

CHAPTER 3

CUSTODIAL TORTURE: CONSTITUTIONAL AND LEGISLATIVE PROVISIONS IN INDIA

The rule of law means that no one shall be deprived of his liberty except with the authority of a law and all persons shall be equal before the law. It means that even the Government and its agents have to act according to and within the limits of the law¹. In a democracy and under the Indian Constitution, the police as representative of a State whose sovereignty lies in the Indian people are public servants and the police station is a public property. The conduct within it should conform to law, needs to respect basic human freedom to ensure a basic confidence between the people of a city, State or region and the wings of the State, the law and order machinery, i.e., the police. Custodial torture, inhuman treatment, handcuffing prisoners, third degree methods which are often used and practiced by police officials during the course of their official duties are against the norms of the civilised nations and are barbarous activities violative of the principles of rule of law and human dignity. The main objective of the police is to apprehend criminals, to protect law abiding citizens, to prevent commission of crimes and to maintain law and order².

Torture has been practiced frequently in India regardless of the Government in power. Torture is committed on a regular basis by enforcement officials in the course of criminal investigations. As per International Rehabilitation Council for Torture Victims, the most likely perpetrators to be involved in torture and other forms of ill treatment are: the police, the military, paramilitary forces, State controlled forces, Governmental officials, health professionals and co-detainees acting with the approval or on the orders of public officials³. In India the main perpetrators of torture have been police officers and other law enforcement officials, such as paramilitary forces and those authorities, who have the power to detain and interrogate persons.

¹ Dr. S.P. Sathe, "Liability of a Police Officer for Custodial Death: A Note" *Ashwatthe*, Vol.4 Issue 1 (January-March, 2004).

² H.H. Singh, "Importance of judicial activism in preventing custodial violence" *Central India Law Quarterly*, Vol. XVI, 431 (2003).

³ International Rehabilitation Council for Torture Victims, "What is Torture?" available at: www.org/what-is-torture/defining-torture.aspx (visited on 25 March 2010).

In India, torture is not expressly prohibited by the Constitution but the Ministry of Home Affairs has claimed that Indian law contains adequate provisions for safeguarding human rights and sufficient safeguards against police brutality and torture also exist. Although, the prohibition of torture in specific terms lacks Constitutional authority, Indian courts have held that Article 21 of the Constitution implies protection against torture.

Provisions under the Indian Legal System: To Protect a Person from Custodial Torture

Protection against Conviction or Enhanced Punishment under Ex-Post Facto Law

Article 20(1) of the Constitution of India provides that, no person shall be convicted of any offence except for violation of law in force at the time of commission of the act charged as an offence, nor be subjected to any greater penalty than that which might have been inflicted under the law in force at the time of the commission of an offence.

The concept of *ex-post facto* law has its roots in the maxim *nulla poena sine lege*, which profounds the idea that no man shall be made to suffer except for a distinct breach of the criminal law. The implications of this maxim can be broadly stated as under:-

- It prohibits retrospective imposition of criminality.
- It prohibits the extension by analogy of a criminal rule to cover a case not obviously falling within it, and.
- It prohibits formulation of the penal laws in excessively vague and wide terms.

Article 20(1) sets two limitations upon the law making power of every legislative authority in India as regards to retrospective criminal legislations. It prohibits –the making of an *ex- post facto* criminal law i.e. making an act a crime for the first time and making that law retrospective and the infliction of a penalty greater than that which might have been inflicted under the law, which was in force when the act was committed.

Distinction between *ex-post facto* law and retrospective law was first time discussed in case of *Colden v Bull*⁴. In this case Court observed, “Every *ex-post facto* law must necessarily be retrospective but every retrospective law is not *ex-post facto* law. The former only is prohibited. Every law that takes away or impairs, rights vested agreeably to

⁴ 1978(3) Dallas 386 at 391.

existing laws is retrospective and generally unjust and may be oppressive, it is a good general rule that a law should have no retrospect, but there are cases in which the laws may justly and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement, as status of oblivion or a burden that creates or aggravate, the crime or increase the punishment or change the rules of evidence for the purpose of conviction. There is a great and apparent difference between making an unlawful act lawfully and the making an innocent action criminal and punishing it as a crime”.

The concept of *ex-post facto* law as provided under the Constitution of India is recognised under the international instruments as Article 11(2) of the Universal Declaration of Human Rights provides that ‘no one shall be held guilty of any penal offence on account of any act or omission, which did not constitute penal offence, under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed’. Article 15 of the International Covenant on Civil and Political Rights provides that ‘no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If subsequent to the commission of the offence, provision is made by law for imposition of lighter penalty, the offender shall benefit there by’.

Articles 245, 246 and 248 of the Constitution confer power on the Parliament and the State Legislature to make laws. There is nothing in these Articles to provide that the Indian legislatures do not possess the right to make retrospective legislation which every sovereign legislature possesses⁵. However, the only express limitation imposed upon the power is retrospective legislation that is contained in Article 20(1)⁶.

In *Shiv Bahadur’s*⁷ case it was observed that prohibition contained in the Article 20(1) is not confined to the validity or passing of the law but extends to conviction or sentence based on its character as an *ex- post facto* law. Article 20(1) prohibits the

⁵ *Sunder Ram Iyer v State of A.P.*, (1959) SCR 1422.

⁶ *Rama Krishna v State of Bihar*, AIR 1963 SC 1669.

⁷ *Shiv Bahadur v State of West Bengal*, AIR 1953 SC 394.

creation of a new offence with retrospective effect. It does not prohibit the creation of a new rule of evidence or a presumption for an existing offence⁸.

In *Soni Devrajbhai Basubai's*⁹ case the Supreme Court clarified the scope of Article 20(1). In this case dowry death punishable under the newly inserted Section 304-B of Indian Penal Code was sought to be made applicable against the respondents. The appellant's daughter was married to the respondent on 13 August 1986, and she died under mysterious circumstances. The appellant suspected foul play and got a case registered under Section 498-A read with Section 34 of IPC. He further applied for a petition seeking the addition of the charge under newly inserted Section 304-B of IPC which had become effective from 19 November 1986. The Supreme Court held that as on the date of the death of daughter of the appellant, Section 304-B of IPC had not come into existence and therefore the protection of Article 20(1) of the Constitution of India would be available to the accused persons.

The words 'penalty greater than which might have been inflicted' mean a person may be subjected to only those penalties which were prescribed by the law that were in force at the time when he committed the offence. If an additional¹⁰ or higher¹¹ penalty is prescribed by any law made subsequently to the commission of the offence that will not operate against him in respect of the offence in question. However, the Article does not prohibit the substitution of a penalty which is not higher or greater than the previous one¹².

Protection against Double Jeopardy

Article 20(2) of the Constitution of India provides that,

no person shall be prosecuted and punished for the same offence more than once.

Article 20(2) is based on the *maxims nemo debet bis vexari, si constat curiae quod sit pro una et eadem causa*, which means that no one must be vexed twice if it appears to the court that it is for one and the same cause.

Not only the Constitution of India but also Section 26 of the General Clauses Act, 1897 provides that, where an act or omission constitutes an offence under two or more

⁸ *Sajjan Singh v State of Punjab*, AIR 1964 SC 464.

⁹ *Soni Devrajbhai Basubai v State of Gujarat*, AIR 1991 SC 2173.

¹⁰ *Kedarnath v State of West Bengal*, (1954) SCR 30.

¹¹ *Mohari Lal v Corporation of Calcutta*, AIR 1953 Cal 561.

¹² *Rattan Lal v State of Punjab*, AIR 1965 SC 444.

enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence,' and Section 300 of the Criminal Procedure Code, 1973 have recognised the same right of an accused person. Provision of Section 300 of Criminal Procedure Code, 1973 is wider in their ambit in contrast to Article 20(2) of the Constitution of India. This is so as the Constitutional protection is available only to an accused person who has been prosecuted and punished, whereas under the Criminal Procedure Code, 1973 the protection offered also extends to an accused person who had been prosecuted and acquitted.

To cover under the provisions of clause (2) of Article 20, the following conditions are necessary:-

- There must have been a previous proceeding before a court of law or a judicial tribunal of competent jurisdiction; and
- The person must have been 'prosecuted' in the previous proceeding.
- There should be not only a prosecution but also a punishment in the first instance to operate as a bar to a second prosecution and punishment for the same offence¹³.
- The application of the benefit is for an offence and in a judicial proceeding only¹⁴.
- The benefit does not flow in case of departmental action even though based on same facts¹⁵.

Right not to be Witness against Himself

Article 20(3) of the Constitution of India provides that,
no person accused of any offence shall be compelled to be a witness against himself.

The Constitutional protection against testimonial compulsion on the premise that such compulsion may act as subtle form of coercion on the accused and it is also the underlying theme of several statutory provisions – particularly Sections 24-26 of the Indian Evidence Act. Article 20(3) of the Constitution comes into operation as soon as a formal accusation is made whether before the commencement of a prosecution or during its currency¹⁶.

¹³ *Venkateraman v Union of India*, (1954) SCR 1150.

¹⁴ *Pulian Krishna v Pashupati*, 1953 CriLJ 294 (Cal).

¹⁵ *Le Roy v Supdt. of District Jail Amritsar*, AIR 1958 SC 119.

¹⁶ *Dastagir v State of Madras*, AIR 1960 SC 759.

In *Nandini Sathpathy*¹⁷ case, a former Chief Minister of Orissa was directed to appear before the investigating officer in connection with a criminal case registered against her. During the course of investigation she was interrogated with a long string of questions, given to her in writing. She refused to answer the questions on the plea that she was protected against self-incrimination. For her failure to answer the questions put to her, she was charged under Section 179 of Indian Penal Code. The Court observed that Section 161 of Code of Criminal Procedure, 1973 enables the police to examine the accused during investigation. The prohibitive sweep of Article 20(3) of the Constitution of India goes back to the stage of police investigation not commencing in Court only. Both the provisions substantially cover the same area, so far as police investigations are concerned. The phrase 'compelled testimony' must be read as evidence procured not merely by physical threats or violence but also by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like not legal penalty for violation. So, the legal perils following upon refusal to answer or answer truthfully cannot be regarded as compulsion within the meaning of Article 20(3). On the other hand, if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes 'compelled testimony', violative of Article 20(3).

Section 163 of the Code of Criminal Procedure, 1973 provides that,

(1) No police officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in Section 24 of the Indian Evidence Act, 1872 (1 of 1872).

(2) But no police officer or person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will:

provided that nothing in this sub-section shall affect the provisions of sub-section (4) of Section 164.

Section 164 (4) of the Code of Criminal Procedure, 1973 provides that,

Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:-" I have explained to (name) that he is not bound to make a confession and

¹⁷ *Nandini Satpathy v P.L. Dani*, AIR 1978 SC 1025 see also *Smt Salvi and Others v State of Karnataka*, AIR 2010 SC 1974.

that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

The right against self-incrimination guaranteed under the Indian criminal justice system is in tune with international law. Article 14(3) (g) of the International Covenant on Civil and Political Rights obliges the State parties to provide some minimum guarantees to persons who are charged with criminal offences as not to be compelled to testify against himself or to confess guilt.

Section 348 of Indian Penal Code, 1860 provides that,

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

The right against self incrimination recognizes the fundamental principle of criminal law that the accused must be presumed innocent and it is for the prosecution to establish his guilt.

Section 24 of the Indian Evidence Act, 1872 provides that,

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

The accused cannot be compelled to make any statement against his will. These propositions emanate from an apprehension that if the statements of the accused were admitted as evidence, then force or torture may be used by the investigating authorities to trap the accused. This may be prejudicial or against the interest of the accused person. This right seeks to enable him to preserve his privacy, dignity and inviolability of his person from torture.

Section 25 the Indian Evidence Act, 1872 provides that,

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

Section 26 the Indian Evidence Act, 1872 provides that,

no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such persons.

Section 27 the Indian Evidence Act, 1872 provides that,

when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

Section 25 of the Evidence Act stipulates that no confession made to a police officer shall be proved against a person accused of an offence. By holding that Section 27 is an exception to Section 25 in *State of Bombay v Kothi Kalu Oghed*,¹⁸ because as a natural corollary to the proposition that Section 27 is a proviso to Section 25 is that information leading to the discovery of a relevant fact should be given to anyone including a police officer. Although the Supreme Court pointed out that if the accused showed that he was compelled to make a statement before the police, he could claim the privilege against self incrimination contained in Article 20(3) of the Constitution. However, it is contended that such a protection is illusory, as it throw almost impossible burden upon the accused. How can the accused if 'compelled' in a police station ever satisfy a Court there was compulsion?

The Malimath Committee¹⁹ on Reforms in Criminal Justice System suggested that Section 25 of the Indian Evidence Act should be amended on the lines of Section 32 of Prevention of Terrorism Act to make a confession recorded by a Superintendent of Police (or officer above him) which is also audio or video-recorded admissible in Indian courts as evidence, subject to the condition that the accused was informed of his right to consult a lawyer. It is submitted that this provision is inconsistent with Article 20(3) of the Indian Constitution and Article 7 of the International Convention on Civil and Political Rights which provides that, 'no one shall be subjected to torture or to inhuman or degrading

¹⁸ AIR 1961 SC 1808.

¹⁹ Dr. Justice V.S. Malimath, 'Report of Committee on Reforms of Criminal Justice System', Vol. I, March, 2003.

treatment or punishment'. The rights against *ex- post facto* law and self incrimination are made absolute and non-derogable even during emergency.

Right to Life and Personal Liberty

Article 21 of the Constitution of India provides that,

no person shall be deprived of life or personal liberty except according to procedure established by law.

Article 21 does not contain any express provision against torture or custodial crimes. The expression 'Life or personal liberty' occurring in the Article has been interpreted to include constitutional guarantee against torture, assault or injury against a person.

In *Maneka Gandhi's case*²⁰, judiciary has expanded the scope and ambit of Article 21 of the Constitution. The right to live under Article 21 is not confined merely to physical existence but it includes within its ambit the right to live with human dignity. In *Inderjeet v State of Uttar Pradesh*²¹, the Supreme Court held that punishment which has an element of torture is unconstitutional. The Court has frowned upon the practice of keeping prisoners condemned to death sentence in solitary confinement apart from Article 21 the Court has also held it invalid under Article 20(2). A person under death sentence is held in jail custody, so that he is available for execution of the death sentence when the time comes. No punitive detention can be imposed on him by the jail authorities except for prison offences. He is not to be detained in solitary confinement as it will amount to imposing punishment for the same offence more than once which would be violative of Article 20(2).

In *Inder Singh v State (Delhi Adm.)*, the Supreme Court issued certain directions regarding treatment of two young men convicted of murder and sentenced to life imprisonment with a view to reform them. Article 21 of the Constitution is the jurisdictional root for this legal liberalism²².

In *Jolly George Varghese v Bank of Cochin*²³, the high value of human dignity and the worth of human person enshrined in Article 21 read with Article 14 and Article 19 obligate the State to incarcerate except under law which is fair, just and reasonable in its procedural essence.

²⁰ *Maneka Gandhi v Union of India*, AIR 1978 SC 597.

²¹ AIR 1975 SC 1867.

²² AIR 1978 SC 1091.

²³ AIR 1980 SC 470.

In *Raghubir Singh v Haryana*²⁴, the Supreme Court said, “We are deeply disturbed by the diabolical recurrence of police torture resulting in terrible scars in the minds of common citizens that their lives and liberty are under a new peril because the guardians of the law destroy human rights.”

In *Pram Shanker Shukla v Delhi Administration*²⁵, the Supreme Court held that handcuffs are prima facie inhuman, unreasonable, and at first blush arbitrary without fair procedure and objective monitoring. The Court recognized the need to secure the prisoner from fleeing but asserted that this does not compulsorily require handcuffing. The guidelines laid down by the Court are:

- (i) To be used only if a person is a) involved in serious non-bailable offences, has been previously convicted of a crime; and/or b) is of desperate character-violent, disorderly or obstructive; and/or c) is likely to commit suicide; and/or d) is likely to attempt escape.
- (ii) Reasons for handcuffing must be clearly recorded in the police Daily Diary in order to reduce discretion.
- (iii) Police must first seek judicial permission for the use of restraint during arrest or on a detainee.
- (iv) At first production of an arrested person, the Magistrate must inquire whether handcuffs or fetters were used, and if so, demand an explanation.

In the case of *Sunil Batra (II) v Delhi Administration*²⁶ the Court reiterated that “handcuffs and irons bespeaks a barbarity hostile to our goal of human dignity and social justice”. In *Kishore Singh v State of Rajasthan*²⁷ case Krishna Iyer, J. has observed, “Nothing is more cowardly and unconscionable than person in police custody being beaten up and nothing inflicts a deeper wound on our constitutional culture than a State official running berserk regardless of human rights”.

In *Francis Corali Mullin v Union Territory of Delhi*²⁸ the Supreme Court has condemned cruelty or torture as being violative of Article 21 in the following words, “any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an in-road into this right to live and it would, on this view, be

²⁴ AIR 1980 SC1087.

²⁵ AIR 1980 SC 1535.

²⁶ AIR 1980 SC 1579.

²⁷ AIR 1981 SC 625.

²⁸ AIR 1981 SC 746.

prohibited by Article 21 unless it is in accordance with the procedure prescribed by law”. The Supreme Court asserted in *Sheela Barse v State of Maharashtra*²⁹ case that prison restrictions amounting to torture, pressure or infliction and going beyond what the Court order authorized were un-constitutional. An under trial or convicted prisoner could not be subjected to physical or mental restraint, which is not warranted by the punishment awarded by the Court or which was in excess of the requirement of prisoner’s discipline or which amounted to human degradation³⁰. In *Mohan Lal Sharma v State of Uttar Pradesh*³¹, the Supreme Court has ruled that it is well recognised right under Article 21 that a person detained lawfully by the police and that legal detention does not mean that he could be tortured or beaten up. If it is found that the police have ill-treated a detainee, he would be entitled to monetary compensation under Article 21.

In *D.K. Basu v State of West Bengal*³², Supreme Court observed, “Custodial violence, including torture and death in lockups, 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.”

Fundamental rights occupy a place of pride in the Indian Constitution. No civilized national can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrest him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal cord of human rights jurisprudence, the answer, indeed has to be an emphatic ‘no’. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under trials, detainees and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

Right of Privacy

A citizen to have his house free from snooping by the State and also to have it protected from all other kind of invasion by the authority is of a fairly long antiquity. The right of privacy was advanced in the year 1963 in *Kharak Singh v State of U.P.*³³ In this case meaning of term ‘personal liberty’ was considered by the Supreme Court. Both the

²⁹ AIR 1983 SC 378.

³⁰ *Sita Ram v State of Uttar Pradesh*, AIR 1978 SC 745.

³¹ (1989) 2 SCC 314.

³² AIR 1997 SC 610 see also *Haricharan and Others v State of Madhya Pradesh and Others*, (2011) 3 SCR 769, *Dr Mehmood Nayyar Azam v State of Chhattisgarh and Others*, (2012) 8 SCC 1.

³³ AIR 1963 SC 1295.

majority and minority on the bench relied on the meaning given to the term 'personal liberty' by an American Judgement in *Munn v Illinois*³⁴ which held that, "Life meant something more than mere animal existence. The prohibition against its deprivation extended to all those limits and facilities by which the life was enjoyed. This provision equally prohibited the mutilation of the body or the amputation of an arm or leg or the putting out an eye or the destruction of any other organ of the body through which the soul communicated with the outer world." Iyyengar, J., in the majority view, categorically refused to accept the American precedents as according to the Court the Constitution of India did not guarantee the 'Right of Privacy'. However, the minority view expressed by Subba Rao, J., relied upon American precedents in highlighting the 'Right of Privacy'.

The Supreme Court, however, emphasized the Right of Privacy of a person forcefully in *State of Maharashtra v Madhukar Narayan Gardikar*³⁵ In this case a departmental proceeding was initiated against the respondent police inspector on the charge that he attempted to trespass into the house of the complainant woman with an intention to have illicit intercourse with her against her wish. As his attempt was frustrated, he took the plea that the complainant was a woman of easy virtue and he had raided the house for the purpose of action under the Excise Act. His plea was rejected and on the charge being proved he was dismissed from service. However, the Bombay High Court quashed the said order. Observing, that the complainant was an unchaste woman and it would be unsafe to allow the fortunes and career of a governmental official to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person. The Supreme Court, reversing the judgement of the Bombay High Court observed that under Article 21 of the Constitution of India. "Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when one likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of the law"³⁶.

³⁴ 95 (US) 113 (1877).

³⁵ AIR 1991 SC 297.

³⁶ *Id.* at 211.

Right to be Informed of the Ground of Arrest

Article 22 (1) of the Constitution of India provides that,

no person who is arrested shall be detained in custody without being informed as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice.

International Covenant on Civil and Political Rights, in Article 9 exhaustively deals with the rights of the arrested person. It provides, 'Anyone who is arrested shall be informed at the time of arrest, of reasons for his arrest and shall be promptly informed of any charges against him'. It further declares that 'anyone arrested or detained on a criminal charge shall be brought promptly before a Judge or other officer authorized by a law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial at any other stage of the judicial proceedings and, should occasion arise, for execution of the judgement'. Under this provision different rights of the person arrested are guaranteed. The same are conferred by the Constitution under Article 22 on person arrested.

Section 49 of the Code of Criminal Procedure, 1973 provides that,

the person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

Section 50 of the Code of Criminal Procedure, 1973 provides that,

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

(1) Every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.

(2) Where a police officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.

The right of information of the grounds of arrest would enable the person arrested to prepare for his defence and also to move the court for bail, or writ of *habeas corpus*. Failure of communication of the grounds of arrest would entitle the person arrested to release.

Section 50A of the Code of Criminal Procedure, 1973 provides that,

(1) Every police officer or other person making any arrest under this Code shall forthwith give the information regarding such arrest and place where the arrested person is being held to any of his friends; relatives or such

other persons as may be disclosed or nominated by the arrested person for the purpose of giving such information.

(2) The police officer shall inform the arrested person of his rights under sub-section (1) as soon as he is brought to the police station.

(3) An entry of the fact as to who has been informed of the arrest of such person shall be made in a book to be kept in the police station in such form as may be prescribed in this behalf by the State Government.

(4) It shall be the duty of the Magistrate before whom such arrested person is produced, to satisfy himself that the requirements of sub-section (2) and sub-section (3) have been complied with in respect of such arrested person³⁷.

Section 55A of the Code of Criminal Procedure, 1973 provides that,

it shall be the duty of the person having the custody of an accused to take reasonable care of the health and safety of the accused³⁸.

Section 75 of the Code of Criminal Procedure, 1973 provides that,

the police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant.

Reply to the question whether a person who is being arrested by another, can be kept in ignorance of the charge made against him, Lord Symonds in *Christie v Leachinsky*³⁹ observed, “Blind, unquestioning obedience is the law of tyrants. I would, therefore, submit the general proposition that it is a condition of lawful arrest that the man arrested should be entitled to know why he is arrested, and then, since the affairs of life seldom admit an absolute standard or an unqualified proposition, see whether any qualification is of necessity imposed on it. The law requires that, where arrest proceedings on a warrant, the warrant should state the charge on which the arrest is made. I can see no valid reason why this safeguard for the subject should not be equally his when the arrest is made without a warrant. The exigency of the situation, which justifies or demands arrest without a warrant, cannot justify or demand either a refusal to state the reason of arrest or a misstatement of the reason. Arrested with or without a warrant, the subject is entitled to know why he is deprived of his freedom, if only in order that he may without a moment delay to take steps as will enable him to regain it.”

In *Vimal Kishore's*⁴⁰ case it was pointed out that conveying the grounds of arrest will enable the arrested person to prepare for his defence well in time and give him an

³⁷ Inserted by The Code of Criminal Procedure (Amendment) Act, 2005.

³⁸ Inserted by The Code of Criminal Procedure (Amendment) Act, 2008.

³⁹ All ER 567.

⁴⁰ *Vimal Kishore v State of U.P.*, AIR 1956 All 56.

opportunity to meet the case against him. This also gives an opportunity to arrested person to be in a position to file appropriate application for bail or move the competent court for a writ of *habeas corpus*, if necessary.

In *Shobharam v State of M.P.*⁴¹ as per Hidayatullah, J. “Arrest is arrest, whatever may be the reason for it and the first part of Article 22 (1) enjoins a duty on an arresting person to tell the ground of arrest if made otherwise than under a warrant and if it is made under a warrant, the warrant must itself inform the arrested person with grounds of arrest, so as to enable him to look for the second enshrinement of the right to counsel”. It has been also held that even after a person is released on bail, the requirement of furnishing him the grounds of arrest does not come to an end.

In *re Madhu Limaya's case*,⁴² the Court went on record to hold that if the Court finds that the grounds furnished to the arrested person are insufficient and are not intelligible, detention becomes unlawful and the detenu is entitled to be released forthwith. Grounds of arrest should be communicated in a language known to the detenu⁴³ and should not be vague⁴⁴.

Right of an Accused Person to Counsel

Right to Counsel is a fundamental right under the Constitution of India by virtue of Article 22 (1). The right to consult a lawyer is intended to enable the detained person –

- to secure release, if the arrest is totally illegal.
- to apply for bail, if the circumstances so warrant, to prepare for his defence; and
- to ensure that while he is in custody, no illegality is perpetrated upon him.

Section 41D of the Code of Criminal Procedure, 1973 provides that,

when any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, through not throughout interrogation⁴⁵.

In *A.K. Gopalan v State of Madras*⁴⁶ it is held that the right to counsel as a statutory provision is immune from legislative attack. The question as to the extent of its application came up for consideration and where in case of capital punishment the court

⁴¹ AIR 1966 SC 1910.

⁴² *In re Madhu Limaya*, AIR 1969 SC 1014.

⁴³ *Harkrishan v State of Maharashtra*, AIR 1962 SC 911.

⁴⁴ *Jasbir Singh v Lt. Governor of Delhi*, (1999)4 SCC 228.

⁴⁵ *Supra* note 37.

⁴⁶ AIR 1950 SC 27 see also *Mohammad Amir Kasab v State of Maharashtra*, AIR 2012 SC 3565.

did not try to find out whether the accused was unable to employ counsel or incapable of making his own defence and whether they wanted to engage defence counsel, the fundamental right of the accused to be defended by counsel is violated, warranting a retrial of that case. It was pointed that, the right “refers to the same principle that when a person is detained he should get the opportunity not only to know the reasons for his detention but he should also be given sufficient means available to defend himself i.e. no person can be sentenced unless he has been given an opportunity to defend himself.”

Right to Speedy Trial

Article 22(2) of the Constitution of India provides that,

Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person be detained in custody beyond the said period without the authority of a magistrate.

The right to be produced before a Magistrate under Article 22(2) is intended to enable the detained person-

- To have adequate and defensive opportunity for seeking release on bail and
- Availability on avenue where the person detained can ventilate his grievances that he might have against the treatment meted out to him in custody.
- To have independent scrutiny of the legality of the detention.

Article 9(3) of International Covenant on Civil and Political Rights provides that ‘any one arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings and should occasion arise, for execution of the judgement’. Article 14(3) further provides that, ‘in the determination of any criminal charge against him, everyone shall be entitled to the certain minimum guarantees, in full equality, inter alia to be tried without undue delay’. Under the Indian Constitution the right to speedy trial has been held as a fundamental right arising within the scope of Article 21.

Section 56 of the Code of Criminal Procedure, 1973 provides that,

Person arrested to be taken before Magistrate of officer in charge of police station. A police officer making an arrest without warrant shall, without

unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station.

Section 57 of the Code of Criminal Procedure, 1973 provides that,

no police officer shall detain in custody a person arrested without warrant for a longer period, than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

Section 58 of the Code of Criminal Procedure, 1973 provides that,

officers-in-Charge of police stations shall report to the District Magistrate, or, if he so directs, to the Sub-Divisional Magistrate, the cases of all persons arrested without warrant, with the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

Section 76 of the Code of Criminal Procedure, 1973 provides that,

the police officer or other person executing a warrant of arrest shall (subject to the provisions of Section 71 as to security) without unnecessary delays bring the person arrested before the Court before which he is required by law to produce such person:

Provided that such delay shall not, in any case, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

Section 167(2) of the Code of Criminal Procedure, 1973 provides that,

(b) no Magistrate shall authorize detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage⁴⁷.

Section 167 of the Code of Criminal Procedure, 1973 provides that,

Explanation II– If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorizing detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be⁴⁸.

An arrested person should not be confined in any place other than a police station before he is taken to the Magistrate irrespective of the fact that whether the arrest is with

⁴⁷Substituted by The Code of Criminal Procedure (Amendment) Act, 2008.

⁴⁸ *Ibid.*

or without warrant, the arrested person must be brought before the Magistrate or Court within 24 hours. This healthy provision enables the magistrate to keep a check over the police investigation. It is necessary that the magistrate should try to enforce this requirement and where it is found disobeyed, it should come down heavily on the police⁴⁹. It is well settled that if a police officer fails to produce an arrested person before a magistrate within 24 hours of the arrest, he shall be guilty of wrongful detention⁵⁰. In *Hussainara Khatoon's*⁵¹ case the Supreme Court found that prisoners were kept in jails in violation of directory provision of Section 167 (2) of Code of Criminal Procedure, without they having been produced regularly before the appropriate magistrates, or without being remanded by the magistrates, often for periods longer than the maximum term for which they could be sentenced on conviction and without their trial having been commenced. Even though many among them were charged with bailable offences, they had not been released because, for reasons of lack of legal aid bail applications had not been made on their behalf, or they being poor themselves were unable to furnish bail. The Supreme Court further held that, 'the right to speedy trial is a fundamental right implicit in right to life and liberty of person.' Fair trial implies a speedy trial. No procedure can be reasonable, just or fair unless that procedure ensures speedy trial for determination of guilt or innocence of the person accused. In *Kadra Pahadia v State of Bihar*⁵² the Supreme Court again reiterated that "speedy trial is a fundamental right of an accused implied in Article 21 of the Constitution".

Protection against Illegal Arrest

India is a party to many International Conventions/Covenants which prohibit torture. But there are no explicit provisions in the Constitution regulating the incorporation of and status of international law in Indian legal system. Article 51(c) stipulates as one of directive principles of State policy, that: "the State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another."

⁴⁹ *Khatri v State of Bihar*, 1981 SCC (Cr) 288.

⁵⁰ *Sharif Bhai v Abdul Razak*, AIR 1961 Bom 42 see also *Mst Bhagwan v State*, AIR 1955 Pepsu 33.

⁵¹ *Hussainara Khatoon v State of Bihar*, AIR 1979 SC 1360.

⁵² AIR 1982 SC 1167 see also *Shyam Babu v State of U.P.*, (2012) 6 ALJ 10, *Mohd. Hussain @ Julfikar Ali v State (Govt. of N.C.T.) Delhi*, 2013 (80) ACC 910 (SC).

Article 253 of the Constitution of India provides that,

notwithstanding anything in the foregoing provisions of this chapter, Parliament has power to make any law for the whole or any part of the territory of India implementing any treaty or, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

For the successful implementation of International laws in the domestic legal system, they have to be transformed into domestic law by the legislative act and the Union has the exclusive power in this regard under Article 253 of the Constitution and to this end it has passed only Geneva Conventions Act, 1960.

The judicial opinion in India as expressed in numerous recent judgements demonstrates that the rules of international law should be constructed harmoniously, and only when there is an inevitable conflict between these two laws municipal law should prevail over international law.

The Supreme Court in *Chairman, Railway Board v Chandrime Das*⁵³ observed the applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence. In *Peoples' Union for Civil Liberties v Union of India*⁵⁴ the Supreme Court stated that “the provisions of the Covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by Courts as facets of those fundamental rights and hence, enforceable as such.”

In *Vishaka v State of Rajasthan*⁵⁵ the Supreme Court held that it is now an accepted rule of judicial construction that regards must be had to International Conventions and norms for construing domestic law when there is no inconsistency between them. In *Apparel Export Promotion Council v A.K. Chopra*⁵⁶, the Supreme Court has stated that “In cases involving violation of human rights, the Courts must remain alive to the international instruments and Conventions and apply the same to a given case where there is no inconsistency between the international norms and the domestic law occupying the field.”

Arrest means the deprivation of a person of his liberty by legal authority or at least by apparent legal authority. Every compulsion or physical restraint by the police or state

⁵³ (1993) 2 SCC 746.

⁵⁴ (1997) 3 SCC 433 at 442.

⁵⁵ (1997) 6 SCC 241.

⁵⁶ (1999) 1 SCC 759.

authority is not arrest but when the restraint is total and deprivation of liberty is complete, that would amount to arrest. If a person suppresses or overpowers the voluntary action of another and detains him in a particular place or compels him to go in a specific direction, he is said to imprison that other person. If such detention or imprisonment is in pursuance of any legal authority or apparent legal authority, it would amount to arrest. Preventing a person from willing his movements and from moving according to his will amount to arrest of such person. In the Constituent Assembly debates it had been pointed out that, the usual grounds for such arrests are that there is a credible or reasonable information against that he has committed or is concerned with a cognizable crime or that from his demeanour or other circumstances the officer arresting has reasonable suspicion that he is about to commit such crime for which he has to face trial⁵⁷. The term arrest is not defined in any Statute. However, the lexicon Dictionary has given a meaning of the term arrest as an apprehension of a person by legal authority resulting in deprivation of his liberty⁵⁸. Arrest is a comprehensive term and it essentially includes in effect cases of arrest made by a competent authority and is inclusive of the instances or cases of arrest made by the order of the Civil or Criminal Court. It also can be said to include the cases of arrests so made without a warrant.

The question whether the scope of Article 22 (1) extends to both these types of arrests is not answered in the affirmative. The Supreme Court in the case of *State of Punjab v Ajaib Singh*⁵⁹ held that the protective sweep of Article 22 (1) and (2) does not cover the cases of detention made under a statute without any accusation of a crime or criminal conduct. The logic of *Ajaib Singh* was followed by *Raj Bahadur's*⁶⁰, case by holding that Article 22 (1) and (2) does not cover every case of physical restraint on a person but is limited in scope and provide protection only in respect of certain cases of arrest and detention and not in all cases.

Section 41 is a depository of general powers of the police officer to arrest, but this power is subject to certain other provisions contained in the Code as well as in the special Statute to which the Code is made applicable⁶¹. The powers of the police to arrest a person without a warrant are only confined to such persons who are accused or concerned

⁵⁷ Constituent Assembly Debates, Vol.IX, 1509.

⁵⁸ 152nd Report of Law Commission on, 'Custodial Crime' (1994).

⁵⁹ 1953 CriLJ 180(SC).

⁶⁰ *Raj Bahadur v Legal Remanabrancer*, AIR 1953 Cal.522.

⁶¹ *Avinash Madhukar v State of Maharashtra*, 1983 CriLJ 1833 (Bom).

with the offences or are suspects thereof⁶². When an arrest is made under suspicion of the police and police has to carry out investigation without unnecessary delay, Magistrate has to be watchful, as the power of arrest without warrant under suspicion is liable to be abused⁶³. Arrest means restrain of liberty of the person. Custody means immediate charge and control exercised by person under authority of law. Taking a person into custody is followed after arrest of the concerned person⁶⁴.

In *Director of Enforcement v Deepak Mahajan*⁶⁵ the Supreme Court laid down that in every arrest, there is custody but not vice-versa and custody and arrest are not synonymous terms. Arrest is a formal mode of taking a person in custody, but a person may be in the custody in other ways also. Even the very fact of submission to an interrogation by the police would amount to custody⁶⁶. By going to police station and making a statement which shows that an offence has been committed by him, a person not only accuses himself but also surrenders himself to the custody of the police⁶⁷.

The Royal Commission⁶⁸ suggested certain restrictions on the power of arrest on the basis of the necessity principle. The Royal Commission recommend that detention upon arrest for an offence should continue only on one or more of the following criteria:-

- The person's unwillingness to identify himself so that a summons may be served upon him
- The need to prevent the continuation or repetition of that offence
- The need to protect the arrested person himself or other person or property
- The need to secure or preserve evidence of or relating to that offence or to obtain such evidence from the suspect by questioning him: and
- The likelihood of the person failing to appear at court to answer any charge made against him

The Royal Commission also suggested to reduce the use of arrest, Royal Commission proposed the introduction of a scheme that is used in Ontario, enabling a police officer to issue what is called an appearance notice. That procedure can be used to

⁶² *Sham Lal v Ajit Singh*, 1981 CriLJ NOC 150 (P&H).

⁶³ *Shahadat Khan*, AIR 1965 Tripura 27.

⁶⁴ *Supra* note 58.

⁶⁵ AIR 1994 SC 1775.

⁶⁶ *Parm Hansa v State of Orissa*, 1964 (1) CriLJ 680 (Orissa).

⁶⁷ *State v Mohd. Hussain*, 1959 CriLJ 1419 (Bom).

⁶⁸ Report of Royal Commission on 'Criminal Procedure' as quoted in *D.K. Basu v State of West Bengal*, (1997) 1 SCC 416 at 425.

obtain attendance at the police station without resorting to arrest provided a power to arrest exists, for example to be fingerprinted or to participate in an identification parade. It could also be extended to the attendance for interview at a time convenient both to the suspect and to the police officer investigating the case.

Third Report of the National Police Commission⁶⁹ suggested that an arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances:-

- The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror-stricken victims.
- The accused is likely to abscond and evade the process of law.
- The accused is showing violent behaviour and is likely to commit further offences unless his movements are brought under restraint.
- The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again. It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines.

The National Police Commission in its Third Report referring to the quality of arrests by the Police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, approximately 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.3% of the expenditure of the jails. The said Commission observed that a major portion of the arrests were connected with very minor prosecutions and cannot, therefore, be regarded as quite necessary from the point of view of crime prevention. Continued detention in jail of the persons so arrested has also meant avoidable expenditure on their maintenance. In the above period it was estimated that 43.2% of the expenditure in the connected jails was over such prisoners only who in the ultimate analysis need not have been arrested at all⁷⁰.

⁶⁹ 3rd Report of National Police Commission of India, A publication of Government of India (1980).

⁷⁰ *Id.* at 31.

The Tokyo Rules⁷¹ provide a set of basic principles to promote the use of non-custodial measures, as well as minimum safeguards for person subjected to alternatives to imprisonment. Pre-trial detention is used as a last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim. Alternatives to pre-trial detention shall be employed at as early stage as possible. Pre-trial detention shall last no longer than necessary. The judicial authority, having at its disposal a range of non-custodial measures should take into consideration in making its decision the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted wherever appropriate. Sentencing authorities may dispose of cases in the following ways:-

- Verbal sanctions, such as admonition, reprimand and warning;
- Conditional discharge;
- Status penalties;
- Economic sanctions and monetary penalties, such as fines and day-fines
- Confiscation or an expropriation order;
- Restitution to the victim or a compensation order;
- Suspended or deferred sentence;
- Probation and judicial supervision;
- A community service order;
- Referral to an attendance centre;
- House arrest;
- Any other mode of non-institutional treatment;
- Some combination of the measures listed above.

It is submitted that these Rules should be incorporated in the Indian legal system as India is bound to put in place all those measures that may pre-empt the perpetration of torture.

Article 3 of Universal Declaration of Human Rights proclaims that everyone has the right to liberty and security, Article 9 of the Declaration provides that no one shall be subjected to arbitrary arrest, detention, or exile. In fact, all the rights mentioned in the Declaration are rendered worthless if a person is not free. This is because such a loss of liberty destroys privacy, violently neutralizing the rights of freedom of movement.

⁷¹ Proceedings of the 68th Plenary Meeting of the United Nations on 14 December 1990.

Obviously, it also directly infringes adversely various other rights such as political and economic rights contained in the Declaration.

Some of the internationally accepted control mechanisms to prevent such illegal or arbitrary arrests, under varying legal systems can be summarized as:-

- Limitations on the power of arrest by mandating that before a person can be deprived of his liberty, certain conditions established by law must be satisfied and certain procedures must be followed.
- A system of checks and controls, which forms the part of the process of arrest and detention, provides built-in safeguards against illegal or arbitrary action.
- Legal remedies designed to permit the arrested or detained person to obtain speedy adjudication of the validity of his arrest or detention.
- Civil, criminal and disciplinary sanctions, which act as deterrents to violations of the safeguards established by law against illegal or arbitrary arrest or detention.

The Supreme Court of India in various cases has laid down guidelines and principles of custody jurisprudence; leaving no space for any ambiguity in understanding the spirit behind the Constitutional and statutory provisions relating to human rights and human dignity. Custody jurisprudence includes provisions regarding arrest, handcuffing, custodial crime and victim compensation. The horizon of human rights is expanding, at the same time; the crime rate is also increasing. The Courts have voiced their concern regarding indiscriminate use and abuse of power of arrest by law enforcement agencies on several occasions. The Apex Court while commenting on the violation of human rights because of indiscriminate arrest observed that, “the law of arrest is one of the balancing individual rights, liberties and privileges on the one hand and responsibilities on the other hand: of weighing and balancing or rights, liberties and privileges of the single individual and those of individuals collectively: of simply deciding what is wanted and where to put the weight and the emphasis: of deciding which comes first the criminal or the society, the law violation or the abider”⁷².

Guidelines on Arrest

In *Joginder Kumar v State of Utter Pradesh*⁷³, the Supreme Court set four major guidelines that are to be followed by the police in all cases of arrest. These are:-

⁷² *Joginder Kumar v State of Utter Pradesh*, AIR 1994 SC 1349.

⁷³ *Ibid.*

- An arrested person in custody is entitled, if he so requests, to have one friend or relative or other person known to him or likely to take interest in him told as far as is practicable, that he has been arrested and details as to where he is being detained;
- The officer shall inform the arrested person of the above rights;
- An entry is to be made in the case diary as to who was informed of the arrest (in the concerned case); and
- Departmental instructions are to be issued that a police officer making arrest should record in the case diary, the reasons for making the arrest.

In order to ensure that the above directions complied with; the Court declared that it shall be the duty of the Magistrate (before whom the arrested person is produced) to satisfy that these requirements have been met. Taking cognizance of the reporting of large number of custodial crimes in India, the Supreme Court delivered a historic judgement in *D.K. Basu v State of West Bengal*⁷⁴ which laid down rules for custody jurisprudence. The apex court felt the urgency of streamlining the structure and functions of the law enforcement machinery responsible for effecting arrests in the country. The Court observed that there should be more transparency and accountability in the system so far as arrests and detentions of the offenders are concerned. In addition to the statutory and constitutional requirements, it was made mandatory on part of the law enforcement agencies to follow the following guidelines at the time of effecting arrest of an offender:-

- The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
- The police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person

⁷⁴ *Supra* note 32.

of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

- A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the arresting witness of the memo of arrest is himself such a friend or a relative of the arrestee.
- The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organization in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.
- The person arrested must be made aware of his right to have some one informed of his arrest or detention as soon as he is put under arrest or is detained.
- An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.
- The arrestee should, where he/she so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The 'Inspection Memo' must be signed both by the arrestee and the police officer affecting the arrest and its copy provided to the arrestee.
- The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director Health Services of the concerned State or Union Territory. Director Health Services should prepare such a panel for all Tehsils and Districts as well.
- Copies of all the documents including the memo of arrest referred to above, should be sent to the 'Illaqua Magistrate' for his record.
- The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

- A police control room should be provided at all district and state headquarters where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and it should be displayed on a conspicuous notice board at the police control room.

The Court in the same case observed that failure to comply with the requirements mentioned above shall, apart from rendering the concerned official liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country, having jurisdiction over the matter. The extent of these detailed instructions is itself an indication of judicial concern over illegal detention, torture and custodial deaths. However, an individual being picked up by the police anywhere in the Country is under enormous pressure and he or she would not directly confront the power of the men in uniform. In such a situation, it is extremely unlikely that he or she will be able to insist on the safeguards these judicial orders provide.

The National Human Rights Commission's Guidelines on Arrest

The National Human Rights Commission has issued following detailed guidelines⁷⁵ regarding arrest, keeping in view various judicial pronouncements

(A) Pre-arrest Guidelines

- 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 bonafides of a complaint and a reasonable belief as to both the person's complicity as well as the need to affect arrest⁷⁶. 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*⁷⁷ case pronouncement of the Supreme Court the question whether the power of arrest has been exercised reasonably or not is clearly a justifiable one.
- Arrest in cognizable cases may be considered justified in one or other of the following circumstances;

⁷⁵ Important Instructions/Guidelines of National Human Rights Commission, New Delhi, 22 August 2000.

⁷⁶ *Supra* note 72.

⁷⁷ *Ibid.*

- (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.⁷⁸
- Except in heinous offences, as mentioned above, an arrest must be avoided if a police officer issues notice to the person to attend the police station and not leave the station without permission⁷⁹.
 - Police officers carrying out an arrest or interrogation should bear clear identification and name tag 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 Guidelines

- As a rule, use of force should be avoided while affecting 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 are 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. Searches of women should only be made by other women with strict regard to decency⁸⁰.
- 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

⁷⁸ *Supra* note 69.

⁷⁹ *Supra* note 72.

⁸⁰ Section 51(2) of the Code of Criminal Procedure, 1973.

in judgement of the Supreme Court in *Prem Chander Shukla v Delhi Administration*⁸¹ and *Citizen for Democracy v State of Assam*⁸².

- As far as is practicable women police officers should be associated where the person or persons being arrested are women. The arrest of women between sunset and sunrise should be avoided⁸³.
- 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 terrorized 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 demand⁸⁴.
- 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 informed⁸⁵.
- 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.
- 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 expense⁸⁶.
- 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 request but is in need of medical help,

⁸¹ *Supra* note 25.

⁸² (1995)3 SCC 743.

⁸³ *Supra* note 37.

⁸⁴ Section 50(1) of the Code of Criminal Procedure, 1973.

⁸⁵ Section 50 A of the Code of Criminal Procedure, Inserted by the Code of Criminal Procedure (Amendment) Act, 2005.

⁸⁶ *Supra* note 32.

he should promptly arrange for the same. This must also be recorded contemporaneously in a register. Only a female registered medical practitioner should examine the female requesting for medical help

- Information regarding the arrest and the place of detention should be communicated by the police officer affected 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 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, 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 Guidelines

- The person under arrest must be produced before the appropriate court within 24 hours of the arrest⁸⁷.
- 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

⁸⁷ Sections 56 and 57 of the Code of Criminal Procedure, 1973.

and the relatives or friend of the person arrested must be informed of the place of interrogation.

- The methods of interrogation must be consistent with the recognised rights to life, dignity and liberty and right against torture and degrading treatment.

(D) Enforcement of Guidelines

- The guidelines must be translated in as many languages as possible and distributed to every police station. It must also be incorporated in a handbook which should be given to every policeman.
- Guidelines must receive maximum publicity in the print or other electronic media. It should also be prominently displayed on notice board, in more than one language, in every police station.
- The police must set up a complaint redressal mechanism, which will promptly investigate complaints of violation of guidelines and take corrective action.
- The notice board, which displays guidelines must also indicate the location of the complaints redressal mechanism and how that body can be approached.
- NGOs and public institutions including courts, hospitals, universities etc. must be involved in the dissemination of these guidelines to ensure the widest possible reach.
- The functioning of the complaint redressal mechanism must be transparent and its reports should be accessible.
- Prompt action must be taken against errant police officers for violation of the guidelines. This should not be limited to departmental enquiries but should also set in motion the criminal justice mechanism.
- Sensitization and training of police officers is essential for effective implementation of the guidelines.

Section 50 A (incorporated by the Code of Criminal Procedure (Amendment) Act, 2005) provides that, any person held in custody by the police, shall be entitled to have one person of his choice informed of his arrest and place of detention so that he can arrange for adequate assistance during investigation and trial. In this way the legislature has given effect to the guidelines issued by the Supreme Court in *Joginder*

*Kumar v. State of U.P.*⁸⁸ and in few of the recommendations made by the Law Commission in its 152nd report on Custodial Crimes⁸⁹.

Section 330 of the Indian Penal Code, 1860 provides that,

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

In *Meach Mohamed*⁹⁰, the Court held that the principal object of Section 330 is to prevent torture by the police. Where a constable, during an inquiry into a theft case, violently beat the accused, who died about nine days afterwards from the effect of the beating, it was held that he was guilty under this Section.

In *Sham Kant v State of Maharashtra*⁹¹, where the accused, the investigating officer and his assistant entertained suspicion about two persons in case of theft and subjected to detention of stolen properties, the accused were held guilty of offence under Section 330.

Section 331 of the Indian Penal Code, 1860 provides that,

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

In *Munshi Singh Gautam v State of M.P.*⁹², the deceased alleged to be taken to police station and beaten as result of which he died. False statement by one of the accused police official as to occurrence of death of deceased, plea by another accused that

⁸⁸ *Supra* note 72.

⁸⁹ *Supra* note 58.

⁹⁰ (1866) PR No.86 of 1866.

⁹¹ AIR 1992 SC 1879.

⁹² AIR 2005 SC 402.

deceased came to police station in severe condition and after telling his name has collapsed. Accusations found established against the accused, however, no grievous injuries found on vital parts of the body of deceased. Duration of injuries was widely variant, right lung of deceased was TB affected thus combined effect of alcohol consumed by him and injuries shortened period of death and resulted in quicker death. Therefore, conviction of accused under Section 304, Part II was proper.

Provisions under the Indian Legal System: To protect a woman from custodial torture

Section 376 (2) of the Indian Penal Code, 1860 provides that,

Whoever, —

- a) *being* a police officer, commits rape —
within the limits of the police station to which such police officer is appointed; or
in the premises of any station house; or
on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or
- b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or
- c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or
- d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or
- e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital;

.....
.....

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine”.

Explanation — For the purposes of this sub-section,—

- a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;
- b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons

during convalescence or of persons requiring medical attention or rehabilitation;

- c) "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861;
- d) "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children⁹³.

Section 376C of the Indian Penal Code, 1860 provides that,

whoever, being —

in a position of authority or in a fiduciary relationship;

public servant;

superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution;

on the management of a hospital or being on the staff of a hospital, abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine

Section 46(1) of the Code of Criminal Procedure, 1973 provide that,

where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer is a female, the police officer shall not touch the person of the woman for making her arrest⁹⁴.

Section 46(4) of the Code of Criminal Procedure, 1973 provides that,

Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made⁹⁵.

State owned institutions typically include prisons and jails, but can also include nursing homes, hospitals and institutions for the mentally ill⁹⁶. Custodial sexual assault can also occur outside of an institutional setting. United Nations Special Rapporteur on 'Violence against Women' has explained 'when police or military personnel enter home

⁹³ Inserted by the Criminal Law (Amendment) Act, 2013.

⁹⁴ *Supra* note 38.

⁹⁵ *Supra* note 37.

⁹⁶ Available at: www.stopvaw.org/custodial_sexual_Assault.htm (visited on 11 March 2011).

to search, question, intimidate and/or harass, there is at the very least an unspoken presumption, if not an overt order, that those within the home cannot leave, thereby placing them in *de facto*, albeit in many cases unofficial, custody of the state. Such situations, particularly prevalent during breakdowns of the rule of law, can be called '*constructive custody*'. For example, when police entered a factory in Tirana (Albania) to enforce a mayoral decree, their mistreatment of the women was custodial violence because the officers '*custody*' of the women began when they entered the factory and the women were no longer free to leave⁹⁷.

Women are tortured in prison with the purpose of extracting a confession and to punish, inflict pain and suffering, instil fear and cause psychological damage. Rape has been used as a form of torture not only directly against the rape victims, but also against male members who are forced to witness the rape of the wives, sisters, partners, daughters or mothers. The act of being forced to watch the rape of another has been recognized as distinct psychological form of torture. However, in such scenarios, the rape itself often has not qualified as torture. Rather, like the electric shock, the shackles or the police baton, the rape of women has been viewed as a weapon of the torturer. Thus, the attack on the woman's body is perpetrated as an attack on the male and, in many cases, is perceived as such, except by the woman herself⁹⁸. Physical captivity in any form where the power between the captive and the captor is unequal as in police and penal custody increases the risk for abuse of power and torture. Male prison officials increase the risk of sexual abuse and coercion of female prisoners, so does housing of females in male prison facilities.

In 1972, Mathura Rape case⁹⁹ marked one of the major watersheds in the history of the codification of laws regarding sexual repression of women. It mirrored the patriarchal and Victorian biases of the entire legal system in more than one way. The binding theme of the narrative that emanated from its proceedings was based on the fact that this tribal woman had a pre-marital sexual relationship with the person she eloped with and hence it was argued that she had presumably consented to sexual intercourse in the police station, being a woman of loose morals. An open letter of protest to the President of India by some eminent members of Delhi's legal fraternity followed and various women's groups clamoured fiercely for a re-definition of 'consent' to an act of

⁹⁷ Available at: www.amnestyusa.org/pdf/custodyissue.pdf (visited on 11 March 2011).

⁹⁸ *Ibid.*

⁹⁹ *Tuka Ram and Anr. v State Of Maharashtra*, AIR 1979 SC 185.

sexual intercourse. Mathura was forced to undergo sex at gunpoint, they argued. In 1979, the Indian Government referred revision of the law of rape to the Law Commission of India. The 84th Report of Law Commission on Rape and Allied offences focussed on the controversial “consent” issue while emphasizing that consent was an antithesis of rape and consent must be real and not vitiated by any duress. Submission to intercourse or a mere act of helpless resignation in the face of inevitable compulsion could not be deemed to be consent. The Report recommended changes in procedural law¹⁰⁰. The 84th Report of Law Commission suggested changes to the law relating to rape. Some of these were incorporated into the Criminal Law (Amendment) Act, 1983.

Section 114A the Indian Evidence Act, 1872 provides that,

in a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of sub-section (2) of section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

Explanation- In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375 of the Indian Penal Code¹⁰¹.

Section 146 the Indian Evidence Act, 1872 provides that,

when a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend

(1).....

(2).....

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty for forfeiture

Provided that in a prosecution for an offence under section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code or for attempt to commit any such offence, where the question of consent is an issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to the general immoral character, or previous sexual experience, of such victim with any person for proving such consent or the quality of consent¹⁰².

¹⁰⁰ 84th Report of Law Commission on ‘Rape and Allied Offences’ (1980).

¹⁰¹ *Supra* note 93.

¹⁰² *Ibid.*

Women activists are special targets of police brutality and sexual violence. Rape or the threat of rape is the weapon most frequently resorted to for purposes of intimidation and breaking the spirit of these women. A woman activist of the Janta Party was taken to the police station on a minor charge and then stripped, slapped and threatened. She was paraded round the room of the police station naked, kicked on her hips and threatened with worse treatment, if she screamed. A woman activist Madhu, rescued a girl from a brothel in Agra in which she revealed the complicity of the police in running the brothel and in return received brutal physical torture¹⁰³. In State of Jammu and Kashmir, rape by security forces was found to be systematically practised as part of attempts to humiliate and intimidate the local population¹⁰⁴.

In the case of *Sheela Barse*¹⁰⁵, the Court has given directions to ensure protection against torture and maltreatment of women in police custody which as follows:

- (i) Female suspects must be kept in separate lock-ups under the supervision of female constables.
- (ii) Interrogation of females must be carried out in the presence of female Police persons.
- (iii) A person arrested without a warrant must be immediately informed about the grounds of arrest and the right to obtain bail.
- (iv) As soon as an arrest is made, the police should obtain from the arrested person, the name of a relative or friend whom s/he would like to be informed about the arrest. The relative or friend must then be informed by the police.
- (v) The police must inform the nearest Legal Aid Committee as soon as an arrest is made and the person is taken to the lock-up.
- (vi) The Legal Aid Committee should take immediate steps to provide legal assistance to the arrested person at State cost, provided such person is willing to accept legal assistance.
- (vii) The magistrate before whom an arrested person is produced shall inquire from the arrested person whether s/he has any complaints against torture and maltreatment in police custody. The magistrate shall also inform such person of her/his right to be medically examined.

¹⁰³ Uma Chakaravarti, "Rape, Class and the State", *PUCL Bulletin*, September, 1982.

¹⁰⁴ Report of Amnesty International, "India: Torture, Rape and Death in Custody", available at: <http://india.code.nic.in/law com report> (visited on 15 March 2011).

¹⁰⁵ *Supra* note 29.

In *Veena Sethi v State of Bihar*¹⁰⁶, the Supreme Court has strongly deprecated the tendency of continuing to detain persons as criminal lunatics for long periods even after they have become sane. The Court has emphasized that there should be an adequate number of institutions for looking after the mentally sick persons and the practice of sending lunatics or persons of unsound mind to jail for safe custody is not desirable, because jail is hardly a place for treating such persons. The Court has also frowned upon the practice of keeping women in prison without being accused of any crime. These women are kept in prison merely because they happen to be victims of an offence or they are required for the purpose of giving evidence or they are in protective custody.

In *Bharwada Bhoginbhai v State of Gujrat*¹⁰⁷, Thakkar, J. observed with some anguish, “In the Indian setting, refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule is adding insult to injury. A girl or woman in the tradition bound non –permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society and when in the face of these factors the crime is brought to light, there is built in assurance that the charge is genuine rather than fabricated, just as a witness who has sustained an injury is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sex offence is entitled to great weight absence of corroboration notwithstanding”.

In *Hussainara Khatoon (IV) v State of Bihar*¹⁰⁸, the Court has characterized protective custody as in truth nothing but imprisonment which violates Article 21. The Court has directed the Government to set up welfare and rescue homes to take care of destitute women and children.

In the case of *State of Maharashtra v Chanderprakash Kewal Chand Jain*¹⁰⁹, the Supreme Court held, prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in case of physical violence. The same degree of

¹⁰⁶ AIR 1983 SC 339.

¹⁰⁷ AIR 1983 SC 753.

¹⁰⁸ AIR 1983 SC 1360.

¹⁰⁹ AIR 1990 SC 658.

care and caution must attach in the evaluation of her evidence as in the case of any injured complainant or witness and no more.

In March 1992, Amnesty International published a report, which described rape as a common form of torture in India. This document describes several reports of rape perpetrated by police and security forces in several Indian States during 1993 which demonstrates that rape continues to be a disturbing aspect of custodial violence in India¹¹⁰. Gang rapes of women are common when villages are raided by the police or army. An editorial in the Statesman commented saying that “police abuse women to carry out a proxy war against what their menfolk stand for”.¹¹¹

In 1994, India ratified the Convention of the Elimination of all forms of Discrimination against Women (CEDAW). The purpose, as provided in Article 1 of the treaty, is to focus on the forms of discrimination that women face and to help eliminate discrimination that either intends to, or has the effect of, limiting women from participating equally in public life. The General Assembly on 6 October 1999 adopted the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women. By ratifying the Optional Protocol, a State recognizes the competence of the Committee on the Elimination of Discrimination against Women -- the body that monitors States parties' compliance with the Convention -- to receive and consider complaints from individuals or groups within its jurisdiction. Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women is not ratified by Government of India.

In case of *Arvind Singh Bagga v State of Uttar Pradesh*¹¹², the Court has given an extensive definition of ‘torture’. According to the Court, “torture is not merely physical but may even consist of mental and psychological torture calculated to create fright to make her submit to the demands of the police”. The detention of a married woman in custody who is not an accused on the pretext of her being a victim of abduction and rape which never was to her knowledge and to the knowledge of the police officers concerned aforesaid is itself a great mental torture for her which cannot be compensated later but here we have found that she was tortured otherwise also by threats of violence to her and to her husband and his family and was given physical violence calculated to instil fear in

¹¹⁰ *Supra* note 104.

¹¹¹ S.K. Ghosh, *Torture and Rape in Police Custody* 27 (1993).

¹¹² AIR 1995 SC 117.

her mind and compel her to yield and to abandon her marriage with Charanjit Singh Bagga which had been duly performed . She was made to write a statement as commanded by investigation officers.

In *Christian Community Welfare Council of India and Others v State of Maharashtra and Others*¹¹³, on the intervening night of 23 June-24 June 1993 at 12:45 P.M., 10 Policemen of Nagpur Crime Branch took railway worker Jaonious Adam, his wife Jarina Adam and their two children into custody, detained them for allegedly harbouring a person suspected in robbery. Adam was brutally beaten and died in the cell. His wife was beaten and repeatedly molested. According to High Court, “not only taking away a lady forcibly in the mid night by male police officers was deplorable but also gross and blatant abuse of power shows that such police officials have no regard for public morality and decency. The State should ensure that, female person is not arrested without the presence of a lady constable and in no case, after sunset and before sunrise”.

The State of Maharashtra State went in appeal to the Supreme Court and the Apex Court gave its verdict in *State of Maharashtra v Christian Community Welfare Council of India*¹¹⁴ and held that ‘all efforts’ should be made to have a lady constable present .If the arresting officers could reasonably satisfy that it is not possible to have a lady constable present or there could be a delay in arresting; he can record reasons either before or immediately after the arrest and is permitted to arrest a woman for lawful reasons at any time of the day or night depending on the circumstances of the case even without the presence of a lady constable.

Women organisation and legal activists have very different opinion. They feel that practical considerations cannot overrule the ground reality in the attitude of police to woman. The National Commission for Women based on the reports of the National Expert Committee on Women Prisoners and the All India Committee on Jail Reforms recommended to the Union Home Ministry that woman should not be arrested between sunset and sunrise and not arrested except in the presence of woman¹¹⁵. Section 46(4) is inserted by the Code of Criminal Procedure (Amendment) Act, 2005 to protect a woman from custodial torture¹¹⁶. In case of *Mehboob Batcha and Others v State Rep. by*

¹¹³ 1995 CriLJ 4223(Bombay).

¹¹⁴ (2003)8 SCC 456.

¹¹⁵ *The Hindu*, 28 December 2003.

¹¹⁶ *Supra* note 37.

*Superintendent of Police*¹¹⁷, the Supreme Court observed, “Crimes against women are not ordinary crimes committed in a fit of anger or for property. They are social crimes and disrupt the entire social fabric and hence they call for harsh punishment”.

It is worthwhile to mention that there are practical difficulties in implementing these orders in letter and spirit. Majority of the investigating officers are afraid of interrogating criminals now-a-days. They have become extra cautious lest they should be held responsible for violating the orders. Some of these instructions render the investigating officer vulnerable to vague allegations by the persons in custody. Clever hardened criminals have already started misusing the concessions provided in these guidelines and investigating officers are demoralized. There is urgent need to give practical shape to these directions in consultation with police officers as per ground realities.

In spite of all the Constitution and Statutory safeguards the worst form of human rights violations happen and the worst thing is the propagations of this violence are the custodians of human rights themselves. Even the Supreme Court has denounced this cruelty in number of cases. The matter received serious attention at the hands of the Supreme Court in a judgement of 1985,¹¹⁸ in the wake of which the Law Commission prepared and forwarded a separate Report dealing with prosecutions of police officers in certain situations¹¹⁹. This case relates to highly shocking incident of torture of a suspect in police custody, who died within six hours of his arrest. After two hours of his arrest, the person was produced before the Magistrate, he was injured and in a serious condition. In fact, he could not even walk upto the room of the Magistrate, who had to come out and examine him in the verandah of the Court room. Both the Magistrate and the prison doctor were told by the accused about the beating by the police constable. The constable was convicted by the Sessions Court under Section 304 of IPC. In the appeal, the Supreme Court emphasised the extremely peculiar character of the situation where none else than the police officer having custody can give evidence regarding the circumstances in which the person in custody came to receive injuries. Persons on whom atrocities are perpetrated by the police in the police station, are, thus, left without any evidence to prove

¹¹⁷(2011)3 SCR 1091.

¹¹⁸ *State of U.P. v Ram Sagar Yadav*, AIR 1985 SC 416.

¹¹⁹ 113th Report of Law Commission on ‘Injuries in Police Custody’ (1985).

who the offenders are for this reason. The Court called for re-examination of the law of burden of proof in such cases.

After the judgement in the case of *Ram Sagar Yadav's case*, the Law Commission of India recommended the insertion of new Section in the Indian Evidence Act, 1872, as under:- "114B (1) In a prosecution of a police officer for an offence constituted by an act alleged to have caused bodily injury to a person, if there is evidence that the injury was caused during a period when that person was in the custody of the police, the court may presume that the injury was caused by the police officer having custody of that person during that period.

(2) The Court in deciding whether or not it should draw a presumption under sub-section

(1) shall have recourse to all the relevant circumstances, including, in particular,

(a) the period of custody,

(b) any statement made by the victim as to how the injuries were received, being a statement admissible in evidence,

(c) the evidence if any medical practitioner who might have examined the victim, and

(d) evidence of any magistrate who might have recorded the victim's statement or attempted to record it".

It is submitted these recommendations have not been implemented till today although instances of custodial torture are going on. Recommendations of Law Commission and Apex Court should be implemented to check and curb custodial crimes.

In *Bhagwan Singh v State of Punjab*¹²⁰, the following observations occurred, "If a person is in police custody, then what has happened to him is peculiarly within the knowledge of the police officials who have taken him into custody when the other evidence is convincing enough to establish that the deceased died because of the injuries inflicted by the accused, the circumstances would only lead to an irresistible inference that the police personnel who caused his death must also have caused the disappearance of body".

The need for a change in the rule regarding burden of proof was adverted to in the case of *Nilabati Behera v State of Orissa*.¹²¹ The victim taken into police custody was on the next day found dead at a place near the police post, the Court held that the burden was

¹²⁰ (1992) 3 SCC 249.

¹²¹ 1994 (1) RCR 18.

on the State to prove how the victim came to sustain the injuries resulting in his death. In *Shakila Abdul Gafar v Vasant Raghunath Dhobla*¹²², keeping in view the dehumanizing aspect of the crime, the Court held that, “the flagrant violation of the fundamental rights of the victim and the growing rise in the crimes in this type, where only a few come to light and others don’t, the Government and the legislature must give serious thought to the recommendations of the Law Commission and bring about appropriate change in the law not only to curb the custodial crime but also to see that custodial crime does not go unpunished”.

In *Munshi Singh Gautam v State of M.P.*¹²³, the Court held that rarely in cases of police torture or custodial death, only direct ocular evidence of custodial death are police personnel and they can only explain the circumstances in which the person died in custody. They are bounded by the ties of brotherhood and it is not unknown that the police personnel prefer to remain silent and more often than not even prevent the truth to save their colleagues.

Provision under the Police Act, 1861– To Protect a Person from Custodial Torture

Section 29 of the Police Act, provides that,

every police officer who shall be guilty of any violation of duty or wilful breach or neglect of any rule or regulation of lawful order made by competent authority, or who shall withdraw from the duties of his office without permission, or without having given previous notice for a period of two months, or who, being absent on leave shall fail, without reasonable cause, to report himself for duty on the expiration of such leave or who shall engage without authority in any employment other than his police duty, or who shall be guilty of cowardice, or who shall offer any unwarrantable personal violence to any person in his custody shall be liable, on conviction before a Magistrate, to a penalty not exceeding three months pay, or to imprisonment with or without hard labour, for a period not exceeding three months or both.

In the case of *Dr. Mehmood Nayyar Azam V State of Chattisgarh and Others*,¹²⁴ the appellant, while in custody, was compelled to hold a placard in which condemning language was written. He was photographed with the said placard and the photograph was made public. After referring to various provisions, the learned single Judge called for a

¹²² AIR 2003 SC 4567.

¹²³ *Supra* note 92.

¹²⁴ 2012 CriLJ 3934 (SC).

report from the Chief Secretary. The report was filed stating that the Sub-Inspector had been imposed punishment of “censure” by the Superintendent of Police. It was also set forth that a charge-sheet was served on all the erring officers and a departmental enquiry was held and in the ultimate eventuate, they had been imposed major penalty of withholding of one annual increment and a case had been registered under Section 29 of the Police Act against the erring officers. In the appeal Division Bench observed that, “On a reflection of the facts of the case, it is luculent that the appellant had undergone mental torture at the hands of insensible police officials. Regard being had to the various aspects which we have analysed and taking note of the totality of facts and circumstances, a sum of rupees five lakh should be granted towards compensation to the appellant. The said amount shall be paid by the respondent State within a period of six weeks and be realized from the erring officers in equal proportions from their salary as thought appropriate by the competent authority of the State”.

Provisions under Army Act, 1950– To Protect a Person from Custodial Torture

Section 50 of the Army Act, 1950 provides that,

any person subject to this Act who commits any of the following offences, that is to say:-

Unnecessarily detains a person in arrest or confinement without bringing him to trial, or fails to bring his case before the proper authority for investigation or

Having committed a person to military custody fails without reasonable cause to deliver at the time of such committal, or as soon as practicable, and in any case within forty eight hours, therefore, to the officer or other person into whose custody the person arrested is committed, an account in writing signed by himself of the offence with which the person so committed is charged; shall; on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to two years or such less punishment as in this Act mentioned.

Section 64 of the Army Act, 1950 provides that,

Any person subject to this Act who commits any of the following offences, that is to say:-

(a) being in command at any post or on the march, and receiving a complaint that anyone under his command has beaten or otherwise maltreated or oppressed any person, or has disturbed any fair or market, or committed any riot or trespass, fails to have due separation made to the injured person or to report the case to the proper authority; or

(b) commits any offence against the property or person of any inhabitant of, or resident in, the country in which he is serving, shall on conviction

by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as in the Act mentioned.

In the case of *Ajay Kumar Roy v Union of India*¹²⁵ the Court observed that, “It is no doubt true that discipline has to be maintained in the Army and the concerned officer shall be vested with certain powers to deal with the soldiers and other subordinate officers to follow their instructions and to act according to their commands. But, the officers on the pretext of discipline are not supposed to curtail the freedom of the personnel working under them or infringe the rights guaranteed under Article 21 of the Constitution of India and to the extent permissible under the provisions of the relevant statutes. There is no meaning in repeatedly saying that the Constitution protects the rights of the individuals as enshrined under Part III of the Constitution of India unless it is put to practice. The rights of the personnel also cannot be taken away or abridged completely except according to the procedure established by law. The concerned authorities are entitled to impose reasonable restrictions on such rights as provided under the relevant statutes or statutory rules to maintain law and order in all disciplines. But, that does not give unfettered powers to those authorities to deal with the lives and liberties of the people as they like. So long as the authorities exercise their powers within the limits prescribed under the relevant statutes, the Courts do not interfere, but, when once they cross a line known as 'Lakshmana Rekha' the Courts being the custodians of the people are bound to **react** and correct the errors committed by the concerned authorities either to prevent the abuse of the process of law or failure to follow the procedure established by law. Though, the respondents mentioned in the counter-affidavit the reasons for ordering of 'close arrest' of the detenu, they did not place any record regarding assigning of reasons for such arrest. The Court held that, “order of 'close arrest' without assigning sufficient reasons in writing is not legal and in such a case the arrest becomes illegal”.

Provisions under Navy Act, 1957– To Protect a Person from Custodial Torture

Section 85 of the Navy Act, 1957 provides that,

No person subject to Naval law who is arrested under this Act shall be detained in Naval custody without being informed, as soon as may be, of the grounds for such arrest.

¹²⁵ 2003 CriLJ 3999 (A.P.).

Every person subject to Naval law who is arrested and detained in naval custody shall be produced before his commanding officer or other officer prescribed in this behalf within a period of forty-eight hours of such arrest excluding the time necessary for the journey from the place of arrest to such commanding or other officer and no such person shall be detained in custody beyond the said period without the authority of such commanding or other officer.

Section 86 of the Navy Act, 1957 provides that,

The charge made against any person subject to naval law taken into custody shall without any unnecessary delay be investigated by the proper authority and as soon as may be either proceedings shall be taken for the trial or such person shall be discharged from custody.

Section 87 of the Navy Act, 1957 provides that,

The commanding officer shall be responsible for the safe custody of every person who is in naval custody on board his ship or in his establishment.

The officer or sailor in charge of guard, or a provost-marshal shall receive and keep any person who is duly committed to his custody.

In case of, *Dhirendra Kumar Singh and Others v State of A.P. and Others*¹²⁶, the Court held that the provisions in the Navy Act can be considered as parallel to the provisions in the Criminal Procedure Code pertaining to arrest, detention and bail though not identical with them.

Provisions Under Air Force Act, 1950– To Protect A Person From Custodial Torture

Section 50 of the Air Force Act, 1950 provides that,

Any person subject to this Act who commits any of the following offences, that is to say,-

(a) unnecessarily detains a person in arrest or confinement without bringing him to trial, or fails to bring his case before the proper authority for investigation; or

(b) having committed a person to air force custody fails without reasonable cause to deliver at the time of such committal, or as soon as practicable, and in any case within forty- eight hours thereafter, to the officer or other person into whose custody the person arrested is committed, an account in writing signed by himself of the offence with which the person so committed is charged; shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to two years or such less punishment as is in this Act mentioned.

¹²⁶ 1999 CriLJ 4421 (AP).

Section 103 of the Air Force Act, 1950 provides that,

(1) It shall be the duty of every commanding officer to take care that a person under his command when charged with an offence is not detained in custody for more than forty- eight hours after the committal of such person into custody is reported to him, without the charge being investigated, unless investigation within that period seems to him to be impracticable with due regard to the public service.

(2) Every case of a person being detained in custody beyond a period of forty- eight hours, and the reason thereof shall be reported by the commanding officer to the air or other officer to whom application would be made to convene a general or district court- martial for the trial of the person charged.

(3) In reckoning the period of forty- eight hours specified in subsection (1), Sundays and public holidays shall be excluded.

(4) Subject to the provisions of this Act, the Central Government may make rules providing for the manner in which and the period for which any person subject to this Act may be taken into and detained in air force custody, pending the trial by any competent authority for any offence committed by him.

Section 104 of the Air Force Act, 1950 provides that,

In every case where any such person as is mentioned in section 102 and as is not on active service remains in such custody for a longer period than eight days, without a court- martial for his trial being ordered to assemble, a special report giving reasons for the delay shall be made by his commanding officer in the manner prescribed; and a similar report shall be forwarded every eight days until a court- martial is assembled or such person is released from custody.

In *Peoples Union for Human Rights (represented by Ramesh Kumar Jain and Ors.) v Union of India and Ors.*¹²⁷, the Court directed the Central Government and the Government of Assam, within a month to issue following instructions that:

- a) any person arrested by the armed forces or other armed forces of the Union shall be handed over to the nearest police station with least possible delay and be produced before the nearest Magistrate within 24 hours from the time of arrest.
- b) A person who either has committed a cognizable (offence) or against whom reasonable suspicion exists such persons alone are to be arrested, innocent persons are not to be arrested and later to give a clean chit to them as is being 'white'.

¹²⁷ AIR 1992 Gau 23.

Legal Remedies in Cases of Torture Committed in Third Countries

Prosecution of Act of Torture Committed in Third Countries

The Indian Penal Code neither recognises the principle of universal jurisdiction nor the passive personality principle. Offences committed outside Indian territory only fall within the ambit of the Penal Code if the perpetrator is a citizen of India and the act, if committed in India, is punishable under the Penal Code. The Code, therefore, recognises the active personality principle only. However, universal jurisdiction can be exercised over perpetrators of grave breaches of the Geneva Conventions. Section 3(1) of the Geneva Conventions Act, 1960, provides “(1) If any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the Conventions he shall be punished, (a) where the offence involves the wilful killing of a person protected by any of the Conventions, with death or with imprisonment for life and (b) in any other case, with imprisonment for a term which may extend to fourteen years.” This section applies to persons regardless of their nationality or citizenship¹²⁸. Such offences are only tried by court equal or superior to that of Chief Presidency Magistrate or a Court of Session.¹²⁹ The competent courts shall not take cognizance of any offence under the Act except on complaint by the Government or of such officer of the Government as the Government may specify by notification in the official Gazette¹³⁰.

The Act does not give a specific right to anyone to approach the Court, nor does it create a right in favour of victims who might otherwise be left without a remedy.¹³¹ Finally, if a complaint is made by the Government or an authorised officer, questions relating to the application of the Convention to a conflict are to be determined by a Government official, not the Court¹³².

Extradition Laws

The extradition of alleged perpetrators of torture is governed by the Extradition Act, 1962. Extradition is conditional upon the existence of an extradition treaty that has been implemented in domestic law. The Extradition Act allows for the extradition of the crimes

¹²⁸ Section 3(2) of the Geneva Conventions Act, 1960.

¹²⁹ Section 5 of the Geneva Conventions Act, 1960.

¹³⁰ Section 17 of the Geneva Conventions Act, 1960.

¹³¹ *Rev. Mons. Sebastion Francisco Xavier Dos Remedies Monteiro v State of Goa*, AIR 1970 SC 329.

¹³² Section 6 of the Geneva Conventions Act, 1960.

of culpable homicides, rape and ‘unnatural offences’ but not for the crimes relating to the extortion of confessions by means of force laid down in Section 330, 331 and 348 of the Penal Code. Acts of torture thus do not constitute extraditable crimes unless they result in the death of the tortured person or involve rape or other sexual acts of torture prohibited in the Indian Penal Code. A fugitive criminal shall, *inter alia*, not be surrendered or returned to a foreign State or Commonwealth country if the offence in respect of which his surrender is sought is of a political character¹³³. The Government has discretionary power with regard to the decision whether to extradite the person sought. It might refuse extradition even if there is a treaty and a good cause for extradition¹³⁴.

Indian legislation contains various provisions relating immunity from prosecution to certain groups of public officials for any offence committed in the discharge of duties unless specifically sanctioned by the Central or State Government.

Laws Relating to Immunities Available to Public Servants

Section 45 of Code of Criminal Procedure, 1973 Code provides that,

Protection of members of armed forces from arrest:-

1. Notwithstanding anything contained in Sections 41-44, no member of the Armed Forces of the Union shall be arrested for anything done or purported to be done by him in the discharge of his official duties except after obtaining the consent of the Central Government.
2. The State Government, may, by notification, direct that the provisions of sub-section (1) shall apply to such class or category of the members of the Force charged with the maintenance of public order as may be specified therein, wherever they may be serving, and, thereupon the provisions of that sub-section shall apply as if for the expression ‘Central Government’ occurring therein, the expression, “State Government” were substituted.

Section 197 of Code of Criminal Procedure, 1973 provides that,

Prosecution of Judges and Public Servants:-

1. When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction -
 - (a) In the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the union of the Central Government.

¹³³ Section 31 of the Extradition Act, 1962.

¹³⁴ *Hans Mullar v Nuremberg v Superintendent Presidency Jail, Cal and Others*, AIR 1955 SC 367.

(b) In the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a state, of the State Government. Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression " State Government" occurring therein, the expression " Central Government" were substituted.

"Explanation.—For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section 166A, section 166B, section 354, section 354A, section 354B, section 354C, section 354D, section 370, section 375, section 376, section 376A, section 376C, section 376D or section 509 of the Indian Penal Code."

2. No court shall take cognizance of any offence alleged to have committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

3. The State Government may, by notification, direct that the provisions of sub section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression 'Central Government' occurring therein, the expression, "State Government" were substituted.

(3A) Notwithstanding anything contained in sub- section (3), no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991 , receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.]

4. The Central Government or State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such judge, Magistrate or public servant is to be conducted and may specify the court before which the trial is to be held.

Section 190 of the Code empowers a magistrate to take cognizance of any offence. Section 197 embodies one of the exceptions to general rule laid down in Section 190, as it regulates the competence of the Court and bars its jurisdiction in certain cases. The objective and purposes of these Sections is to ensure that public servants and officials while discharging their official duties are not subjected to needless or vexatious prosecutions. Prosecution is permissible only after sanction is granted on the well-considered opinion of the superior authority.

In case of *Ganapathy Gounder v Emperor*,¹³⁵ a village Munsif, who has power to arrest or keep under custody persons suspected of certain offences, held in confinement a person whom he had arrested and tortured to force him to confess his guilt. It was held that in committing such torture, he was not purporting to act in the discharge of his official duties and no sanction under Section 197 was needed. The Supreme Court¹³⁶ held that the offence alleged to have been committed must have something to do or must be related in some manner with the discharge of official duty. No question of sanction can arise under Section 197 unless the act complained of is an offence, the only point to determine is whether it was committed in the discharge of official duty. There must be reasonable connection between the act and the official duty.

There are difficulties in way of the successful prosecution of offences committed by public servants and one need not add to them by allowing a provision operating as a bar to prosecution or to nullify attempts to bring such offenders to trial.

Sections 468, 469-473 of the Criminal Procedure Code stipulates the following limitations: Six months for offences punishable with only a fine: One year for offences punishable with imprisonment a term not exceeding one year and three years for a term more than one year but not exceeding three years.

In PP *Unnikrishnan and Another v Puttiyottil Alikuly and Another*¹³⁷, an individual tried to initiate criminal proceedings against police officers for alleged acts of torture. Such a prosecution would have been barred by the statute of the concerned State which prevented hearing cases based on complaints against police officers unless the complaint was filed within six months of the date of the alleged offence. The Court in this case interpreted the statute as not applying to acts amounting to an abuse of authority.

¹³⁵ AIR1932Mad.214.

¹³⁶ *Prabhakar v. Sinar v Shankar Anant Verlekari*, AIR 1969 SC 681.

¹³⁷ 2000(8) SCC (3).

Section 6 of Armed Forces (Special Powers) Act, 1958 Act provides that,

No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.

Section 7 of Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 provides that,

No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.

Section 7 of the Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983 provides that,

No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.

Section 26 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 provided that,

No suit, prosecution or other legal proceedings shall lie against the Central Government or State Government or any other authority on whom powers have been conferred under this Act or any rules made there under, for anything which is in good faith done or purported to be done in pursuance of this Act or any rules made there under or any order issued under any such rule¹³⁸.

Section 57 of the Prevention of Terrorism Act, 2002 provided that,

No suit, prosecution or other legal proceeding shall lie against the Central Government or a State Government or any Officer or authority of the Central Government or State Government or any other authority on whom powers have been conferred under this Act, for anything which is in good faith done or purported to be done in pursuance of this Act:

Provided that no suit, prosecution or other legal proceedings shall lie against any serving member or retired member of the armed forces or other para-military forces in respect of any action taken or purported to be taken by him in good faith, in the course of any operation directed towards combating terrorism¹³⁹.

Section 2 of Prevention of Terrorism Act, 2004 provides that,

1. The Prevention of Terrorism Act, 2002, is hereby repealed
2. The repeal of the said Act shall not affect -

¹³⁸ Repealed by the Repealing and Amending Act, 2001.

¹³⁹ Repealed by Prevention of Terrorism (Repeal) Ordinance, 2004.

- (a) The previous operation of, or anything duly done or suffered under, the said Act, or
- (b) Any right, privilege or obligation or liability acquired, accrued or incurred under the said act, or
- (c) Any penalty, forfeiture or punishment incurred in respect of any offence under the said Act, or
- (d) Any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid.

Section 43 of The Police Act, 1861 provides that,

When any action of prosecution shall be brought or any proceedings held against any police officer for any act done by him in such capacity, it shall be lawful for him to plead that such act was done by him under the authority of a warrant issued by a Magistrate.

Such plea shall be proved by the production of the warrant directing the act, and purporting to be signed by such Magistrate and the defendant shall, thereupon, be entitled to a decree in his favour, notwithstanding any defect of jurisdiction in such Magistrate. No proof of the signature of such Magistrate shall be necessary, unless the Court shall see reason to doubt its being genuine and, any such investigation, legal proceedings or remedy may be instituted, continued or enforced and such penalty, forfeiture or punishment may be imposed as if the principal Act had not been replaced.

Proviso - Provided always that any remedy which the party may have against the authority issuing such warrant shall not be affected by anything contained in this section.

Section 49 of Unlawful Activities (Prevention) Amendment Act, 2004 provides that,

The Central Government or a State Government or any officer or authority of the Central Government or State Government or District Magistrate or any officer authorised in this behalf by the Government or the District Magistrate or any other authority on whom powers have been conferred under this Act, for anything which is in good faith done or purported to be done in pursuance of this Act or any rule or order made thereunder; and

any serving or retired member of the armed forces or para-military forces in respect of any action taken or purported to be taken by him in good faith, in the course of any operation directed towards combating terrorism.

Notwithstanding the safeguards contained in the Code of Criminal Procedure and the Constitution referred to above, the fact remains that the power of arrest is wrongly and illegally exercised in a large number of cases all over the country. Very often this power is utilized to extort money and valuable property. Even in case of civil disputes, this power is being used on the basis of false allegations against a party for a civil dispute at the instance of his opponent. The vast discretion given by the Criminal Procedure Code to

arrest a person even in the case of a bailable offence and the further power to make preventive arrest, clothe the police with extraordinary power which can easily be abused. Neither there is any in-house mechanism in the police department to check such misuse or abuse nor does the complaint of such misuse or abuse to higher police officers brought fruit except in some exceptional cases.

United Nations adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment that was opened for signature, ratification and accession by the General Assembly in 1984 and came into force in 1987. The Government of India took a significant step when it signed the UN Convention on October, 1997. The Government of India stated, “The Convention corresponds to the ethos of Indian democracy, rule of law, individual freedom, personal liberty and security enshrined in Indian polity”¹⁴⁰. Signature of the Convention against Torture by India is an important milestone in the process of India’s continued commitment to fundamental and human rights of all persons and directive principles of national policy¹⁴¹. Despite holding the view that United Nations Convention against Torture corresponds to the Indian ethos of democracy the rule of law and individual freedom, India has failed to implement this clear commitment for the last so many years despite ongoing use of torture and the repeated interventions of the National Human Rights Commission (NHRC), civil society organizations and repeated rulings by the Courts.

According to the figures placed before parliament, the National Human Rights Commission registered 142 deaths in police custody and 574 cases of torture in 2008-2009, 124 deaths in police custody and 615 cases of torture in 2009-2010 and 147 deaths in police custody and 855 cases of torture in 2010-2011. Neither all cases of torture and deaths in police custody are notified to National Human Rights Commission nor do the statistics include torture and deaths in prison custody.

Asian Centre for Human Rights in its report, ‘Torture in India 2008: A State of Denial’ had found that on an average at least four persons die each day in police and prison custody¹⁴² and torturers do enjoy impunity in India. The NHRC has reportedly recommended compensation of Rupees 73, 50, 000/- in 45 cases of death in police

¹⁴⁰ Suhas Chakma, *Report of the National Conference on the Prevention of Torture Bill*, 2008 as drafted by the Government of India, Asian Centre for Human Rights.

¹⁴¹ *Ibid.*

¹⁴² “India Losing on torture” *The Quarterly Journal of Asian Centre for Human Rights*, Issue 3 and 4, 10(January – June 2011).

custody and Rupees 3, 58,000/- in 17 cases of torture from 2008 to 2011. However as India's Minister of State for Home, Shri Jitendra Singh informed the parliament on 9 August, 2011, "National Human Rights Commission did not make any recommendation for disciplinary action/prosecution of the erring public servants"¹⁴³.

Ratification of the United Nations Convention against Torture which necessitates adoption of a national law against torture has long been considered as a step in the right direction. India failed on that front despite national and international outrage¹⁴⁴.

When India submitted its voluntary pledge to the UN General Assembly in December 2006 for its candidature as a member of the UN Human Rights Council, the word 'torture' was missing! Not surprisingly the United Nations Human Rights Commission struck back. During examination of India's human rights records under Universal Periodic Review (UPR) on 8 April 2008, the first recommendation made to India was to "expedite ratification of the Convention against Torture".¹⁴⁵ India indeed accepted the recommendation and informed the United Nations Human Rights Commission that "the ratification of the Convention against Torture is being processed by Government of India"¹⁴⁶.

After three years, India was once again required to submit voluntary pledge in February 2011 for membership to the United Nations Human Rights Commission. India this time reiterated that it 'remains committed to ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment'¹⁴⁷.

Prevention of Torture Bill, 2010

The Prevention of Torture Bill, 2010 was introduced in the Lok Sabha on 26 April 2010 to allow India to ratify the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. It was passed by the Lok Sabha on the 6 May 2010. However, in the Rajya Sabha, the Government was forced to refer the Bill to a Parliamentary Selection Committee. The Government of India stated that the law is being enacted to provide punishment for torture inflicted by public servants or any person

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

inflicting torture with the consent or acquiescence of any public servant and matters connected therewith or incidental thereto¹⁴⁸.

The Bill contains only three operative paragraphs relating to (1) definition of torture (2) punishment for torture and (3) limitations for cognizance of offences. It lacks many of the key provisions of the United Nations Convention against Torture. The three paragraphs outlined in the Bill also fall short of obligations that the ratifying parties to the United Nations Convention against Torture must undertake.

Definition of Torture

The elements constituting torture in Sections 3 and 4 of the Bill are wholly inadequate. Not only they do not conform to the definition of torture established in Article 1 of the United Nations Convention against Torture (UNCAT), but also hardly address the full scale of acts amounting to torture that are routinely practiced in India.

Section 3 of the Bill defines torture as : whoever being a public servant or being abetted by a public servant or with the consent or acquiescence of a public servant, intentionally does any act for the purpose to obtain from him or a third person such information or confession which causes:-

- (i) grievous hurt to any person or
- (ii) danger to life, limb or health (whether mental or physical) of any person,
is said to inflict torture.

Provided that nothing contained in this section shall apply to any pain, hurt or danger as aforementioned caused by any act, which is inflicted in accordance with any procedure established by law or justified by law¹⁴⁹.

Article 1(1) of the UNCAT defines torture as any act by which severe pain or suffering whether physically or mentally, is inflicted on a person for such purposes as obtaining from him or a third person, information or a confession punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the

¹⁴⁸ *The Tribune*, 8 December 2010.

¹⁴⁹ The Prevention of Torture Bill, 2010, Bill No.58/2010.

consent or acquiescence of a public official or other person acting in an official capacity¹⁵⁰.

The degree of harm required to constitute torture is more severe in the Bill, whereas the Convention's threshold starts from 'pain or suffering'. The Bill states that only actions that cause actual damage or danger constitute torture.

The Bill relies on the definition of 'grievous hurt' found in the Indian Penal Code¹⁵¹. All elements of this definition include physical harm that is visible upon and after its infliction. This is highly restrictive for instance, act of beating the victim with a stick, inserting chilli powder or petrol in the rectum or electric current to the victim's body or private parts, hanging the victim upside down from the ceiling, water-boarding, illegal detention etc. currently practiced by our security agencies would cause 'severe pain and suffering' but may not amount to grievous hurt/danger to life, limb or death even in its broadest sense. It has been held that a blow to the head with an iron rod, in the absence of contrary evidence, does not endanger life and therefore is not grievous hurt¹⁵². Being struck on the head with a shade and being hospitalized for ten days thereafter too not been held to be grievous hurt.¹⁵³ Even stabbing the lower abdomen of a person leading to the protrusion of the intestines has been held not to be grievous hurt¹⁵⁴. Gunshot injuries to the arms, thighs and back of a victim have, in certain cases, been held as not causing grievous hurt¹⁵⁵. Such acts, which have conventionally evaded prosecution under the existing penal laws, will continue to do so, even more, under the Bill¹⁵⁶.

¹⁵⁰ Article 1, United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

¹⁵¹ Section 320, Indian Penal Code, 1860

The following kinds of hurt only are designated as "grievous":-

First- Emasculation.

Secondly- Permanent privation of the sight of either eye.

Thirdly- Permanent privation of the hearing of either ear,

Fourthly- Privation of any member or joint.

Fifthly- Destruction or permanent impairing of the powers of any member or joint.

Sixthly- Permanent disfiguration of the head or face.

Seventhly- Fracture or dislocation of a bone or tooth.

Eighthly- Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits..

¹⁵² *Tilak Raj v State of Delhi*, Cri.A. No. 178-2009, available at: www.delhihighcourt.nic.in (visited on 25 January 2012).

¹⁵³ *Samen v State of Orissa*, 2009 CriLJ 418 (Ori).

¹⁵⁴ *Rajvir v State*, 2005 CriLJ 1652(Del).

¹⁵⁵ *Jalim Singh v State of Rajasthan*, 2005 (2) WLC 829

¹⁵⁶ Arun Ferreira, "A Critical Appraisal of Prevention of Torture Bill, 2010" *Economic & Political Weekly*, Vol. XLV No.21, 10 (22May 2010)

Certain acts, which are already considered as torture under Section 330 of the Indian Penal Code, have been consciously evaded in the definition. Here, simple 'hurt' by a public servant would call for a punishment of a seven year term and fine. The following examples of severe hurt for which a police officer would be punishable under the IPC but not under the Torture Bill:

- (i) Stubbing a cigarette on the body of a person several times
- (ii) Whipping a person with various instruments
- (iii) Causing severe pain to a person that lasts for less than twenty days, etc¹⁵⁷.

Furthermore, the definition in the Bill excludes purely mental torture which is included within the United Nations Convention against Torture definition. The Select Committee submitted its report on 6 December 2010 and recommended that the definition of torture should be suitably expanded, so as to make it consistent with the UN Convention and include offences, under the Indian Penal Code. Torture of women and children should be given special consideration and attempt to torture should also be made an offence. The definition of public servant should include Government companies or institutions¹⁵⁸.

Moreover, Section 4 of the Bill infuses an additional and restrictive element into the definition of torture. Section 4 provides that where the public servant referred to in Section 3 or any person abetted by or with the consent or acquiescence of such public servant, tortures any person:

- a) for the purpose of extorting from him or from any other person interested in him, any confession or any information which may lead to the detection of an offence or misconduct and
- b) On the ground of his religion, race, place of birth, residence, language, caste or community or any other ground whatsoever shall be punishable with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine¹⁵⁹.

Under Article 1 of the United Nations Convention against Torture, the purposes for which torture could be inflicted include four broad categories (1) obtaining

¹⁵⁷ Report submitted by Pre-Legislative Briefing Service to the Select Committee of the Rajya Sabha on 'the Prevention of Torture Bill, 2010' on 22 September 2010.

¹⁵⁸ Select Committee Report, 6 December 2010 submitted to Rajya Sabha.

¹⁵⁹ Section 4, The Prevention of Torture Bill, 2010, Bill No. 58/2010.

information or a confession (2) punishment for a committed act or suspected act, (3) intimidation or coercion and (4) for any reason based on discrimination of any kind. Thus the Bill is in contradiction to the formulation in the United Nations Convention against Torture which prohibits torture ‘for any reason based on discrimination of any kind’ as an independent, rather than an additional, ingredient of torture. In effect, the Bill would only punish those acts of torture which result in a very serious injury, were motivated by a desire to extract a confession or information¹⁶⁰. For example, grievous hurt caused by a public official for extorting information that is not done with a discriminatory purpose will not amount to a punishable act under the Bill. This is an internal incoherence which violates Article 4(1) of the Convention against Torture; according to which, “each state must ensure that all acts of torture are offences under its criminal law”¹⁶¹. If an act is defined as torture but not punished, it would clearly violate this provision. By such a restrictive definition, torture committed by overzealous public servants who see themselves as extrajudicial penal authorities would not be liable for punishment. In such cases, like the Bhagalpur blinding, torture is committed for the sole purpose of punishment. Similarly, in areas of mass resistances, acts of torture are committed on the protesters for the only purpose of forcing them into submission. Here too, such an act would not attract any punishment under the proposed Bill¹⁶².

On the question of quantum of punishment there is no advancement in the existing provisions under Section 331 IPC, which punishes grievous hurt with imprisonment up to 10 years and fine. But, for an act causing ‘danger to life’, which would be prosecutable under Section 307 IPC and attract punishment for life, the proposed Bill, in fact, seeks to reduce the punishment as Section 4 of the Bill provides imprisonment for a term which may extend to ten years¹⁶³.

Section 4 of the proposed Bill does not lay down any minimum sentence for a person found guilty of torture. This would effectively result in the imposition of shorter sentences violating the spirit of the legislation.¹⁶⁴ The Select Committee suggested that a

¹⁶⁰ Commonwealth Human Rights Initiative, “Prevention of Torture Bill, 2010 – A Critique” available at: www.chri.org (visited on 23 February 2012).

¹⁶¹ Article 4, United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or punishment, 1984.

¹⁶² *Supra* note 155.

¹⁶³ *Ibid.*

¹⁶⁴ *Supra* note 157.

minimum punishment of three years be given to make the law more of a deterrent. Also, the torturer should be fined a minimum of 1 lakh¹⁶⁵.

Furthermore, the draft Bill does not include the offences less severe than torture, including those in the Convention, namely: complicity and participation in torture¹⁶⁶ and cruel, inhuman or degrading treatment¹⁶⁷. Although it makes reference to ‘abetting’ and ‘acquiescence’; these terms appear only in the context of a requirement that an act of torture must have some connection to a public official.

Limitation Period

Section 5 of the Bill requires that a court can entertain a complaint only if it is made within six months of the date of the offence.¹⁶⁸ Victims of torture need longer to be able to gather courage and resources to make the complaint. Under Section 468 of the Code of Criminal Procedure, the limitation of six months for taking cognizance is applicable only to offences punishable by a fine. Torture would definitely not fall within this category.

The Select Committee stated that the limitation period for filing a complaint should be two years so that complainants have sufficient time to initiate proceedings. Also, it is necessary for the courts to have the discretion to allow complaints after two years in exceptional circumstances.

No change in Existing Systems of Impunity

A major obstacle in punishing those who are responsible for acts of torture is the fact that they are ‘Public Servants’. The prosecution of public servants becomes virtually impossible due to the exercise of power given under Section 197 of Criminal Procedure Code, 1973, which provides that public servants cannot be prosecuted without prior permission from the Government, either state or central, which employs them¹⁶⁹.

Though the Supreme Court of India has established that the requirement of prior sanction is not applicable in every case involving a public servant, in other words, there is

¹⁶⁵ *Supra* note 156.

¹⁶⁶ *Supra* note 155.

¹⁶⁷ Article 6, United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

¹⁶⁸ Section 5, The Prevention of Torture Bill, 2010, Bill No. 58/2010.

¹⁶⁹ In Section 197 of the Code of Criminal Procedure, after sub-section (I), Explanation is inserted by Criminal Law (Amendment) Act, 2013. "Explanation.—For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under Section 166A, Section 166B, Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 370, Section 375, Section 376, Section 376A, Section 376C, Section 376D or Section 509 of the Indian Penal Code".

no blanket requirement for prior sanction in every case. In case of *State of M.P. v Sheetal Sahai*¹⁷⁰, the Supreme Court has held that the object of Section 197 of Criminal Procedure Code is not the protection of a public servant who is accused of offences, but the creation of an environment where a public servant is not deterred from discharging his functions by the threat of frivolous prosecution.

Section 6 of the Bill prohibits the prosecution of a public servant without the explicit permission from the Government or authority that employs him/ her. This provision does not comply with the Convention against Torture for three reasons – first, Article 12 of the Convention states that each State party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction. The requirement for sanction violates this provision because Article 12 cannot be complied with if the relevant superior does not give the sanction to prosecute the public official who is suspected of having committed an act of torture. This is strengthened by the comments of the committee in case of Serbia and Montenegro where it said that judges are obliged to investigate allegations of torture wherever they come to their attention, even if no complaint has been filed¹⁷¹. But, sanction is only required for cognizance and not for investigation which can be carried out independent of the sanction. However, the relevant authority will not proceed with the investigation of an offence, if there is high chance or knowledge that no sanction for its cognizance and prosecution will be given.

Secondly, Article 12 requires that such an investigation be impartial. In their treatise on the Convention against Torture, Burgers and Danelius have argued that impartiality is important because “any investigation that proceeds from the assumption that no such acts have occurred or in which there is a desire to protect the suspected officials cannot be considered effective”¹⁷². It may be argued that, from the given judgments of the Supreme Court¹⁷³, such sanction amounts to an executive action and there is a presumption of fairness accorded in such acts. Therefore, Section 6 would comply with the Convention against Torture as it provides for a *prima facie* fair and

¹⁷⁰ (2009) 8 SCC 617.

¹⁷¹ Manfred Nowak, *The UN Convention Against Torture – A Commentary* 430(2008).

¹⁷² Burgers and Danelius, *A Hand book on the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* 145 (1988).

¹⁷³ *State (NCT of Delhi) v Navjot Sandhu*, (2005) 11 SCC 600.

impartial process. If such a presumption of fairness was rebutted it would be a question of domestic administrative law and not international law. However, the fact that the Government may employ the person in question, that the relevant functionaries of the Government on several occasions may be complicit in torture themselves, calls into question the possibility of partiality. At any rate, the complete lack of safeguards regarding the grant or denial of sanction may conflict with Article 12 of the Convention against Torture.

Thirdly, Article 12 of the Convention against Torture also requires that any investigation into an allegation of torture should be prompt. Section 6 does not comply with this provision. The fact that a court cannot take cognizance of a complaint of torture without prior sanction from specific authorities violates the requirements of promptness under the Convention against Torture.

Select Committee gave the remarks that while there is need to protect honest officials, this provision should not be used to shield guilty officials and deny justice to victims. Therefore, it suggested that if required sanction is not given within three months, it would be deemed to have been granted¹⁷⁴.

Silence on Certain Provisions

In addition to the above flaws, there are various other important components of the Convention that are not combined in the Bill.

Penal Offences

In a serious omission, the Bill does not incorporate the offences in the Indian Penal Code which constitute acts of torture – even those which specifically set out custodial crimes by public servants. The Law Commission in 1994¹⁷⁵ described the types of custodial crimes being perpetrated in ‘alarming dimensions’ – torture, assault, injury, extortion, sexual exploitation and death in custody.

The Bill also makes no reference to gender-based violence perpetrated by public servants, particularly violence affecting women in custody given the wide ambit for States to codify a broad definition of torture. As advised by the UN Committee against Torture, borrowing from Domestic definitions, the relevant Indian Penal Code offences need to be incorporated into the definition of torture in Sections 3 and 4 of the Bill.

¹⁷⁴ *Supra* note 156.

¹⁷⁵ *Supra* note 58.

Death in Custody

In spite of high number of custodial deaths in India, many of them obviously resulting from torture, the Bill is totally silent on deaths in custody. Commonwealth Human Rights Initiative strongly recommends that Sections 3 and 4 be amended to include a provision that establishes death in custody, or death occurring as a result of injuries sustained while in custody, as a part of the definition of torture. Any death in custody, or as result of injuries sustained while in custody, should be made punishable with the offence of murder or culpable homicide not amounting to murder, depending on the specific circumstances of each case¹⁷⁶.

Statements Obtained Through Torture

Article 15 of the Convention requires the exclusion in all proceedings of any statements made as a result of torture except as evidence against a person accused of torture. The protection against self-incrimination found in Article 20(3) of the Indian Constitution would only prohibit the inclusion, in criminal trial, if any statement by an accused person herself/himself made under compulsion, as a result of torture or otherwise. In practice, it is difficult for a detainee to prove that an incriminating statement was made under compulsion¹⁷⁷.

Presumption

The Law Commission in its 113th report on custodial violence recommended the insertion of a new Section in the Evidence Act, 1872, to give courts the power to draw a presumption that injuries caused to a person while in police custody were caused by the police officer with custody over that person¹⁷⁸. Commonwealth Human Rights Initiative objects to the proviso following Section 3 of the Bill, which states, provided that nothing contained in this Section shall apply to any pain, hurt or danger as aforementioned caused by law or justified by law¹⁷⁹.

Right of Victims to Redress

Article 14 of the United Nations Convention against Torture provides that “each state party shall ensure in its legal system that the victim of an act of torture obtains redress

¹⁷⁶ *Supra* note 158.

¹⁷⁷ Ravi Nair, “Prevention of Torture Bill: A feeble” *Economic & Political Weekly*, Vol.XLV No. 25(19 June 2010).

¹⁷⁸ *Supra* note 119.

¹⁷⁹ *Supra* note 158.

and has an enforceable right to fair and adequate compensation, including the means for full rehabilitation as possible”. The Bill fails to include any such provision.

Criminal Liability of Superior Officers for Acts of Torture

Article 2(3) of the United Nations Convention against Torture holds that, “an order of a superior or public authority can never be invoked as a justification of torture.” In parallel, the Committee has also held that senior officials are criminally liable for acts of torture committed by juniors. In spite of their role, superior officers escape all accountability because they are not actually involved in the acts and the hierarchies in security of forces are so entrenched that it is unthinkable for a junior officer to implicate his senior for wrongful orders.

Review Mechanisms

The Bill also fails to provide for the establishment of appropriate review mechanism of interrogation practices and custodial treatment. Similarly, it does not provide any mechanism to ensure proper education and training of law enforcement officers, medical personnel, public officials and others interacting with those arrested or detained. The absence of such provisions dilutes its capacity to prevent torture in practice.

Power to Make Rules

Anti torture Bill is silent about the powers of the Government to make rules for implementation of the Bill. Select Committee stated that the appropriate government would need to frame rules for implementation of Bill. Such a provision should be included in the Bill¹⁸⁰.

Expulsion and Extradition Provisions

The Bill is silent on the requirements of Article 3 of the Convention that no State party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. These prohibitions are particularly pertinent given that India has not ratified the 1951 Refugee Convention and does not have any national legislation for the protection of refugees¹⁸¹.

¹⁸⁰ *Supra* note 156.

¹⁸¹ Ananthachari, “Refugees in India: legal framework” *International Law yearbook on International Humanitarian and Refugee Law* (2001).

Use of Scientific Tests

In case of *Smt Selvi and Ors. v State of Karnataka*¹⁸², the Supreme Court ruled that narco analysis test conducted by an investigating agency on an accused is unconstitutional. But the proposed Legislation maintains silence on the practice of conducting narco-analysis, polygraph and brain mapping tests on arrestees. Such tests are conducted for the purpose of extorting confession or information by a public servant and amount to intentionally inflicting physical/mental suffering and degrading treatment. All these aspects amount to an act of torture as defined by the United Nations Convention against Torture. So called scientific tests could also violate other international human rights standards such as Article 7 of the International Covenant on Civil and Political Rights which states, 'No one shall be subjected to torture or to cruel or degrading treatment or punishment'. In particular, no one shall be subjected to medical or scientific experimentation without his free consent¹⁸³.

Optional Protocol

The Bill is silent about the Optional Protocol to the Convention against Torture. The Optional Protocol calls for (a) the establishment of an International Sub Committee on Prevention of Torture that can make visits and recommendations related to protection of detainee against torture, (b) the creation of independent national preventive mechanisms by State Parties, and (c) the granting of access to the Sub Committee and national bodies by State Parties to visit and monitor places of detention. If the government intends to ratify the Convention and is truly concerned about preventing torture, it should also ratify the Optional Protocol¹⁸⁴.

In order to comply with the basic requirements of the Convention against Torture and to curb the rampant practice of torture in India, the existing Bill needs consideration and amendments. Prevention of Torture Bill, 2010 should be amended as follows:

- It is suggested to redraft Sections 3 and 4 of the Bill to incorporate the basic minimum standard laid down in Article 1 of the United Nations Convention against Torture.

¹⁸² (2010)7 SCC 263.

¹⁸³ *Supra* note 154.

¹⁸⁴ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 18 December 2002, entered into force on 22 June 2006.

- It must be ensured that the definition of torture at a minimum should include acts done for the purpose of extracting, information, punishment, intimidating, or any reason based on discrimination. It should ensure that these varying purposes are alternative elements of punishable torture rather than additional elements that all must be shown to inflict punishment.
- It is recommended to eliminate the time limit prescribed in Section 5 for a victim of torture to file a complaint.
- The requirement of prior sanction for prosecution of public servants accused of torture and other ill-treatment found in Section 6 should be removed.
- It is also suggested to provide appropriate mechanism for victims of torture and other ill-treatment to seek or obtain compensation from the Government for the abuse they have suffered.
- It is suggested to add a provision relating to prohibition on the use of any evidence obtained through torture or cruel, inhuman or degrading treatment in any court, investigative authority, quasi judicial authority or other tribunal.
- A provision should be incorporated in the Bill to prohibit the expulsion or extradition of persons to the States where there are substantial grounds to believe that those persons will face torture or cruel, inhuman or degrading treatment.
- To prevent torture a comprehensive mechanism for monitoring and evaluating interrogation methods and conditions of custody should be provided.
- There should be a mechanism to ensure proper education and training of civil and military pro-enforcement personnel, medical personnel, public officials and other involved in arrest, detention and imprisonment.
- India should extend a standing invitation to the UN Special Rapporteur against Torture to visit India.
- Above all Indian Government should ratify the Convention against Torture.

Therefore, no doubt, there exists a need for a special and effective anti-torture programme. Historically, torture has been institutionalized in India during the British Rule, when it had been used as a weapon to keep the ‘natives in submission’ and suppress national liberation movement. The present ruling classes continue using this inherited institution to counter people’s movements. Here torture is not an exception perpetuated by some ‘evil subordinates’, but rather a deliberate practice sanctioned by top ranking officials and policymakers. Special draconian laws have further institutionalized torture.