyer. The court declared "there can be no doubt that speedy trial, and by speedy trial, we mean reasonably expeditious trial, is an integral and essential part of the

[238] http://causelists.nic.in/nalsa/ visited on 1.08.07.
[239] AIR 1979 SC 1360.

fundamental right to life and liberty enshrined in *Article* 21." The court pointed out that *Article* 39- A emphasised that free legal service was an inalienable element of 'reasonable, fair and just' procedure and that the right to free legal services was implicit in the guarantee of *Article* 21. In his inimitable style Justice Bhagwati declared:

> *"Legal aid is really nothing else but equal justice in action. Legal aid is in fact the delivery system of social justice. If free legal services are not provided to such an accused, the trial itself may run the risk of being vitiated as contravening Article 21 and we have no doubt that every State Government would try to avoid such a possible eventuality".*[240]

Further in the case of *Hussainara Khatoon v. Home Secretary,* [241]State of Bihar, Patna Justice Bhagwati held that: "it's the constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation, to have free legal services provided to him by the State and the State is under a constitutional mandate to provide a free lawyer to such accused person if the needs of justice so require. If free legal services are not provided to such an accused, the trial itself may run the risk of being vitiated as contravening *Article* 21 and it is hoped that every State Government would try to avoid such a possible eventuality."

After Two years, in the case of *Khatri v. State of Bihar*[242], the court answered the question the right to free legal aid to poor or indigent accused who are incapable of engaging lawyers. It held that:

> *"the state is constitutionally bound to provide such aid not only at the stage of trial but also when they are first produced before the magistrate or remanded from time to time and that such a right cannot be denied on the ground of financial constraints or administrative inability or that the accused did not ask for it. Magistrates and Sessions Judges must inform the accused of such rights. The right to free legal services is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held*

---

[240] *Ibid* at 1369.
[241] *Hussainara Khatoon (V) v. Home Secretary* AIR 1979 SC 1818.
[242] AIR 1981 SC 1068 (second case).

implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. The State cannot avoid this obligation by pleading financial or administrative inability or that none of the aggrieved prisoners asked for any legal aid at the expense of the State. The only qualification would be that the offence charged against the accused is such that on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. There may, however, be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal or child abuse and the like, where social justice may require that free legal services need not be provided by the State."

He reiterated this in *Suk Das v. Union Territory of Arunachal Pradesh* [243]and said "It may therefore now be taken as settled law that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by *Article* 21." This part of the narration would be incomplete without referring to the other astute architect of human rights jurisprudence, Justice Krishna Iyer. In *M.H. Hoskot v. State of Maharashtra,* [244]he declared:

> *"If a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal inclusive of special leave to appeal (to the Supreme Court) for want of legal assistance, there is implicit in the Court under Article 142 read with Articles 21 and 39-A of the Constitution, power to assign counsel for such imprisoned individual 'for doing complete justice"*

In *Khatri v. State of Bihar,*[245] Bhagwati J. observed:

> *Right to free legal aid, just, fail and reasonable procedures is a fundamental right (Khatoon's Case). It is elementary that the jeopardy to his personal liberty arises as soon as the person is arrested and is*

---

[243] AIR 1986 SC 991.
[244] AIR 1978 SC 1548.
[245] AIR 1981 SC 928.

produced before a magistrate for it is at this stage that he gets the 1st opportunity to apply for bail and obtain his release as also to resist remain to police or jail custody. This is the stage at which and accused person needs competent legal advice and representation. No procedure can be said to be just, fair and reasonable which denies legal advice representation to the accused at this stage.

In *Indira Nehru Gandhi v. Raj Narain* [246]the Court observed:

"Rule of Law is basic structure of constitution of India. Every individual is guaranteed the its give to him under the constitution. No one so condemn unheard. Equality of justice. There ought to be a violation to the fundamental right or prerogatives, or privileges, only then remedy go to Court of Law. But also at the stage when he first is produced before the magistrate. In absence of legal aid, trial is vitiated."

The assistance of voluntary agencies and social action groups must therefore be taken by the State for the purpose of operating the legal aid programme in its widest and most comprehensive sense, and this is an obligation which flows directly from *Article* 39-A of the Constitution. It is also necessary to lay down norms which should guide the State in lending its encouragement and support to voluntary organizations and social action groups in operating legal aid programmes and organizing legal aid camps and lok adalats or niti melas. We are of the view that the following norms should provide sufficient guidance to the State in this behalf and we would direct that the State Government shall, in compliance with its obligations under *Article* 39-A of the Constitution extend its cooperation and support to the following categories of voluntary organizations and social action groups in running the legal aid programme and organizing legal aid camps and lok adalats or niti melas.

VIII. Freedom of thought, conscience and belief

This right cannot be subject to any derogation under the United Nations or the Inter-American systems. It is, however, subject to derogation

[246]AIR 1975 SC 2299.

in the European system.

A. UNITED NATIONS

The Human Rights Committee is concerned at reports that, since recent terrorist attacks, persons have been the subject of attack and harassment on the basis of their religious beliefs and that religion has been utilized to incite to the commission of criminal acts. The Committee is also disturbed that incidents of violence and intimidation on the basis of religious affiliation ... continue to occur. The State party should extend its criminal legislation to cover offences motivated by religious hatred and should take other steps to ensure that all persons are protected from discrimination on account of their religious beliefs.[247]

B. Indian Position

The Constituent Assembly while framing the present *Article* 21 (*Article* 15 of the Draft Constitution), took into account the fluctuations in the interpretations of liberty and due process of law clause appearing in the Fifth and the Fourteenth Amendments of the Constitutions of the United States. It did not want to leave the terms vague, requiring a judicial interpretation as in the United States. No doubt, the Constitution of India in its draft stage followed the American liberty clause but later on the Constituent Assembly inserted the word liberty in order to differentiate between the two types of rights and to ensure that the word liberty was not misconstrued so as to include even those freedoms already dealt with in *Article* 13 which is present *Article* 19 of the Constitution. Consequently, the import of the word liberty in *Article* 21 of our Constitution is narrowed down to the meaning given in the English Law to the expression liberty of the person or personal freedom, i.e. the right not to be subject to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification.

Article 21 further makes it clear that life or personal liberty can only be deprived according to the procedure established by law. The Assembly

[247] CCPR/CO/73/UK, para 14 (2001).

believed that this provision taken from *Article* 31 of the Japanese Constitution was more specific and would help avoid the repetition of the history of the American due process clause. However, in *Maneka Gandhi v Union of India,*[248] the Supreme Court expanded the ambit of both personal liberty and the procedure established by law. Interpretation by the Supreme Court:

> *It is the judiciary, which defines the scope, and limits of the basic rights and liberties, and the other branches of State are constitutionally required not to encroach on the rights that are given Constitutional protection. Judicial consideration has always been there with regard to solving of any dispute*[249].

Over the years, a notable achievement of the Supreme Court has been not only to resurrect *Article* 21 from the oblivion into which it was relegated by the Courts own decision as early as 1950 in *A.K.Gopalan v State of Madras*[250], but to give it such an expansive and liberal interpretation as to raise it to a high pedestal. A dramatic transformation has occurred in the fortunes since 1978, giving a very good proof of the law creative role played by the Court. *Article* 21 although is worded in negative terms, it is now well established that it has both negative and as well as an affirmative dimension. The Court took an extremely static, mechanical, literal and positivistic view of *Article* 21 in Gopalan's case[251], the very first case which arose immediately after the inauguration of the Constitution. In this case, the Court interpreted *Article* 21 extremely literally and opined that expression procedure established by law only meant any procedure which was laid down in the statute by the competent legislature to deprive a person of his life or personal liberty, and that it was not permissible to read in the *Article* any such concept as natural justice, or the due process of law or reasonableness. Also the Court ruled that each fundamental right was independent of each other and that *Article* 19 did not apply where *Article* 21 applied. *Article* 19 applied to a free man and not to a person in preventive detention. Thus the procedure could not be challenged even if it were not reasonable or not consistent with natural justice.

---

[248] AIR 1978 SC 597.
[249] *Ibid.*
[250] AIR 1950 27.
[251] *Ibid.*

IX. Right to political participation and freedom of expression, opinion and assembly

States may derogate from these freedoms in times of emergency that threaten the life of the nation, provided that they follow the specific requirements pertaining to declaration of the emergency. They also may limit these freedoms in the absence of an emergency for specific reasons mentioned in each relevant human rights treaty. There are, however, conditions that must be met as specified below.

X. Freedom of movement

As with the rights discussed in the previous section, States may derogate from this right in times of emergency that threaten the life of the nation, provided that they follow certain specific requirements. They also may limit the right in the absence of an emergency, under strict limitations contained in the relevant treaty.

A. UNITED NATIONS

Freedom of movement is protected by *Article* 12 of the Covenant. This provision nevertheless allows some restrictions and limitations, addressed by the Human Rights Committee in its General Comment No. 27:

> *Article 12, paragraph 3, provides for exceptional circumstances in which rights under paragraphs 1 and 2 may be restricted. This provision authorizes the State to restrict these rights only to protect national security, public order, public health or morals and the rights and freedoms of others. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant.*[252]

XI. Freedom from Discrimination

The prohibition against discrimination on grounds including race, color,

---

[252] *General Comment No. 27, CCPR/C/21/Rev.1/Add.9, para. 11 (1999)*

sex, religion, political opinion, and national or social origin is a core human rights norm considered to be *jus cogens*. States must respect it in all circumstances.

A. UNITED NATIONS

While it understands the security requirements relating to the events of 11 September 2001, and takes note of the appeal of the State party for respect for human rights within the framework of the international campaign against terrorism, the Human Rights Committee expresses its concern regarding the effect of this campaign on the situation of human rights in [the State party], in particular for persons of foreign extraction. The State party is requested to undertake an educational campaign through the media to protect persons of foreign extraction, in particular Arabs and Muslims, from stereotypes associating them with terrorism, extremism and fanaticism.[253]

Since 11 September 2001, the United Nations Committee on the Elimination of Racial Discrimination has addressed in several instances the relationship between terrorism and racial discrimination:

> *While acknowledging the efforts made to confront the scourge of terrorism, the Committee is concerned about reports that members of particular groups ... are singled out by law-enforcement officials. In this regard, the Committee draws the State party's attention to its statement of 8 March 2002 in which the Committee underlines the obligation of States to "ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin" (A/57/18, paragraph 514, Statement on racial discrimination and measures to combat terrorism, paragraph 5 of the Statement).*[254]

B. Inter-American System

Also non-derogable under international human rights law and international humanitarian law is the requirement that states fulfil their

---

[253] CCPR/CO/74/SWE, para. 12 (2002).
[254] CERD/C/62/CO/7, para 24 (2003).

obligations without discrimination of any kind, including discrimination based upon religion, political or other opinion or national or social origin. This applies not only to a state's commitment to respect and ensure respect for fundamental rights in the context of terrorist threats, but also limits the measures that states may take in derogating from rights that may properly be suspended in times of emergency by prohibiting any such measures that involve discrimination on such grounds as race, colour, sex, language, religion, or social origin. The principle of non-discrimination also applies to all aspects of a state's treatment of individuals in connection with anti-terrorist initiatives, including their treatment when in detention.[255]

XII. Treatment of non- nationals (including asylum, expulsion and non- refoulement)

Article 14 of the Universal Declaration of Human Rights provides that everyone has the right to seek and enjoy in other countries asylum from persecution. This right may not be invoked in the case of persecution genuinely arising from non-political crimes or from acts, as is the case with terrorist acts, which are contrary to the purposes and principles of the United Nations. At the same time, human rights treaties consider that persons, regardless of their conduct, should never be sent to countries where they face a substantial risk of torture or other serious human rights violation.

A. UNITED NATIONS

The Human Rights Committee considered the link between removal, expulsion or *refoulement* of non-nationals and torture, in its General Comment No. 20 on *Article* 7 of the Covenant:

> *States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement*[256].

---

[255] *Inter-American Commission on Human Rights, Report on Terrorism and Human Rights,* OEA/Ser.L/V/II.116, Doc. 5, rev. 1 corr., 22 October 2002 (para. 351).

[256] *General Comment No. 20, para. 9 (1992).*

B. European Court of Human Rights

The prohibition provided by *Article* 3 against ill treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to *Article* 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by *Article* 3 ... is thus wider than that provided by *Articles* 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.[257]

C. Inter-American System

The Commission considers that, taking into account the fundamental right of the individual to seek asylum from persecution and to be heard in making that presentation through an effective procedure rights recognized in the American Declaration as well as the legitimate right and duty of the State to uphold citizen security and public order, issues of eligibility to enter the determination process should be placed within the competence of the Convention Refugee Determination Division. Given the interests at stake, these eligibility determinations would necessarily involve a different, more expedited procedure than the refugee determination process. While the denial of eligibility to enter the determination process involves a small number of individuals, the nature of the rights potentially at issue – for example, to life and to be free from torture – requires the strictest adherence to all applicable safeguards. Those safeguards include the right to have one's eligibility to enter the process decided by a competent, independent and impartial decision-

[257] *Chahal v. the United Kingdom, ECHR, 15 November 1996 (para. 80).*

maker, through a process which is fair and transparent. The status of refugee is one which derives from the circumstances of the person; it is recognized by the State rather than conferred by it. The purpose of the applicable procedures is to ensure that it is recognized in every case where that is justified.

D. African Commission on Human and Peoples' Rights

The Government of Africa has relied on the "*draw-back*" clause of *Article* 12(2): *This right may only be subject to restrictions, provided for by law for the protection of national security, law or order, public health or morality.*

E. Indian Position

The Constitution of India on Human rights and Fundamental Freedoms attach great importance to the protection of life and personal liberty of an individual and stress on the respect for Human dignity. In the *Bhagalpur Blinding case*[258], Bhagwati J., (as he then was), speaking for the Bench, posed the following question while considering the relief that could be given by a court for violation of constitutional rights guaranteed in *Article* 21 of the Constitution:

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

In *Bhagalpur Blinding case,*[259] thus court observed:

> *"If an officer of the State acting in his official capacity threatens to deprive a person of his life or personal liberty without the authority of law, can such person not approach the court for injuncting the State from acting through such officer in violation of his fundamental right under Article 21 ? Can the State urge in defence in such a case that it is not infringing the fundamental right of the petitioner under Article*

[258] *Khatri (II) v State of Bihar*, AIR 1981 SC 1068.
[259] *Ibid.*

21, because the officer who is threatening to do so is acting outside the law and therefore beyond the scope of his authority and hence the State is not responsible for his action ? Would this not make a mockery of Article 21 and reduce it to nullity, a mere rope of sand, for, on this view, if the officer is acting according to law there would ex concessionis be no breach of Article 21 and if he is acting without the authority of law, the State would be able to contend that it is not responsible for his action and therefore there is no violation of Article 21. So also if there is any threatened invasion by the State of the fundamental right guaranteed under Article 21, the petitioner who is aggrieved can move the court under Article 32 for a writ injuncting such threatened invasion and if there is any continuing action of the State which is violative of the fundamental right under Article 21, the petitioner can approach the court under Article 32 and ask for a writ striking down the continuance of such action, but where the action taken by the State has already resulted in breach of the fundamental right under Article 21 by deprivation of some limb of the petitioner, would the petitioner have no remedy under Article 32 for breach of the fundamental right guaranteed to him ? Would the court permit itself to become helpless spectator of the violation of the fundamental right of the petitioner by the State and tell the petitioner that though the Constitution has guaranteed the fundamental right to him and has also given him the fundamental right of moving the court for enforcement of his fundamental right, the court cannot give him any relief."

Answering the said questions, it was held that when a court trying the writ petition proceeds to inquire into the violation of any right to life or personal liberty, while in police custody, it does so, not for the purpose of adjudicating upon the guilt of any particular officer with a view to punishing him but for the purpose of deciding whether the fundamental right of the petitioners under *Article* 21 has been violated and the State is liable to pay compensation to them for such violation. This Court clarified that the nature and object of the inquiry is altogether different from that in a criminal case and any decision arrived at in the writ petition on this issue cannot have any relevance much less any binding effect, in any criminal proceeding which may be taken against a particular police officer. This Court further clarified that in a given case, if the investigation is still proceeding, the Court may even defer the inquiry before it until the investigation is completed or if the Court considered it necessary in the interests of Justice, it may postpone its inquiry

until after the prosecution was terminated, but that is a matter entirely for the exercise of the discretion of the Court and there is no bar precluding the Court from proceeding with the inquiry before it, even if the investigation or prosecution is pending.

In *Rudul Sah vs. State of Bihar*[260], the petitioner therein approached this Court under *Article* 32 of the Constitution alleging that though he was acquitted by the Sessions Court on 3.6.1968, he was released from jail only on 6.10.1982, after 14 years, and sought compensation for his illegal detention. This Court while recognizing that *Article* 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of courts, civil and criminal, raised for consideration the important question as to whether in the exercise of its jurisdiction under *Article* 32, this Court can pass an order for payment of money, as compensation for the deprivation of a fundamental right. This Court answered the question thus while awarding compensation:

> *"Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilisation is not to perish in this country as it has perished in some others too well-known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers."*[261]

---

[260] AIR 1983 SC 1086.

[261] Rudul Sah was followed in *Bhim Singh vs. State of J&K*, AIR 1986 SC 494 and *Peoples' Union for Democratic Rights vs. Police Commissioner,* Delhi Police Headquarters, (1989) 4 SCC 730.

The law was crystallized in *Nilabati Behera vs. State of Orissa*[262]. In this case, the deceased was arrested by the police, handcuffed and kept in police custody. The next day, his dead-body was found on a railway track. This Court awarded compensation to the mother of the deceased. J. S. Verma J., (as he then was) spelt out the following principles:

> *"Award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort.*
> *Enforcement of the constitutional right and grant of redress embraces award of compensation as part of the legal consequences of its contravention.*
> *A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution."*

Dr. A. S. Anand J., (as he then was) in his concurring judgment elaborated the principle thus[263]:

> *"... Convicts, prisoners or under-trials are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental rights by such persons. It is an obligation of the State to*

---

[262] AIR 1993 SC 1960.
[263] *Ibid.*

ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody.

The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by the Supreme Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting 'compensation' in proceedings under Article 32 or 226 seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."

In *D. K. Basu v. State of West Bengal*[264], this Court again considered exhaustively the question and held that monetary compensation should be awarded for established infringement of fundamental rights guaranteed under *Article* 21. This Court observed:

> *"Custodial violence, including torture and death in the lock ups strikes 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 concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or*

---

[264] AIR 1997 SC 610.

lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law enforcing officers is a matter of deep concern in a free society.
Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law-breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchy. No civilized nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? The answer, indeed, has to be an emphatic 'No'.
Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of an offence but it must be remembered that the law does not permit use of third degree methods or torture of accused in custody during interrogation and investigation with a view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purposeful to make the investigation effective. By torturing a person and using third degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it."

It is thus now well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under *Article* 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under section 357 of Code of Civil Procedure.

This takes us to the next question as to whether compensation should be awarded under *Article* 32/226, for every violation of *Article* 21 where illegal detention or custodial violence is alleged. Whether compensation should be awarded for every violation of *Article* 21.

In *M. C. Mehta vs. Union of India*[265], a Constitution Bench of this Court while considering the question whether compensation can be awarded in a petition under *Article* 32, observed:

> *"We must, therefore, hold that Article 32 is not powerless to assist a person when he finds that his fundamental right has been violated. He can in that event seek remedial assistance under Article 32. The power of the court to grant such remedial relief may include the power to award compensation in appropriate cases. We are deliberately using the words "in appropriate cases" because we must make it clear that it is not in every case where there is a breach of a fundamental right committed by the violator that compensation would be awarded by the court in a petition under Article 32. The infringement of the fundamental right must be gross and patent, that is, incontrovertible and ex facie glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons, or it should appear unjust or unduly harsh or oppressive on account of their poverty or disability or socially or economically disadvantaged position to require the person or persons affected by such infringement to initiate and pursue act in the civil courts. Ordinarily, of course, a petition under Article 32 should not be used as a substitute for enforcement of the right to claim compensation for infringement of a fundamental right through the ordinary process of civil court. It is only in exceptional cases of the nature indicated by us above, that compensation may be awarded in a petition under Article 32. ....*
>
> *If we make a fact analysis of the cases where compensation has been awarded by this Court, we will find that in all the cases, the fact of infringement was patent and incontrovertible, the violation was gross and its magnitude was such as to shock the conscience of the court and it would have been gravely unjust to the person whose fundamental right was violated, to require him to go to the civil court for claiming compensation."*

In *Nilabati Behera vs. State of Orissa*[266], this Court put in a word of caution thus :-

> *"Of course, relief in exercise of the power under Article 32 or 226 would be granted only (when) it is established that there has been an infringement of the fundamental rights of the citizen and no other form of appropriate redressal by the court in the facts and circumstances of the case, is possible. .... Law is in the process of development and the process necessitates developing separate public law procedures as*

---

[265] AIR 1987 SC 1086.
[266] AIR 1993 SC 1960.

also public law principles. It may be necessary to identify the situations to which separate proceedings and principles apply and the courts have to act firmly but with certain amount of circumspection and self-restraint, lest proceedings under Article 32 or 226 are misused as a disguised substitute for civil action in private law."

In *D. K. Basu v State of West Bengal*,[267] this Court repeatedly stressed that compensation can be awarded only for redressal of an established violation of *Article* 21. This Court also drew attention to the following aspect:

"There is one other aspect also which needs our consideration. We are conscious of the fact that the police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals. Many hard core criminals like extremists, the terrorists, drug peddlers, smugglers who have organized, gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalization and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogation, it is felt in those quarters that if we lay too much of emphasis on protection of their fundamental rights and human rights, such criminals may go scot-free without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime. The cure cannot, however, be worst than the disease itself."[268]

Court warned against non-genuine claims:

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

---

[267] AIR 1997 SC 610.

[268] In *Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble* (2003) 7 SCC 749, *Munshi Singh Gautam v. State of M.P.* (2005) 9 SCC 631.

In *Dhananjay Sharma vs. State of Haryana*[269], this Court refused compensation where the petitioner had exaggerated the incident and had indulged in falsehood. This Court observed:

> *"Since, from the report of the CBI and our own independent appraisal of the evidence recorded by the CBI. We have come to the conclusion that Shri Dhananjay Sharma and Sushil Kumar had been illegally detained by respondents 3 to 5 from the afternoon of 15.1.94 to 17.1.94, the State must be held responsible for the unlawful acts of its officers and it must repair the damage done to the citizens by its officers for violating their indivisible fundamental right of personal liberty without any authority of law in an absolutely high-handed manner. We would have been, therefore, inclined to direct the State Government of Haryana to compensate Dhananjay Sharma and Sushil Kumar but since Sushil Kumar has indulged in false-hood in this Court and Shri Dhananjay Sharma, has also exaggerated the incident by stating that on 15.1.94 when he was way laid along with Sushil Kumar and Shri S. C. Puri, Advocate, two employees of respondents 6 and 7 were also present with the police party, which version has not been found to be correct by the CBI, they both have disentitled themselves from receiving any compensation, as monetary amends for the wrong done by respondents 3 to 5, in detaining them. We, therefore do not direct the payment of any compensation to them."*

Cases where violation of *Article* 21 involving custodial death or torture is established or is incontrovertible stand on a different footing when compared to cases where such violation is doubtful or not established. Where there is no independent or medical evidence of custodial torture and about any injury or disability, resulting from custodial torture, nor any mark/scar, it may not be prudent to accept claims of human right violation, by persons having criminal records in a routine manner for awarding compensation. That may open the floodgates for false claims, either to mulct money from the State or as to prevent or thwart further investigation. Courts should, therefore, while jealously protecting the fundamental rights of those who are illegally detained or subjected to custodial violence should also stand guard against false, motivated and frivolous claims in the interests of the society and to enable Police to discharge their duties fearlessly and effectively. While custodial

---

[269] AIR 1995 SC 1795.

torture is not infrequent, it should be borne in mind that every arrest and detention does not lead to custodial torture.

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

We should not, however, be understood as holding that harassment and custodial violence is not serious or worthy of consideration, where there is no medical report or visible marks or independent evidence. We are conscious of the fact that harassment or custodial violence cannot always be supported by a medical report or independent evidence or proved by marks or scars. Every illegal detention irrespective of its duration, and custodial violence, irrespective of its degree or magnitude, is outright condemnable and per se actionable. Remedy for such violation is available in civil law and criminal law. The public law remedy is additionally available where the conditions mentioned in the earlier para are satisfied. We may also note that this Court has softened the degree of proof required in criminal prosecution relating to

such matters. In *State of MP v Shyamsunder Trivedi*[270], reiterated in Abdul Gafar Khan and Munshi Singh Gautam, this Court observed:

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

Unfortunately, police in the country have given room for an impression in the minds of public, that whenever there is a crime, investigation usually means rounding up all persons concerned (say all servants in the event of a theft in the employer's house, or all acquaintances of the deceased, in the event of a murder) and subjecting them to third-degree interrogation in the hope that someone will spill the beans. This impression may not be correct, but instances are not wanting where police have resorted to such a practice. Lack of training in scientific investigative methods, lack of modern equipment, lack of adequate personnel, and lacks of a mindset respecting human rights, are generally the reasons for such illegal action. One other main reason is that the public (and men in power) expect results from police in too short a span of time, forgetting that methodical and scientific investigation is a time consuming and lengthy process.

Police are branded as inefficient even when there is a short delay in catching the culprits in serious crimes. The expectation of quick results in high-profile or heinous crimes build enormous pressure on the police to

---

[270] 1995 (4) SCC 262; AIR 1995 SCW 2793.

somehow 'catch' the 'offender'. The need to have quick results tempts them to resort to third degree methods. They also tend to arrest "someone" in a hurry on the basis of incomplete investigation, just to ease the pressure. Time has come for an attitudinal change not only in the minds of the police, but also on the part of the public. Difficulties in criminal investigation and the time required for such investigation should be recognized, and police should be allowed to function methodically without interferences or unnecessary pressures. If police are to perform better, the public should support them, government should strengthen and equip them, and men in power should not interfere or belittle them. The three wings of the Government should encourage, insist and ensure thorough scientific investigation under proper legal procedures, followed by prompt and efficient prosecution. Be that as it may.

Custodial violence requires to be tackled from two ends, that is, by taking measures that are remedial and preventive. Award of compensation is one of the remedial measures after the event. Effort should be made to remove the very causes, which lead to custodial violence, so as to prevent such occurrences. Following steps, if taken, may prove to be effective preventive measures[271]:

> *(a) Police training should be re-oriented, to bring in a change in the mindset and attitude of the Police personnel in regard to investigations, so that they will recognize and respect human rights, and adopt thorough and scientific investigation methods.*
> *(b) The functioning of lower level Police Officers should be continuously monitored and supervised by their superiors to prevent custodial violence and adherence to lawful standard methods of investigation.*
> *(c) Compliance with the eleven requirements enumerated in D. K. Basu (supra) should be ensured in all cases of arrest and detention.*
> *(d) Simple and fool-proof procedures should be introduced for prompt registration of first information reports relating to all crimes.*
> *(e) Computerization, video-recording, and modern methods of records maintenance should be introduced to avoid manipulations, insertions,*

[271] *Sube Singh v State f Haryana,* Writ Petition (Crl.) 237 of 1998, decided on February 3, 2006.

substitutions and ante-dating in regard to First Information Reports, inquest proceedings, Port-mortem Reports and Statements of witnesses etc. and to bring in transparency in action.
(f) An independent investigating agency (preferably the respective Human Rights Commissions or CBI) may be entrusted with adequate power, to investigate complaints of custodial violence against Police personnel and take stern and speedy action followed by prosecution, wherever necessary.

The endeavour should be to achieve a balanced level of functioning, where police respect human rights, adhere to law, and take confidence building measures (CBMs), and at the same time, firmly deal with organized crime, terrorism, white-collared crime, deteriorating law and order situation etc.[272]

Learned counsel for the appellants submitted that even though the constitutional validity of Section 3 of TADA had been upheld by a Constitution Bench of this Court in *Kartar Singh v. State of Punjab*[273] nonetheless keeping in view the stringent nature of the provisions of TADA the offence constituted by Section 3 of TADA[274] must be the one which qualifies *stricto sensu* as a 'terrorist act' and unless the crime alleged against an accused can be classified as a 'terrorist act' in letter and in spirit, Section 3(1) of TADA has no application and an accused shall have to be tired under the ordinary penal law and in such a fact situation, it is statutory obligation

---

[272] *Hitendra Vishnu Thakur v. State of Maharashtra* , AIR 1994- SC 2623.

[273] (1994) 3 SCC 569: 1994 SCC (Cri) 899: JT (1994) 2 SC 423: 1994 (1) Apex Decisions SC (Cri) 413.

[274] *"Section 3, Punishment for terrorist acts. - (1) Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any persons and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act."*

cast on the Designated Court to transfer the case from that court for its trial by the regular courts under the ordinary criminal law in view of the provisions of Section 18 of TADA. It is submitted that the Designated Court should not, without proper application of mind, charge-sheet or convict an accused under Section 3 of TADA simply because the investigating officer decides to include that section while filing the challan and that it is not open to the State to apply TADA to the ordinary problems arising out of disturbance of law and order or even to situations arising out of the disturbance of public order - a more serious type of crime alone would justify trial under TADA.

Section 3 when analysed would show that whoever with intent (i) to overawe the Government as by the law established; or (ii) to strike terror in the people or any section of the people; or (iii) to alienate any section of the people; or (iv) to adversely affect the harmony amongst different sections of the people, does any act or things by using (a) bombs or dynamite, or (b) other explosive substances, or (c) inflammable substances, or (d) firearms, or (e) other lethal weapons, or (f) poisons or noxious gases or other chemicals, or (g) any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to case or as it is likely to cause (i) death, or (ii) injuries to any persons or persons, (iii) loss of or damage to or destruction of property, or (iv) disruption of any supplies or services essential to the life of the community, or (v) detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a 'terrorist act' punishable under Section 3 of TADA.

In *Kartar Singh's Case*[275], the Supreme Court abdicated doing the duty as a Constitutional Court and was more apprehensive with executive issue presented in an exaggerated and one side fashion. The executive is concerned with the issues of terrorism *per se.* And not concerned with the issue of

[275] (1994) Cr. L.J 3139 (SC); (1994) 3 SCC 569.

terrorist activities on the one hand and the protection of human rights of the accused on the other hand, the Supreme Court is concerned precisely with this balance[276].

The TADA Act makes certain confession made to the police officer admissible in evidence[277], The Supreme Court observed:[278]

> *"In view of the legal position vesting authority on higher police officer to record the confession hitherto enjoyed by the judicial officer in the normal procedure, we state that there should be no breach of procedure and the accepted norms of recording the confession which should reflect only the true and voluntary statement and there should be no room for hyper criticism that the authority has obtained an invented confession as a source of proof irrespective of the truth and creditability as it could be ironically put..."*[279]

Court came to conclusion even though the court was aware of the fact that torture was wide spread in India, the court observed[280]that they are deeply concerned against torture by state authorities[281].

> *"It is heart rending to note that day out we come across with the news of bloodcurdling incidents of police brutality and atrocities, in utter disregard and in all breaches of humanitarian law and universal human rights as well as in total negotiation of the constitutional guarantees and human decency."*[282]

From the period of the Britisher's till the enactment of the TADA, confession made to police was in admissible in the court because of the reason that police use torture as tool to extract confession. It is strange to note that what evidence was relied on by the Supreme Court on the basis of which they

---

[276] Dhairyasheel Patil, *Tragic decline of criminal jurisprudence,* Combat Law, Vol 6 (2007) at 16.

[277] Section 15 of the TADA.

[278] *Kartar Singh v. State of Punjab,* (1994) Cr. L.J 3139 (SC); (1994) 3 SCC 569.

[279] *Ibid* at 680.

[280] *Ibid* at 679.

[281] *Ibid, "...we cannot avoid but saying that we - with the years of experience both at the Bar and on the Bench - have frequently dealt with cases of atrocity and brutality practiced by some overzealous police officers resorting to inhuman, barbaric, archaic and drastic method of treating the suspects in their anxiety to collect evidence by hook or by crook and wrenching a decision of their favour. We remorsefully like to state that on few occasions even custodial deaths caused during interrogation are brought to our notice. We are very much distressed and deeply concerned about the oppressive behaviour and the most degrading and despicable practice adopted by some of the police officers."*

[282] *Ibid* at 711.

could legitimate the response faith on senior police officer that the would be less prone to torture. The Supreme Court made confession to senior police officer admissible based on no evidence at all to justify the departure from a rule of law and practice that governed criminal trials for more than 100years.Supreme Court did not have any evidence that police torture has been reduced to a considerable amount. The custodial violence has been increased in recent years that are what the statistics Crime Record Bureau show.

Justice K Ramaswamy made an extraordinary dissent. He referred to section 25 of the Indian Evidence Act, which excludes the confession made to police, as it is not admissible in the court of law. He observed:

> *"rests upon the principles that it is dangerous to depend upon a confession made to a police officer which cannot extricate itself from the suspicion that it might have been produced by the exercise of coercion."*[283]

Justice Ramaswamy held that Indian Evidence Act has no faith on the police.[284] If more and more powers of judiciary is conferred to the police the people shall loose faith in the system and misuse would be rampant.[285]

---

[283] *Ibid* at 724.

[284] *Ibid* at 731,"*While the Code and the Evidence Act seek to avoid inherent suspicion of a police officer obtaining confession from the accused, does the same dust not cloud the vision of superior police officer ? Does such a procedure not shock the conscience of a conscientious man and smell of unfairness? Would it be just and fair to entrust the same duty by employing non-obstante clause in Section 15(1)? Whether mere incantation by employing non-obstante clause cures the vice of afore enumeration and becomes valid under Articles 14 and 21? My answer is "NO", "absolute no no". The constitutional human rights perspectives projected hereinbefore; the history of working of the relevant provisions in the Evidence Act and the wisdom behind Section 164 of the Code ignites inherent invalidity of sub-section (1) of Section 15 and the court would little afford to turn Nelson's blind eye to the above scenario and blissfully bank on Section 114 Ill.(e) of the Evidence Act that official Acts are done according to law and put the seal that sub-section (1) of Section 15 of the Act passes off the test of fair procedure and is constitutionally valid."*

[285] *"Conferment of judicial powers in higher degree on the police will erode public confidence in the administration of justice. The veil of expediency to try the cases by the persons acquainted with the facts and to track the problems posed or to strike down the crime or suppression thereof cannot be regarded as a valid ground to give primacy to the arbitrary or irrational or ultra vires action taken by the Government in appointing the police officers as Special Executive Magistrate, nor is the right of revision against his decision a solace. It not only sullies the stream of justice at its source but also the confidence of the general public and erodes the efficacy of rule of law and is detrimental to the rule of law."*

Argument given by Justice Ramaswamy[286] while dealing with the power of senior officers to record confession may be trusted because a responsible person of the same rank would give importance to the responsibilities but how far it would be feasible in such case and it would lead to erosion of Rule of law. Justice R. M. Sahai[287] also gave the dissenting opinion according to him State has responsibility to maintain security but in the name of security State has should adopt balanced measures where there are no violation of human rights.[288] His observation was that even after Independence State needs to come up with such Draconian laws of the same

---

[286] *"It would, therefore, be clear that any officer not below the rank of the Superintendent of Police, being the head of the District Police Administration responsible to maintain law and order is expected to be keen on cracking down the crime and would take all tough steps to put down the crime to create terror in the heart of the criminals. It is not the hierarchy of officers but the source and for removal of suspicion from the mind of the suspect and the objective assessor that built-in procedural safeguards have to be scrupulously adhered to in recording the confession and trace of the taint must be absent. It is, therefore, obnoxious to confer power on police officer to record a confession under Section 15(1). If he is entrusted with the solemn power to record a confession, the appearance of objectivity in the discharge of the statutory duty would be seemingly suspect and inspire no public confidence. If the exercise of the power is allowed to be done once, may be conferred with judicial powers in a lesser crisis and be normalised in grave crisis, such an erosion is anathema to rule of law, spirit of judicial review and a clear negation of Article 50 of the Constitution and the constitutional creases. It is, therefore, unfair, unjust and unconscionable, offending Articles 14 and 21 of the Constitution."*

[287] *Ibid* at 753.

[288] *"Killing of democracy by gun and bomb should not be permitted by a State but in doing so the State has to be vigilant not to use methods which may be counter-productive. Care must be taken to distinguish between the terrorist and the innocent. If the State adopts indiscriminate measures of repression resulting in obliterating the distinction between the offender and the innocent and its measures are repressive to such an extent where it might not be easy to decipher one from the other, it would be totally incompatible with liberal values of humanity, equality, liberty and injustice. A country where terrorism or militancy is becoming religion and creed of the frustrated, weak and the misguided the State has a constitutional duty to uphold the authority with firmness and determination by directing its repressive measures towards quelling terrorism without sliding into general repression or exploiting the crisis for its own political advantage or to destroy legitimate opposition. Measures adopted by the State should be to create confidence and faith in the Government and democratic accountability should be so maintained that ever action of the Government be weighed in the scale of rule of law."*

nature, which were there in the imperial regime.[289] In countries like United Kingdoms and United States confession made to police is not admissible.[290] Police under the special statute are capable to record confession but the same police officers under the normal situation are incapable of doing so.[291] According to him this is violation of Constitutional values.[292]

---

[289] *"A police officer is trained to achieve the result irrespective of the means and method which is employed to achieve it. So long the goal is achieved the means are irrelevant and this philosophy does not change by hierarchy of the officers. A Sub-Inspector of the Police may be uncouth in his approach and harsh in his behaviour as compared to a Superintendent of Police or Additional Superintendent of Police or any higher officer. But the basic philosophy of the two remains the same. The Inspector of Police is as much interested in achieving the result by securing confession of an accused person as the Superintendent of Police. By their training and approach they are different. Procedural fairness does not have much meaning for them. It may appear unfortunate that even after independence a force which was created to implement harsh and Draconian laws of imperial regime, ruthlessly and mercilessly, has not changed much even in people regime. Dignity of the individual and liberty of person - the basic philosophy of Constitution - has still not percolated and reached the bottom of the hierarchy as the constabulary is still not accountable to public and unlike British police it is highly centralised administrative instrumentality meant to wield its stick and spread awe by harsh voice more for the executive than for the law and society. One of the reasons for it may be, as observed by the National Police Commission, the political set-up of the country which has used it more to serve its purpose than to serve the society." (para 762)*

[290] *Ibid* at 762,*"A confession made to a police officer is suspect even in England and America. But it has been made admissible subject to the safeguards mentioned above Why? Because what is provided by Section 26 of the Evidence Act stands substituted by presence of lawyer or near relatives."*

[291] *Ibid* at 762, *Further a confession made to a police officer for an offence committed irrespective of its nature in non-notified area is inadmissible. But the same police officer is beyond reproach when it comes to notified area. An offence under TADA is considered to be more serious as compared to the one under Indian Penal Code or any Act. Normally graver the offence more strict the procedural interpretation. But here it is just otherwise. What is inadmissible for a murder under Section 302 is admissible even against a person who abets or is possessed of the arms under Section 5 of the Act. How the method applied by police in extracting confession has been deprecated by this Court in series of decisions need not reproduced. But all that changed overnight when TADA was enacted. Giving power to police officer to record confession may be in line with what is being done in England and America. But that requires a change in outlook by the police. Before doing force by education and training has to be made aware of their duties and responsibilities, as observed by Police Commission. The defect lies not in the personnel but in the culture. In a country where few are under law and there is no accountability, the cultural climate was not conductive for such drastic change. Even when there was no Article 21, Article 20(3) and Article 14 of the Constitution any confession to police officer was inadmissible. It has been the established procedure for more than a century and as essential part of criminal jurisprudence. It was, therefore, necessary to bring about change in outlook before making a provision the merits of which are attempted to be justified on law existing in other countries."*

[292] *Ibid* at 763, *"But Section 15 of the TADA throws all established norms only because it is recorded by a high police officer. In my opinion our social environment was not mature for such a drastic change as has been effected by Section 15. It is destructive of basic values of the constitutional guarantee."*