

Custodial Death / Torture in India: Need to Change the Law

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A. INTRODUCTION:

Asian Centre for Human Rights (ACHR) in its report, released on June 26, 2018 stated that a total of 1,674 custodial deaths, including 1,530 deaths in judicial custody and 144 deaths in police custody, took place from 1 April 2017 to 28 February 2018. Which means that on an average there were about 5 custodial deaths per day in the aforementioned time period.

Custodial death is the event of demise of an individual, who has been detained by the police on being convicted or being under trial. They can be classified into three broad categories: death in police custody, death in judicial custody, and death in custody of defence/paramilitary forces.

As police and public order are state subjects, the brunt of the allegations of institutional murder must be borne by the governments of the respective states, where the police commit such crimes.

Historically, Uttar Pradesh have had the worst record with respect to custodial deaths. During January to August 2017, 204 such deaths were reported in UP, and by February 2018 the numbers had almost doubled.

A court in Jamnagar, Gujarat, has sentenced two policemen to life imprisonment on account of a custodial death in 1990. Suspecting political vendetta, the wife of dismissed IPS officer Sanjiv Bhatt says they will appeal to the high court for justice. However this appeal turns out, two related aspects of 21.06.2019 sentence need to be highlighted. It has taken an extraordinarily long time for the case to reach closure at a lower court, partly on account of the state government withholding permission for prosecution. And data shows that of the 1,557 custodial deaths between 2001 and 2016, convictions were rarely seen.

Custodial deaths are unacceptable as India is a signatory to the UN Convention against torture, which makes custodial deaths a violation of the principles the country professes. One possible reason for the incidence of custodial deaths is that 25 years after India signed the UN Convention, the legal process of its ratification hasn't been completed. This indicates that acting against torture is a low priority for the political class. A clampdown on custodial torture is needed for its own sake. In addition, a legislation against torture will have another important benefit. It will

strengthen India's legal case when it seeks to extradite fugitives from jurisdictions which take a dim view of custodial torture.

In 2017, the law commission recommended that India ratify its UN obligation against torture by creating a legislative framework. There has been progress since then as the Centre has asked state governments for inputs on the legislation. It should translate into a watertight law. A law is necessary to safeguard some of the fundamental rights guaranteed by the Constitution. India has a plethora of harsh laws to check crime. It now needs a legislative framework to stamp out criminal behaviour in custody.

B. Historical Background:

The history of torture throughout the ages reveals¹ that torture was employed by various communities either in their religious rites or its code of punishment. Torture is a form of crudity and a barbarity which appals modern civilisation. The tormenting of those captured in war was looked upon and accepted as inevitable. Often such captives were sacrificed to the gods. Ordeals of fire, water, poison, the balance, and boiling oil, were employed in the trial of accused persons. References are made to the use of anudal by officials of the Southern Indian provinces in the collection of land revenue. One of the most popular methods known as thoodasavary which is known as beating up now-a-days, was used by tax collectors and others for inducing the payment of dues and debts, as well as for eliciting confessions and securing evidence in criminal cases. Subjects were forced to drink milk mixed with salt, till they were brought to death's door by diarrhoea. People were forced to accept death by suffocation in a small cell where a large number of persons, several times than its capacity to accommodate were put and forced to torment by intolerable thirst, lack of fresh air and ruinous odour of the cell.

Depriving a person from sleep impairs the normal functioning and performance of individual which amounts to mental and physical torture as it has a very wide range of negative effects.²

The "Trial and Torture to Elicit Confession" is discussed in detail in Kautilya's Arthashastra³. The relevant part thereof reads as under:

There are in vogue four kinds of torture (karma):-Six punishments (shatdandáh), seven kinds of whipping (kasa), two kinds of suspension from above (uparinibandhau), and water-tube (udakanáliká cha). As to persons who have committed grave offences, the form of torture will be nine kinds of blows with a cane:--12beats on each of the thighs; 28 beats with a stick of the tree (naktamála); 32 beats on each palm of the hands and on each sole of the feet; two on the knuckles, the hands being joined so as to appear like a scorpion; two kinds of suspensions, face downwards (ullambanechale); burning one of the joints of a finger after the accused has been

made to drink rice gruel; heating his body for a day after he has been made to drink oil; causing him to lie on coarse green grass for a night in winter. These are the 18 kinds of torture. Each day a fresh kind of the torture may be employed.

Those whose guilt is believed to be true shall be subjected to torture (áptadosham karma kárayet). But not women who are carrying or who have not passed a month after delivery. Torture of women shall be half of the prescribed standard. There is a necessity to protect the society from the hands of criminals which has been emphasised by Manu and the law givers of this age. ⁴

Under the old Greek and Roman laws, it was specified that only slaves could be tortured but later on, the torture of free-men in cases of treason was also made allowed. In AD 240, the right to torture slaves was abolished under the Roman law. In the Middle Ages, torture was included in the proceedings of the Catholic Church in the 'Spanish Inquisition', which employed it to obtain confessions.⁵

History reveals that various known warriors and emperors were subjected to torture such as thumbscrews after they had lost the battles.⁶

During the Mohammedan era, the Shariat Law, 'an eye for an eye', was made applicable. The basic principles of Muslim criminal jurisprudence are still followed in many Islamic countries. Legislation of some Islamic Countries provides for certain brutal physical punishments eg. Public whipping, executing by lynching, or amputation of limbs.

In *D.K. Basu v. State of West Bengal*⁷ the Supreme Court observed that: "Torture has not been defined in the Constitution or in other penal laws. 'Torture' of a human being by another human being is essentially an instrument to impose the will of the 'strong' over the 'weak' by suffering. The word torture today has become synonymous with the darker side of the human civilisation".

In Elizabethan times 'torture warrants' were legally issued ⁸. Examination by torture was last used in England in 1640⁹. 'Judicial torture' was abolished by the Treason Act 1709 which is considered to be the first formal abolition of torture in any European state.

Alfred McCoy, in a review of the history of secret torture and torture training by the US Central Intelligence Agency (CIA), describes how CIA-funded experiments on psychiatric patients and prisoners in the 1950s developed into 'no-touch torture' which is based primarily on sensory deprivation¹⁰.

India signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [adopted by General Assembly of the UN on 10th

December, 1984 (Resolution No.39/46)] (known as the UN Convention against Torture, in short "CAT") on October 14, 1997 however, so far it has not been ratified. India has expressed its reservations against certain provisions contained in the Convention, such as Inquiry by the CAT (Art. 20); State complaints (Art.21) and individual complaints (Art.22).

C. International Scenario

1. Human Rights Instruments

The right to freedom from torture is enshrined in number of human rights instruments which provide for protection of all individuals from being intentionally subjected to severe physical or psychological distress by, or with the approval or acquiescence of, government agents acting for a specific purpose, such as to obtain information. The prohibition of torture and other cruel, inhuman or degrading treatment is enshrined in the following regional and universal human rights instruments: ¹¹

- (i) Universal Declaration of Human Rights, 1948 (Art. 5)
- (ii) American Declaration of the Rights and Duties of Man, 1948 (Art. 27)
- (iii) European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (Art. 3)
- (iv) United Nations Convention Relating to the Status of Refugees, 1951
- (v) United Nations Standard Minimum Rules for the Treatment of Prisoners, 1955 (Art. 31)
- (vi) Draft Principles on Freedom from Arbitrary Arrest, Detention and Exile (1963).
- (vii) . International Convention on the Elimination of All forms of Racial Discrimination, 1965 (ICERD)
- (viii). International Covenant on Civil and Political Rights, 1966 (Arts.4,7 and 10)
- (ix) . American Convention on Human Rights, 1969 (Art. 5)
- (x) . Declaration on the Protection of All Persons from being subjected to Torture and other Cruel Inhuman or Degrading Treatment or Punishment (1975).
- (xi). Optional Protocol to the International Covenant on Civil and Political Rights (1976)

- (xii). Code of Conduct for Law Enforcement Officials (1979) articles 2-3 & 5-6.
- (xiii). Convention on the Elimination of All Forms of Discrimination against Women 1979(CEDAW)
- (xiv). African Charter on Human and Peoples' Rights, 1981 (Art. 5)
- (xv). Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),1984
- (xvi). UN Declaration on Basic Principles of Justice for Victims of Crime and abuse of Power 1985
- (xvii). Inter-American Convention to Prevent and Punish Torture, 1985
- (xviii). European Convention for the Prevention of Torture and Inhuman or Degrading Treatment, 1987
- (xix). Convention on the Rights of the Child, 1989 (Art. 37)
- (xx). European Convention for the Prevention of Torture and other Cruel, Inhuman or degrading treatment or punishment, 1989
- (xxi). Cairo Declaration on Human Rights in Islam, 1990 (Arts. 19-20)
- (xxii). Charter of Paris for a New Europe, 1990
- (xxiii). Convention on the Protection of the Rights of Migrant Workers and Members of their Families, 1990 (Art. 10)
- (xxiv). International Convention on the protection of the Rights of All persons against Enforced Disappearance 1992 (CPAED).
- (xxv). Arab Charter on Human Rights, 1994 (Arts 8)

2. Article 3 of the European Convention on Human Rights states that: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. There are no exceptions or limitations on this right. This provision usually applies not only to torture but also cases of severe violence in police custody and poor conditions in detention. It is an absolute right and in no circumstances to torture someone will ever be justifiable.

3. The International Covenant on Civil and Political Rights, 1966 (ICCPR) - a multilateral treaty - is a key international human rights treaty, providing a range of protections for civil and political rights. The ICCPR, together with the Universal Declaration of Human Rights, 1948 and the International Covenant on Economic Social and Cultural Rights, are considered as the International Bill of Human Rights. By way of Geneva Conventions there is a series of treaties on the treatment of civilians, prisoners of war (POWs) and soldiers who are otherwise rendered hors de combat, or incapable of fighting and to protect wounded and sick soldiers during wartime.¹²

One of the most universally recognised human rights, the prohibition on torture has attained the status of jus cogens or peremptory norm of general international law, also giving rise to the obligation erga omnes (owed to and by all States) to take action against those who torture. As such, the prohibition may be enforced against a State even if it has not ratified any of the relevant treaties, and the prohibition is not subject to derogation, even in times of war or emergency. Jus cogens are international norms considered so fundamental that no deviation from them is permitted. The jus cogens (peremptory norms), flow from Article 53 of the Vienna Convention on the Law of Treaties, which has deep impact on national and customary law¹³.

D. Convention against Torture (CAT)

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is an international human rights treaty, under the aegis of the United Nations that aims to prevent torture and other acts of cruel, inhuman, or degrading treatment or punishment around the world. "The Convention puts victims at the heart of its normative mechanism, partly by combating the impunity enjoyed by the perpetrators of such acts in authorising the arrest of alleged torturers on the sole ground of their presence in the territory under a State Party's jurisdiction and also by defining the widespread and systematic use of torture as a crime against humanity."..... "The Optional Protocol to the Convention against Torture established the Subcommittee on the Prevention of Torture (SPT), whose task is to carry out inspection visits, in conjunction with national prevention agencies, to all places of detention in the State Parties to the Protocol. The Protocol requires State Parties to set up a visiting body or bodies for the prevention of torture and abuse (known as the national preventive mechanism) within one year after the coming into effect of the Convention for the State Party concerned."¹⁴ The right to freedom from torture includes the following rights and obligations:¹⁵

- (1). the right of individuals to be protected by the State from torture by its agents;
- (2). the State's duty to prosecute torturers; and,

- (3). the right of individuals not to be returned or extradited to another State where they may have the risk of being tortured.

(i). Obligation of States

The States which are party to this Convention are required to take the following steps:

- Take actions to prevent torture by criminalising such acts by enacting domestic laws and regulations and to make provisions to respect human rights of the alleged victim and the accused.
- The torture should be outlawed and 'higher orders' or exceptional circumstances' should not be permitted to be used as an excuse for committing torture.

(ii). A State Party's Undertakings

Most of the provisions of the CAT deal with the obligations of the State parties. These obligations may be summarised as follows:¹⁶

- (i). Each State party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture. The prohibition against torture shall be absolute and shall be upheld also in a state of war and in other exceptional circumstances (Article 2);
- (ii). No State party may expel or extradite a person to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture (Article 3);
- (iii). Each State party shall ensure that acts of torture are serious criminal offences within its legal system (Article 4);
- (iv). Each State party shall, on certain conditions, take a person suspected of the offence of torture into custody and make a preliminary inquiry into the facts (Article 6);
- (v). Each State party shall either extradite a person suspected of the offence of torture or submit the case to its own authorities for prosecution (Article 7);
- (vi). Each State party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials (Article 10);
- (vii). Each State party shall ensure that its authorities make investigations when there is reasonable ground to believe that an act of torture has been committed (Article 12);

(viii). Each State party shall ensure that an individual who alleges that he has been subjected to torture will have his case examined by the competent authorities (Article 13);

(ix). Each State party shall ensure to victims of torture an enforceable right to fair and adequate compensation (Article 14).

E. International Humanitarian Law

The infliction of torture is a “grave breach” of core international humanitarian law under the Geneva Conventions¹⁷ (in particular Article 3), which are designed to limit the effects of armed conflict. Under the Geneva Conventions, States are obliged to enact a legislation necessary to provide effective penal sanctions against persons committing, or ordering to be committed such acts and are obligated to search for persons alleged to have committed, or to have ordered to commit such grave breaches and [to] bring such persons, regardless of their nationality before its own courts, if these persons are not extradited to another State Party. The conventions protect both civilians and military personnel from torture.

Torture may also constitute a “crime against humanity” or “war crime” under international criminal law, such as is specified in the Rome Statute of the International Criminal Court (Arts. 7 and 8). Thus, infliction of torture can be investigated and prosecuted by the International Criminal Court, subject to its jurisdictional limits.

The prohibition on torture also requires governments to take measures to prevent and punish torture and many States have criminalised torture in their national law. The Geneva Conventions and Convention against Torture obligate States to extradite or prosecute, those who are responsible for torture. Governments may exercise universal jurisdiction to prosecute those responsible for torture, and Member States of the International Criminal Court have an obligation to co-operate with the court in the investigation and prosecution of crimes, including torture, falling under their respective jurisdiction. In times of armed conflict, the International Committee of the Red Cross, monitors the compliance of international humanitarian law.¹⁸

The principle of non-refoulement prohibits rendering victims of persecution to their persecutor, and applies to States in the context of their extradition and immigration policies. This obligation was first enshrined in Article 33 of the United Nations Convention Relating to the Status of Refugees 1951 which provides that “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. This duty is reiterated in Article 3 of CAT. For example, in the United States, asylum eligibility is established by showing that the applicant has suffered or

has a “well-founded fear” that he or she will suffer “persecution.”¹⁹ Persecution includes activities those do not fall within the relatively narrow definition of torture.

F. Implementation of CAT in various Countries

(i). United Kingdom

The common law prohibited torture, but, the Privy Council continued to issue torture warrants until Felton's case in 1628 and such practice was formally abolished only in 1640 at the time of Long Parliament. In Scotland, torture was prohibited by section 5 of the Treason Act 1708.²⁰

Section 134 of Criminal Justice Act, 1988 makes it an offence for any public official to ‘intentionally inflict severe pain or suffering on another in the performance ... of his official duties’. This provision was introduced to honour the UK's commitments under the 1984 Convention (CAT).²¹

Under international law, torture is not only prohibited under such instruments as Article 3 of the European Convention on Human Rights (ECHR) and the Torture Convention, but it has become recognised as *jus cogens*, a peremptory norm of international law that binds all states whether they have signed instruments such as the Torture Convention or not²². The prohibition against torture under Article 3 ECHR is also one of the few rights that cannot be derogated from in a state of emergency under Article 15.

The UK Government maintained that it would never return someone to a country where they face a risk of torture. The Human Rights Act 1998 is regularly relied upon in extradition and deportation cases to challenge the government's assessment of whether a risk of ill-treatment exists.²³

(ii). United States of America

In 1992 the United States became a party to the ICCPR, some provisions of which may be considered to have wider application than those of the CAT. The initial report of the United States under the Covenant, which provides general information related to compliance with and implementation of obligations under the Covenant, was submitted to the Human Rights Committee in July 1994.²⁴

Torture is prohibited throughout the United States. It is categorically denounced as a matter of policy and as a tool of State authority. Every act constituting torture under the Convention constitutes a criminal offence under the law of the United States. No official of the Government, federal, state or local, civilian or military, is authorised to commit or to instruct anyone else to commit torture. Nor may any

official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture. United States law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a "state of public emergency") or on orders from a superior officer or public authority, and the protective mechanisms of an independent judiciary are not subject to suspension.²⁵

In 1994 the United States Congress enacted important legislation which authorises the Attorney-General to institute civil law suits to obtain remedies for patterns or practices of misconduct by law enforcement agencies and agencies responsible for the incarceration of juveniles. The Department of Justice is actively enforcing this statute, as well as older laws that permit criminal prosecution of law enforcement and correctional officers who wilfully deprive individuals of their constitutional rights, and statutes that enable the Department of Justice to obtain civil relief for abusive conditions in state prisons and local jails.²⁶

(iii). Russian Federation

The Russian Federation is a party to the CAT, and to the ICCPR and its first Optional Protocol. Both these treaties prohibit the use of torture and other cruel, inhuman or degrading treatment or punishment.

Article 21 (2) of the Russian Constitution, 1993 provides that "no one shall be subjected to torture, violence or other cruel or degrading treatment or punishment. No one may be subjected to medical, scientific or other experiments without voluntary consent".

The Russian Federation ratified the ECHR in May 1998. In 2002 the Court found violations of the right to life (Art. 2), of the right to fair trial (Art. 6), of the prohibition of torture and inhuman or degrading treatment (Art. 3), of the right to liberty and security of the person (Art.5), of the right to respect for private and family life, home and correspondence (Art. 8), of the freedom of expression (Art. 10), of the right to effective remedy (Art. 13), and of the obligation to cooperate with the Court (art. 38).²⁷

(iv). China

China ratified the CAT in 1988. Since its ratification, the Committee has had four reviews and is currently in its fifth review cycle. The Committee against Torture - the international panel of experts that assesses State compliance under the CAT, last reviewed China in 2008. Since then, the government has made a series of reforms to its criminal justice system after domestic press exposed cases of severe torture of criminal suspects leading to wrongful convictions, deaths, and a public outcry.²⁸

(v). France

France is committed to combat torture and other cruel, inhuman or degrading treatment or punishment. France has ratified the CAT. France has also signed the Optional Protocol to the Convention against Torture. It has accordingly set up its national preventive mechanism in the form of a fully independent Controller-General for Places of Deprivation of Liberty, responsible for ensuring that the fundamental rights of detainees are respected.²⁹

France is also a party to the European Convention for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its protocols. The Convention establishes a European Committee for the Prevention of Torture (CPT) responsible, in the same way as the SPT, for visiting and inspecting places of detention.³⁰

G. Pronouncements by various international adjudicatory forums.

The activities prohibited by various regional and international treaties under relevant provisions came up for consideration of international adjudicatory forums while dealing with the torture and inhuman treatment.

(i). Definition of Cruel Treatment and Torture

The European Court has emphasised that an applicant must meet certain standard to establish a claim under Article 3 of the Convention: ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on overall circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and health of the victim. In considering whether a treatment is 'degrading' within the meaning of Art. 3, the Court will have regard to its object whether it is to humiliate and debase the person concerned and as far as the consequences are concerned, whether it adversely affected his or her personality in a manner incompatible with Article 3. It may be noted that the absence of such a purpose does not conclusively rule out a finding of a violation.

Furthermore, the suffering and humiliation must in any event go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.³¹

In *Ireland v. United Kingdom*³², the European Court of Human Rights laid down factors to be taken into account in determining the severity of treatment like the age, sex, and state of health of the victim. The Court also examined certain methods of

interrogation, none of which were found to cause acute physical injury, finding that forcing detainees to remain in stress positions for a long period of time, subjecting them to noise and depriving them of food, water and sleep amounted to ill-treatment, but refused to hold that the treatment amounted to torture. The case stresses the applicability of the prohibition, even in cases involving terrorism and public danger. The reluctance demonstrated in this case, to find that ill-treatment amounts to torture based on the level of severity, has been eroded by subsequent case law that can be read to lower the threshold under the European Convention for finding that torture has occurred³³.

In judging whether an applicant has suffered torture, rather than less severe forms of ill-treatment, the degree of ill-treatment used will help the court determine the intent with which such a treatment was meted out. Subjecting detainees to unnecessary physical force diminishes human dignity and is a violation of the European Convention of Human Rights³⁴.

(ii). Psychological Suffering

Various human rights bodies have acknowledged that no physical element is necessary to establish torture or inhuman treatment. The European Court of Human Rights found that a suspected criminal could not be extradited to the United States because of the psychological harm he would suffer if he were to be sentenced to death and held on death row.³⁵ Actions aimed at humiliating individuals or causing psychological suffering may constitute torture or inhuman treatment, and also violate the right to human dignity.³⁶

In *Cantoral-Benavides v. Peru*³⁷, the Inter-American Commission found that 'according to international standards for protection, torture can be inflicted not only via physical violence, but also through acts that produce severe physical, psychological or moral suffering to the victim.' In that case, the Court found that the aggressive acts suffered by the victim could be classified as physical and psychological torture, and that the acts were planned specifically for the purpose of wearing the victim down and to obtain incriminating evidence from him.

In several cases, it had been found that there had been violation of rights of the relatives of victims of disappearance in the form of the anguish caused to their family members. The State's failure to properly find that the victim suffered physical violence amounting to torture, and mental violence constituting cruel and inhuman treatment, investigate and punish the wrongdoers for the disappearances or murders had further added to their suffering.³⁸

(iii). Corporal Punishment

Corporal punishment is a cruel, inhuman and degrading treatment or punishment that violates the prohibition of torture. The Human Rights Committee has held that corporal punishment is prohibited by Article 7 of the Covenant³⁹. The African Commission has ruled that corporal punishment violates human right to dignity.⁴⁰

(iv). Treatment of Prisoners and Detainees

In *Antti Vuolanne v. Finland*⁴¹, the Human Rights Committee examined a case involving the solitary confinement of a Finnish infantryman. The Committee held that for punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the act of deprivation of liberty. In determining the severity of the alleged maltreatment, the court should consider all the circumstances of the case at hand, including the duration and manner of treatment, its physical and mental effects and the sex, age and state of health of the victim.

In contrast, the Human Rights Committee found, in *Polay Campos v. Peru*⁴², that displaying the victim publicly in a case and isolating him for 23 hours a day in a small cell with only 10 minutes of sunlight a day violated Arts. 7 and 10 of the ICCPR. In *International Pen & Others v. Nigeria*⁴³, the African Commission on Human and Peoples' Rights held that where the State had detained individuals sentenced to death in leg irons and handcuffs and had denied access to attorneys and necessary medicines, is violative of Article 5 of the African Charter.

The European Court of Human Rights has also developed caselaw on presumptions regarding ill-treatment inflicted by State actors. For example, it has stated that "[W]here an individual is taken into custody in good health but is found to be injured by the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the victim's allegations, particularly if those allegations were corroborated by medical reports, failing which a clear issue arises under Art.3 of the Convention."⁴⁴

Interrogation of suspects of terrorist activities between 1971 and 1975 in Northern Ireland involving a combination of five particular techniques – wall-standing, hooding, subjection to white noise, deprivation of sleep and deprivation of food and drink has been held by the European Court of Human Rights an inhuman and degrading treatment and practice of torture which violated Article 3. The court described 'degrading' as 'involving treatment such as to arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance'⁴⁵. The Court said that inhuman or degrading treatment must 'go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment' to be deemed a violation of Article 3.⁴⁶

The 'ill-treatment must attain a minimum level of severity' to fall within the scope of Article 3 and that such assessment of this minimum is relative and depends on 'all circumstances of the case'⁴⁷. In considering the issue of whether a punishment or treatment is 'degrading' within the meaning of Article 3, the Court noted that it would also have to take into account whether its object 'is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3.'⁴⁸

In order to avoid violation of Article 3, the authorities are under an obligation to protect the health of persons deprived of liberty by providing requisite medical care during detention⁴⁹. In the case of mentally ill persons, the assessment of whether the treatment concerned is incompatible with Article 3 has to take into consideration 'their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment.'⁵⁰

Denying adequate medical treatment and force feeding while on hunger strike and not producing the relevant documents in respect of his medical treatment has been held to be violative of Article 3⁵¹.

The Commission has gone through in detail the scenario prevailing across the world with regard to various international conventions on torture. The Commission has noted that though India has signed the Convention against Torture, it is yet to be ratified. Not ratifying the Convention may lead to difficulties in cases involving extradition, as the foreign courts may refuse extradition or may impose limitations, in the absence of anti-torture law in line with the Convention, while granting extradition⁵².

H. Constitutional / Statutory Provisions

A. Constitutional Provisions

Article 20(3) provides that a person accused of any offence shall not be compelled to become a witness against himself. The accused has a right to maintain silence and not to disclose his defence before the trial.⁵³ Test results of polygraph and brain finger printing tests have been held to be testimonial compulsions and thus have been held to be barred by Article 20(3).⁵⁴ Moreover recoveries under section 27 of the India Evidence Act, 1872 are not permitted to be procured through torture.⁵⁵

Article 21 provides that nobody can be deprived of his life and liberty without following the procedure prescribed by law. The Supreme Court has consistently held that custodial torture violates right to life enshrined in Article 21 of the Constitution. It is settled legal proposition that Article 21 may also supplement various requirements laid down in Article 20.⁵⁶

In *Sunil Batra v. Delhi Administration*,⁵⁷ the Supreme Court in crystal clear words held that “fundamental rights do not flee the person as he enters the prison although they may suffer shrinkage necessitated by incarceration.”

Article 22 (1) & (2) provide for protection against arrest and detention in certain cases. It prohibits detention of any person in custody without being informed the grounds for his arrest nor he shall be denied the right to consult and to be defended by a legal practitioner of his choice. “Every person who is arrested and detained in custody shall be produced before the nearest judicial magistrate within a period of twentyfour hours of such arrest.....and no such person shall be detained in custody beyond the said period without the authority of a magistrate.”

Similarly, a criminal trial which may result in depriving a person of not only personal liberty but also his right to life has to be unbiased and without any prejudice for or against the accused.⁵⁸ It has also been held that a punishment which is too cruel or torturous is unconstitutional.⁵⁹

Informing about grounds of arrest is mandatory under Article 22 (1)⁶⁰ Right to consult and to be defended by legal practitioner of his choice is also mandatory.⁶¹ More so, production of the accused before the nearest magistrate is a mandatory constitutional requirement.⁶²

B. Statutory Provisions

(i). Indian Evidence Act, 1872

Section 24 provides that any confession obtained by inducement, threat or promise from an accused or made in order to avoid any evil of temporal nature would not be relevant in criminal proceedings. A confession made by an accused is rendered irrelevant in a criminal trial, if in the opinion of the court, it has been caused by inducement, threat or promise with reference to the charge against the accused.

Section 25 of the Act provides that a confessional statement of an accused to police officer is not admissible in evidence and cannot be brought on record by prosecution to obtain conviction⁶³. In *AghnuNagesia v. State of Bihar*⁶⁴, the Supreme Court held that “if the first information report is given by the accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by section 25.”

Sections 26 provides that confession by an accused while in police custody could not be proved against him. In fact, statement made in police custody remains unreliable unless it is subjected to cross examination or judicial scrutiny.⁶⁵

Section 27 provides as to how much of information received from an accused may be proved. For the application of section 27, the statement of the accused is required to be split into its components and the admissible part of it is to be separated. Only those portions which were immediate cause of discovery would be admissible in evidence.⁶⁶ In *Kathi Kalu Oghad*⁶⁷, the Supreme Court held that:

Compulsion is not however inherent in the receipt of information from an accused person in the custody of a police officer. There may be cases where an accused in custody is compelled to give the information later on sought to be proved under section 27. These will be other cases where the accused gives the information without any compulsion. Where the accused is compelled to give information it will be an infringement of Article 20(3); but there is no such infringement where he gives the information without any compulsion. Therefore, compulsion not being inherent or implicit in the fact of the information having been received from a person in custody, the contention that section 27 necessarily infringes Article 20(3) cannot be accepted.

Section 132 provides that witness is not excused from answering the question on the ground that answer will criminate him. However, the proviso therefor reads as under:

“Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.”

In *R Dinesh Kumar v. State & Ors.*⁶⁸, the Supreme Court explained the scope of the proviso observing that the proviso to section 132 of the Evidence Act is a necessary corollary to the principle enshrined under Article 20(3) of the Constitution of India which confers a fundamental right that “no person accused of any offence shall be compelled to be a witness against himself”. Though such a fundamental right is available only to a person who is accused of an offence, the proviso to section 132 of the Evidence Act creates a statutory immunity in favour of a witness who in the process of giving evidence in any suit or in any civil or criminal proceeding makes a statement which criminate himself which deserves the most liberal construction. Without such an immunity, a witness who is giving evidence before the court to enable the court to reach a just conclusion (and thus assisting the process of law) would be in a worse position than an accused in a criminal case. Therefore, no prosecution can be launched against the maker of a statement falling within the sweep of Section 132 of the Evidence Act on the basis of the “answer” given by a person deposing as a “witness” before a court.

(ii). Code of Criminal Procedure, 1973

Sections 46(3) and 49 protect the person to be arrested and the detenu under police custody, who are not accused of an offence punishable with death or imprisonment for life. The detenu cannot be subjected to more restraint than is necessary to prevent his escape.

Sections 50 and 56 are in conformity and consonance with Article 22 of the Constitution. A person arrested is to be informed of the grounds of arrest and right to bail. More so, he is to be produced before the Magistrate within the stipulated time.

Sections 51(2) and 100(3) provide that if a women is to be searched by a police officer in connection with a crime, the search shall be made by another woman with strict regard to decency. The women accused must be interrogated at her residence.

Section 54 of the Code extends safeguard against any infliction of custodial torture and violence by providing for examination of arrested person by medical officer.

Section 57 requires the police to produce the suspect / accused before the nearest magistrate within 24 hours of arrest. It corresponds to Article 22(2) of the Constitution.

Sections 132 and 197(1) grant immunity to public servants from prosecution, if the public servant is accused of any offence alleged to have been committed by him while discharging his official duties.

Section 160 (1) provides "No male person under the age of 15 years or woman shall be required to attend at any place other than in which such male person or woman resides."

Sections 162, 163(1) and 315 disallow (i) forced confession and (ii) testimony, as inadmissible in the court of law and protect the accused against such confession.

Sections 167 put an obligation to bring the accused person before the court to safeguard their rights and interest.

Section 176 provides for compulsory magisterial inquiry on the death of the accused in police custody.

Section 357A provides for framing of the victim compensation scheme by every State Government in co-ordination with the Central Government.

Section 357B provides for awarding compensation in addition to fine under section 326A or section 376D.

Section 357C provides for treatment of victims of rape by all hospitals, public or private, whether run by the Central Government, State Government, local bodies or by any other persons.

Section 358 provides for compensation to persons groundlessly arrested.

(iii). Indian Police Act, 1860

Sections 7 and 29 provide for dismissal and other penalties to police officers who are negligent in discharge of their duties or unfit to perform the same.

(iv). Indian Penal Code, 1860

Sections 330, 331, 342 and 348 have, purposely been designed to deter police officers who are empowered to arrest a person and to interrogate him during investigation of an offence resorting to third degree methods, which may amount to torture⁶⁹.

Section 376(1)(b) provides for graver penalty in case of custodial rape committed by police officers.

Section 376C provides penalty for sexual intercourse by a person in authority.

(v). Armed Forces Special Powers Act, 1983

Section 6 of the Act creates the concept of sovereign immunity as it protects the security forces against alleged crimes.

I. Judicial Response to Custodial Deaths & Violence

The issues of fake encounters; illegal, unjustified and unwarranted arrests without any valid ground; eliciting confession from innocent persons for offences which they have never committed, by way of custodial violence; etc., have always been subject matters of consideration by the Indian courts.

A. meaning of Custody:

The term "custody" has not been defined in any statute. Its dictionary meanings include: "Safe-keeping, protection, charge, care, guardianship, confinement, imprisonment, duration of person, guardianship, the act or duty of guarding and preserving, control of a thing or person."⁷⁰

In Black's Law Dictionary,⁷¹ the expression "custody" has been explained to be the term very elastic and may mean actual imprisonment or physical detention and does

not necessarily mean actual physical detention in jail or prison but rather is synonymous with restraint of liberty.

In *Niranjan Singh v. Prabhakar Rajaram Kharote*,⁷² the Supreme Court while dealing with the meaning of 'custody' within the purview of Section 439 Cr.P.C. observed:

...When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocal quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law.

The meaning of the term 'custody' has to be understood with reference to the context in which it is used.⁷³

The Bombay High Court, explained the distinction between arrest and custody in *Harbans Singh v. State*,⁷⁴ observing:

'Arrest is a mode of formally taking a person in police custody, but a person may be in the custody of the police in other ways. What amounts to arrest is laid down by the legislature in express terms in S. 46, Cr.P.C., whereas the words 'in custody' which are to be found in certain sections of the Evidence Act only denote surveillance or restriction on the movement of the person concerned, which may be complete, as, for instance, in the case of an arrested person, or may be partial.

In *Directorate of Enforcement v Deepak Mahajan*,⁷⁵ the Supreme Court while differentiating between 'custody' and 'arrest' observed:

..in every arrest, there is custody but not vice-versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences, vide *Roshan Beevi (supra)*.'

Thus, in view of the above, the term custody is to be understood in the contextual reference and depending upon the facts and circumstances of a case it may mean that law has taken control of the person. It may also mean surveillance or restriction on the movement of a person. Custody and arrest are not always synonymous.

B. Judicial Response

In the year 1961, the Allahabad High Court had an occasion to make the following remarks, in a case pertaining to police behaviour:

That there is not a single lawless group in the whole of the country whose record of crime comes anywhere near the record of that organised unit which is known as the Indian Police Force.' ...Where every fish, barring perhaps a few stinks, it is idle to pick out one or two and say that it stinks.

The State of Uttar Pradesh filed an appeal before the Apex Court for expunging these remarks, and the appeal was allowed.⁷⁶

In *People's Union for Civil Liberties v. Union of India & Anr.*⁷⁷, the Court observed:

“Undoubtedly, this Court has been entertaining petition after petition involving the allegations of fake encounters and rapes by police personnel of States and in a large number of cases transferred the investigation itself to other agencies and particularly the CBI.”

In *Francis Coralie Mullin v. Administrator, U.T. of Delhi*⁷⁸, the Supreme Court observed: “

.....any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of Articles 14 and 21.”

The Supreme Court, in *Charan Lal Sahu v. Union of India*⁷⁹, interpreted Articles 21, 48A and 51A(g) of the Constitution, observing:

“In the context of our national dimensions of human rights, right to life, liberty, pollution free air and water is guaranteed by the Constitution under Articles 21, 48A and 51A(g), it is the duty of the State to take effective steps to protect the guaranteed constitutional rights.”

In *Kartar Singh v. State of Punjab*⁸⁰, the Supreme Court observed as under: “..... the recognition of the inherent dignity and of the equal and inalienable rights of the citizens is the foundation of freedom, justice and peace in the world. If the human rights are outraged, then the court should set its face against such violation of human rights by exercising its majestic judicial authority.”

Police atrocities in India had always been a subject matter of controversy and debate. This has been discussed in detail in *Prithipal Singh etc. v. State of Punjab and Anr. etc.*⁸¹ In view of the provisions of Article 21 of the Constitution, any form of torture or cruel, inhuman or degrading treatment is inhibited. Torture is not permissible whether it occurs during investigation, interrogation or otherwise. It cannot be gainsaid that freedom of an individual must yield to the security of the State. Latin maxim *salus populi est suprema lex* - the safety of the people is supreme law; and *salus reipublicae suprema lex* - safety of the State is supreme law, co-exist. The right to life has rightly been characterised as "'supreme' and 'basic'; it includes both so-called negative and positive obligations for the State". The negative obligation means the overall prohibition on arbitrary deprivation of life. In this context, positive obligation requires that State has an overriding obligation to protect the right to life of every person within its territorial jurisdiction. The obligation requires the State to take administrative and all other measures in order to protect life and investigate all suspicious deaths.

In *Gauri Shanker Sharma etc. v. State of U.P.*⁸², the Supreme Court held:

“...it is generally difficult in cases of deaths in police custody to secure evidence against the policemen responsible for resorting to third degree methods since they are in charge of police station records which they do not find difficult to manipulate as in this case. ...The offence is of a serious nature aggravated by the fact that it was committed by a person who is supposed to protect the citizens and not misuse his uniform and authority to brutally assault them while in his custody. Death in police custody must be seriously viewed for otherwise we will help take a stride in the direction of police raj. It must be curbed with a heavy hand. The punishment should be such as would deter others from indulging in such behaviour. There can be no room for leniency.”

In *Munshi Singh Gautam v. State of M.P.*⁸³, the Supreme Court held that peculiar type of cases must be looked at from a prism different from that used for ordinary criminal cases for the reason that in a case where the person is alleged to have died in police custody, it is difficult to get any kind of evidence.

The Supreme Court in *Mehmood Nayyar Azam v. State of Chhattisgarh*⁸⁴ dealt with a case of a social activist, who agitated the issue of exploitation of people belonging to poor and marginalised sections of the society and worked to create awareness about the same, was falsely roped in criminal cases, arrested and humiliated. While

in police custody, he was abused and physically assaulted. The Court held that any form of torture or cruel, inhuman or degrading treatment would fall within the ambit of Articles 20 & 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. The term "harassment" in its connotative expanse includes torment and vexation. The Court held:

"If the functionaries of the Government become lawbreakers, 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.... The right to life of a citizen cannot be put in abeyance on his arrest."

In *D.K Basu v. State of W.B.*⁸⁵ after perusing several reports on custodial violence Supreme Court held that, "Custodial violence including torture and death in lock ups strikes a blow at the rule of law which demands that the powers of executive should not only be derived from law but also that the same should be limited by law."

The Court issued certain guidelines to be followed in the cases of arrest and detention including that the police personnel carrying out the arrest and investigation must carry visible identity card showing his designation, etc., and his designation should also be recorded in the register; arresting officer shall prepare the memo of arrest at the time of arrest which should be attested by a witness preferably the family member of the arrestee and it shall also be counter-signed by the arrestee and it would show the time and date for arrest; arrestee during the period of interrogation shall be entitled to have one friend or his relative with him unless the attesting witness of his arrest is his relative/friend; time, place of arrest and venue of custody of an arrestee must be notified by the police and legal aid organisations should be informed immediately; arrestee must be informed of his right to have someone informed of his arrest immediately after the arrest; entry should be made in the diary disclosing the place of detention and particulars of the police officials having his custody; arrestee, where he so requests be examined medically at the time of his arrest in case having major or minor injuries and the arrestee should be subjected to medical examination within 48 hours of his detention; copies of Memo of arrest and all other documents be sent to the illaqa magistrates; arrestee may be permitted to meet his lawyer during interrogation and aforesaid information regarding arrest and custody shall be communicated to the police control room and shall also be displayed on a conspicuous notice board.

The Court further observed :

"failure to comply with the requirements hereinabove mentioned shall apart from rendering the concerned official liable for departmental action, also render him liable to be punished for contempt of court and proceedings for contempt of court

may be instituted in any high Court of the country having territorial jurisdiction over the matter.”

These two requirements flow from Articles 21 and 22 (1) of the Constitution and require strict adherence.

In *Rama Murthy v. State of Karnataka*,⁸⁶ the Supreme Court identified various issues facing prisons which required reforms and it included torture and ill-treatment. The Apex Court in the case of *Sube Singh v. State of Haryana*⁸⁷ has taken note of custodial violence and third degree methods used by police during interrogation and has discussed in detail the reasons behind such practice and has also suggested preventive measures as to how such violence can be tackled. The Court observed: “The expectation of quick results in high-profile or heinous crimes builds enormous pressure on the police to 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.The three wings of the Government should encourage, insist and ensure thorough scientific investigation under proper legal procedures, followed by prompt and efficient prosecution.”

The Court also issued certain directions for providing training reorientation courses for the change of mindset and the attitude of the police personnel, providing for supervision by superiors to prevent custodial violence, strict adherence to the directions issued by the court earlier in the case of *D.K. Basu (supra)* and for investigation by independent agencies on the complaints for custodial violence by police personnel.

In *Raghubir Singh v. State of Haryana*⁸⁸, where the violence employed by the police to extract a confession resulted in death of a person suspected of theft, the court observed that “We are deeply disturbed by the diabolical recurrence of police torture resulting in terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of law gore human rights to death.” The Court further observed that vulnerability of human rights assumes a traumatic, torturous poignancy, the violent violence is perpetrated by the police arm of the State whose function is to protect the citizen and not to commit gruesome offences against them.

In *State of U.P. v. Ram Sagar Yadav*,⁸⁹ the Supreme Court dealt with a case where the policemen murdered one Brijlal who not only refused to pay bribe of Rs.100 in a trivial matter of cattle trespass but also complained about demand of bribe to senior police officers. The Court observed that “Police officers alone and none else can give evidence as regards the circumstances in which a person in their custody comes to receive injuries while in their custody The result is that persons on whom atrocities are perpetrated by the police in the sanctum sanctorum of the

police station are left without any evidence to prove who the offenders are.” The Court recommended that the “law as to the burden of proof in such cases may be re-examined by the legislature so that handmaids of law and order do not use their authority and opportunities for oppressing the innocent citizens who look to them for protection.”

The Supreme Court in the case of *Prakash Kadam v. Ramprasad Vishwanath Gupta*⁹⁰, expressed its displeasure on fake encounters. Some police officers and staff were engaged by private persons to kill their opponent. If the police personnel act as contract killers, there could be very strong apprehension in the mind of the witnesses about their own safety that the police may kill the important witnesses or their relatives or give threats to them at the time of trial of the case to save themselves. The Court observed that in cases where a fake encounter is proved against policemen in a trial, they must be given death sentence, treating it as the rarest of rare cases. The policemen were warned that they will not be excused for committing murder in the name of ‘encounter’ on the pretext that they were carrying out the orders of their superior officers or politicians, however high. In the Nuremburg trials the Nazi war criminals took the plea that ‘orders are orders’, nevertheless they were hanged. If a policeman is given an illegal order by any superior to do a fake ‘encounter’, it is his duty to refuse to carry out such illegal order, otherwise he will be charged for murder, and if found guilty sentenced to death.

In *Mehboob Batcha v. State*,⁹¹ respondents policemen wrongfully confined one Nandagopal in police custody on suspicion of theft from 30.5.1992 till 2.6.1992 and beat him to death with lathis, and also gang raped his wife Padmini in a barbaric manner. The accused also confined several other persons (who were witnesses) and beat them in the police station with lathis. The graphic description of the barbaric conduct of the accused in this case shocked the conscience of the Court and it observed that Policemen must learn how to behave as public servants in a democratic country, and not as oppressors of the people.

In *The State of Andhra Pradesh v. N. Venugopal*,⁹² the Supreme Court held that there is no provision that authorise the police officers to torture the suspects during investigation/Trial or conviction.

In *Haricharan v. State of M.P.*,⁹³ Supreme Court reiterated that “life or personal liberty in Article 21 includes right to live with human dignity. Therefore, it also includes within itself guarantee against the torture and assault by the States or its functionaries.” The State mechanism must not be used for inflicting torture on people.

In *Nandini Satpathy v. P.L Dani & Anr.*⁹⁴, the Court held that not only physical threats or violence but psychological torture, atmospheric pressure, environmental coercion, tiring interrogation by police are violation of law.

In *Khatri & Ors v. State of Bihar (Bhagalpur Blinding case)*⁹⁵, which was an example of cruel and inhuman treatment to the prisoners which are insulting the spirit of Constitution and human values as well as Article 21. Supreme Court in this case dealt with the blinding of undertrial prisoners by the police by piercing their eyeballs with needle and pouring acid in them. This case shows the pattern of torture and its implicit endorsement by the State.

While commenting upon the aforesaid case, it has been observed that: "Formidable problem in an alleged case of police torture is to establish the guilt of the perpetrators of violence."⁹⁶ This could be due to the situation where offenders are hand-in-glove with the local police and the absence of neutral witness.

In *Bhagwan Singh & Anr. v. State Of Punjab*⁹⁷ a case of death in police custody the Supreme Court observed that the interrogation does not mean inflicting injuries. "Torturing a person and using third degree methods are of medieval nature and they are barbaric and contrary to law. The police would be accomplishing behind their closed doors precisely what the demands of our legal order forbid."

In *Dagdu & Ors. v. State of Maharashtra*⁹⁸, the Supreme Court observed:

"If the custodians of law themselves indulge in committing crimes then no member of the society is safe and secure. If police officers who have to provide security and protection to the citizens indulge in such methods they are creating a sense of insecurity in the minds of the citizens. It is more heinous than a game-keeper becoming a poacher."

In *Ram Lila Maidan Incident v. Home Secy, Union of India*,⁹⁹ the Supreme Court held:

"Article 355 of the Constitution provides that the Government of every State would act in accordance with the provisions of the Constitution. The primary task of the State is to provide security to all citizens without violating human dignity. Powers conferred upon the statutory authorities have to be, perforce, admitted. Nonetheless, the very essence of constitutionalism is also that no organ of the State may arrogate to itself powers beyond what is specified in the Constitution.... Therefore, every act which offends or impairs human dignity tantamounts to deprivation pro tanto of his right to live and the State action must be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights."

In *CBI v. Kishore Singh*¹⁰⁰, a person was arrested without any complaint by constable Kishore Singh suspecting illicit relationship with one Smt. Gaj Kanwar, his relative. He was not only physically assaulted but his penis was chopped off with a sharpened weapon. The Supreme Court while dealing with the appeal of the CBI against the order of reduction of sentence by the High Court and against acquittal of one accused observed that in a police station, there will be no witness except the policemen and the victim, since the police station is not a public place. The Court further observed:

“In our opinion, the policemen who commit criminal acts deserve harsher punishment than other persons who commit such acts, because it is the duty of the policeman to protect the people and not break the law themselves. If the protector becomes the predator society will cease to exist”.

In *S. Nambi Narayanan v. Siby Mathews & Ors.*¹⁰¹, the Supreme Court entertained a case in which a scientist of high repute had been taken into police custody without any justifying cause. The Court observed that non-interference in such a case would give the police a long rope to take anyone into custody without any reason. Though the Investigating Officer has reached the age of superannuation, he was directed to be prosecuted. Similar view was reiterated for inaction by the investigating agency in *Murad Abdul Mulani v. Salma Babu Shaikh & Ors.*¹⁰²

In *Sheela Barse v. State of Maharashtra*¹⁰³, the Supreme Court laid down guidelines regarding arrest in general, and arrest of women in particular. The Court directed that four or five police lock-up should be reserved for female suspects and they should be kept away from the male suspects and be guarded by female constables; interrogation of females should be carried out only in the presence of female police officers/constables; the District Judge would make surprise visits to police lock ups periodically with a view to providing the arrested persons an opportunity to air their grievances and ascertaining what are the conditions in the police lock ups and whether the requisite facilities are being provided and the provisions of law are being observed and the directions given by us are being carried out and the magistrate before whom an arrested person is produced shall enquire from the arrested person whether he has any complaint of torture or mal-treatment in police custody and inform him that he has right under Section 54 of the Cr.P.C. 1973 to be medically examined.

Therefore, it could be seen from the aforesaid judicial pronouncements that torture by a public servant or its implicit endorsement by the State have always been condemned by the Courts. Torture has been a contentious issue having a direct bearing on the right to life and liberty of an individual.

J. Compensation for Custodial Torture / Death

The doctrine of sovereign immunity – a concept of common law principle consistently followed in British jurisprudence in last several centuries that ‘King commits no wrong’ and, therefore, it was not possible to hold him guilty of personal negligence / misconduct, nor he could be held responsible for the negligence or misconduct of his servants. The doctrine evolved on the principle of sovereignty that a State cannot be sued in its own court.¹⁰⁴

In *P & O. Steam Navigation Co. v. Secretary of State for India-in-Council*¹⁰⁵, the legal position as was explained:-

"If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is: was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State of such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie. The act of the public servant committed by him during the course of his employment is, in this category of cases, an act of a servant who might have been employed by a private individual for the same purpose."

In *State of Rajasthan v. Vidyavati*¹⁰⁶, the claim for damages by the dependents of the person who died in an accident caused by the negligence of the driver of the Collector of Udaipur was allowed by the Rajasthan High Court and the Supreme Court, rejecting the plea of sovereign immunity of the State, holding it liable for the tortious act of the driver like any other employer.

However, in *Kasturi Lal v. State of U.P.*¹⁰⁷, the Supreme Court took a contrary view and the plea of sovereign immunity was upheld. In that case, a partner of the *Kasturilal Raliaram Jain*, a firm of jewellers of Amritsar was taken into custody by police in Meerut on the suspicion of possessing stolen property. He stood released but the gold jewellery taken from him was not returned. The head constable in charge of the malkhana not only misappropriated the same but fled away to Pakistan. The firm claimed the recovery of ornaments or in the alternative for compensation. The Apex Court rejected the claim on the ground that the act was committed by the employees during the course of their employment which was in the characteristic of a sovereign power.

In *Rudal Shah v. State of Bihar*¹⁰⁸, the Supreme Court taking a completely opposite stand, rejected the plea of sovereign immunity and awarded the compensation, as the petitioner had been illegally detained in jail for over fourteen years, after his acquittal in full-dress trial.

In *State of Andhra Pradesh v. Challa Ramakrishna Reddy*¹⁰⁹, the Supreme Court affirmed the view taken by the Andhra Pradesh High Court that where the fundamental right of the citizen is violated, the plea of sovereign immunity would not be available. The Court ruled:

“The maxim that King can do no wrong or that the Crown is not answerable in tort has no place in Indian jurisprudence where the power vests, not in the Crown, but in the people who elect their representatives to run the Government, which has to act in accordance with the provisions of the Constitution and would be answerable to the people for any violation thereof.”

In *Nilabati Behera v. State of Orissa & Ors.*¹¹⁰, the Supreme Court said:

.....in a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the State of not protecting the fundamental right to life of the citizen. To repair the wrong done and give judicial redress for legal injury is a compulsion of judicial conscience.

The UN General Assembly recognised the right of victims of crimes to receive compensation by passing a resolution titled “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985.” The relevant part thereof reads:

Where public officials or other agents acting in an official or quasi- official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims. The UN General Assembly passed a resolution titled "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005" which deals with the rights of victims of international crimes and human rights violations. The relevant part dealing with compensation reads:

Compensation shall be provided for any economically Assessable damage resulting from violations of human rights or international humanitarian law, such as:

- (a). Physical or mental harm, including pain, suffering and emotional distress;
- (b). Lost opportunities including education;
- (c). Material damages and loss of earnings, including loss of earning potential;

(d). Harm to reputation or dignity;

(e). Costs required for legal or expert assistance, medicines and medical services."

The Law Commission of India in its 41st Report (1969) titled 'Criminal Procedure Code, 1898', discussed Section 545 of the Code of Criminal Procedure of 1898 extensively and suggested:

"46.12. Under Clause (b) of Sub-section (1) of Section 545, the Court may direct "in the payment to any person of compensation for any loss or injury caused by the offence when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court."

The 154th Law Commission Report (1996) on the Code of Criminal Procedure, 1973 devoted an entire chapter to 'Victimology' in which the growing emphasis on victim's rights in criminal trials was discussed extensively as under¹¹¹:

"9.1 The principles of victimology has foundations in Indian constitutional jurisprudence. The provision on Fundamental Rights (Part III) and Directive Principles of State Policy (Part IV) form the bulwark for a new social order in which social and economic justice would blossom in the national life of the country (Article 38). Article 41 mandates inter alia that the State shall make effective provisions for "securing the right to public assistance in cases of disablement and in other cases of undeserved want." So also Article 51A makes it a fundamental duty of every Indian citizen, inter alia 'to have compassion for living creatures' and to 'develop humanism'. If emphatically interpreted and imaginatively expanded these provisions can form the constitutional underpinnings for victimology."

At the time of accession to International Covenant on Civil and Political Rights, 1966 (ICCPR) on 10 April 1979, India made a reservation to Article 9(5) - the provision on compensation stating that the Indian legal system does not recognise a right to compensation for victims of unlawful arrest or detention.

In D.K. Basu case ¹¹² the Supreme Court held that since compensation was being directed by the courts to be paid by the State holding it vicariously liable for the illegal acts of its officials the reservation to clause 9(5) of ICCPR by the Government of India had lost its relevance. Thus an enforceable right to compensation in case of "torture" including "mental torture" inflicted by the State or its agencies is now a part of the public law regime in India.

In Ram Lakhan Singh v. State of U.P.¹¹³, the Supreme Court dealt with a case under Article 32 of the constitution for compensation for loss of professional career, reputation, great mental agony, heavy financial loss and defamation - Illegal

detention by respondent authorities after implicating petitioner, an Indian Forest Service officer in false vigilance cases at instance of the then Chief Minister of respondent State dishonouring the High Court Orders.

The High Court had recorded the finding that the petitioner had illegally been detained by the authorities after implicating him in false vigilance cases. It was a clearcut case of abuse of legal process. He and his family members had to suffer a great mental agony and heavy financial loss besides being defamed in the society. The Supreme Court awarded him the compensation of Rs.10 lakhs observing:

“12. In such a scenario, until and unless we maintain a fine balance between prosecuting a guilty officer and protecting an innocent officer from vexatious, frivolous and mala fide prosecution, it would be very difficult for the public servant to discharge his duties in free and fair manner. The efficiency of a public servant demands that he should be free to perform his official duties fearlessly and without any favour. The dire necessity is to fill in the existing gap by protecting the honest officers while making the corrupt officers realize that they are not above law. The protection to an honest public servant is required not only in his interest but in the larger interest of society. This Court time and again extended assurance to the honest and sincere officers to perform their duty in a free and fair manner towards achieving a better society.”

The Supreme Court, exercising its power under Article 32 and High Courts under Article 226 of the Constitution have awarded damages to the petitioners for the injuries suffered both on account of the tortious act of servants of the State and also on the ground that the State is liable to pay compensation for the violation of Fundamental Rights of the victims. A survey of the decided cases would reveal that the Courts in their judicial activist role adopted two ways to redress the victims of abuse of power by the public servants as palliative to the victims by way of right of compensation and to penalise the State for negligence of its servants.¹¹⁴

The Supreme Court in the case of custodial torture while exercising jurisdiction under Article 142 of the Constitution, in *Smt. Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble*,¹¹⁵ directed the State Government to pay compensation of Rs.1,00,000/- to the mother and children of the deceased. It was observed:

‘This amount of compensation shall be as a palliative measure and does not preclude the affected person(s) from bringing a suit to recover appropriate damages from the State Government and its erring officials if such a remedy is available in law.’

While deciding the aforesaid case, the Court referred to a Queen’s Bench judgment in *Jennison v. Backer*,¹¹⁶ wherein it was observed:

‘The law should not be seen to sit limply, while those who defy it go free and, those who seek its protection lose hope.’

In *Dr. Rini Johar v. State of Madhya Pradesh*¹¹⁷ the Court held that arrest in violation of due procedure seriously jeopardises the dignity of the person arrested and the law does not countenance abuse of power which causes pain and trauma. The court, after considering the facts, awarded a compensation of five lakh rupees.

In *State of Maharashtra v. Christian Community Welfare Council of India*¹¹⁸, the Supreme Court held that “the question whether such compensation paid by the State can be recovered from the officers concerned will depend on the fact whether the alleged misdeeds by the officer concerned is committed in the course of the discharge of his lawful duties, beyond or in excess of the same which will have to be determined in a proper enquiry”.

The Compensation has to be determined by the Court by taking into consideration various aspects like the nature of injury caused; manner in which the injury is caused; the purpose for which the injury was inflicted; the extent to which the victim has suffered due to such injury. The Court may also take into consideration the nature of torture which could be physical, mental and psychological.

K. Conclusion & Suggestions:

The legal custody though by virtue of law empower police to arrest accused/ suspect and put them behind bars, but it is no manner authorising these officials to abuse the due process of law by taking law into their own hands. Being an under-trial does not eliminate the basic rights of humans. Law sets procedure, adherence to which is the duty of all irrespective of one's designation. Fear of being punished on breaking law should prevail amongst police officials as well, especially in country like ours that preach the principle of rule of law. Cases stated in above discussion depicts there still exists fear of power of Khaki wardi in India. Despite independence practices of colonial era wherein power prevailed over weak still subsist. Flashing of such cases day in and day out creates fear in mind of civilised society and convert these officials into villain that are supposed to curb crime and keep our society safe as per the due process established by law. To minimize or wipe out the custodial torture it is suggested that:

1. The definition of ‘torture’ wide enough to include inflicting injury, either intentionally or involuntarily, or even an attempt to cause such an injury, which should include physical, mental or psychological injury.
2. In order to tide over the difficulties faced by the Country in getting criminals extradited, in the absence of an anti-torture law; and to secure an individual's right to life and liberty, it is suggested that consideration of the Convention Against

Torture for ratification and in the event, the Central Government should ratify the Convention.

3. The existing legal provisions has analysed in the above discussion and it is suggested that the Criminal Procedure Code, 1973 and the Indian Evidence Act, 1872 should be amended to accommodate provisions regarding compensation and burden of proof, respectively.
4. In Criminal Procedure Code 1973, it is suggested that amendment to section 357B should be incorporated for payment of compensation, in addition to payment of fine, as provided under section 326A or section 376D of the Indian Penal Code, 1860.
5. The Law Commission of India vide its Report No.113, and, as reiterated in Report No.152, that the Indian Evidence Act, 1872 requires insertion of section 114B. This will ensure that in case a person in police custody sustains injuries, it is presumed that those injuries have been inflicted by the police, and the burden of proof shall lie on the authority concerned to explain such injury. Above said provision should be made in the Indian Evidence Act, 1872.
6. In order to curb the menace of torture and to have a deterrent effect on acts of torture, it is suggested that stringent punishment should be made to the perpetrators of such acts and punishment may be extending up to life imprisonment and fine.
7. It is suggested that the Courts should decide upon a justiciable compensation after taking into account various facets of an individual case, such as nature, purpose, extent and manner of injury, including mental agony caused to the victim. It is also suggested that the Courts should bear in mind the socio-economic background of the victim and ensure that the compensation so decided should suffice the victim to bear the expenses on medical treatment and rehabilitation.
8. It is also suggested that an effective mechanism should be put in place in order to protect the victims of torture, the complainants and the witnesses against possible threats, violence or ill treatment.
9. Going by the law of torts, which states 'liability follows negligence' it is suggested that the State should own the responsibility for the injuries caused by its agents on citizens, and principle of sovereign immunity cannot override the rights assured by the Constitution. While dealing with the plea of sovereign immunity, the Courts should have to bear in mind that it is the citizens who are entitled for fundamental rights, and not the agents of the State.

10. In light of the aforesaid discussions, the Central Government should take a decision on the issue of ratification of the Convention, and in case it is decided to go for ratification, then, necessary amendment or special law may be considered.

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