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LAW COMMISSION OF INDIA

Report No.273

**Implementation of 'United Nations Convention against Torture and
other Cruel, Inhuman and Degrading Treatment or Punishment'
through Legislation**

October, 2017

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अध्यक्ष
भारत का विधि आयोग
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Dr. Justice B. S. Chauhan
Former Judge, Supreme Court of India
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Law Commission of India
Ministry of Law & Justice
Government of India

D.O.No.6(3)314/2017-LC(LS)

30th October, 2017

Dear Shri Ravi Shankar Prasad,

The Central Government *vide* its letter dated 8th July, 2017 taking note of the Civil Writ Petition [W.P. (Civil) No. 738 of 2016] asked the Law Commission to examine the issue of ratification of UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, and submit a report on the matter.

In this background, the Law Commission considered International Scenario with reference to the Convention, reports of various Commissions including the previous Law Commissions, judicial pronouncements of the Supreme Court and High Courts and analysed the existing provisions of relevant statutes pertaining to the subject.

After deliberations, the Commission has suggested definition of 'torture', so as to include inflicting any injury, either intentionally or voluntarily, or even an attempt to cause such an injury - physical, mental or psychological. Further, the Commission has recommended the Government to consider the possibility of ratification of the Convention against Torture, enactment of standalone legislation and to make consequential amendments in the Code of Criminal Procedure, 1973 and the Evidence Act, 1872, thereunder. Based on the analysis of various aspects of torture, the Commission has prepared a draft Bill titled "The Prevention of Torture Bill, 2017", which is annexed to the Report.

I have the privilege of forwarding the Commission's Two Hundred and Seventy Third Report titled "**Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation**" for consideration by the Central Government.

Yours sincerely,

With warmer regards,

B.S. Chauhan
[Dr. Justice B.S. Chauhan]

Shri Ravi Shankar Prasad
Hon'ble Minister for Law and Justice,
Government of India
Shastri Bhawan
New Delhi

Report No. 273

Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation

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CHAPTER – I

Introduction

A. Background

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

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

¹ George Ryley Scott, "The History of Torture Throughout the Ages", 1940 (T. Werner Laurie Ltd., London)

² In *Re: Ramlila Maidan Incident*, 2012 (5) SCC 1

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

There are in vogue four kinds of torture (karma):-- Six punishments (shatdandáh), seven kinds of whipping (kasa), two kinds of suspension from above (upari nibandhau), and water-tube (udakanáliká cha). As to persons who have committed grave offences, the form of torture will be nine kinds of blows with a cane:--12 beats on each of the thighs; 28 beats with a stick of the tree (naktamála); 32 beats on each palm of the hands and on each sole of the feet; two on the knuckles, the hands being joined so as to appear like a scorpion; two kinds of suspensions, face downwards (ullambanechale); burning one of the joints of a finger after the accused has been made to drink rice gruel; heating his body for a day after he has been made to drink oil; causing him to lie on coarse green grass for a night in winter. These are the 18 kinds of torture. Each day a fresh kind of the torture may be employed.

Those whose guilt is believed to be true shall be subjected to torture (áptadosham karma kárayet). But not women who are carrying or who have not passed a month after delivery. Torture of women shall be half of the prescribed standard.

1.4 There is a necessity to protect the society from the hands of criminals which has been emphasised by Manu and the law givers of this age.⁴

1.5 Under the old Greek and Roman laws, it was specified that only slaves could be tortured but later on, the torture of free-men in cases of treason was also made allowed. In AD 240, the right to torture slaves

³ Translated into English by R Shamasastri; Chapter VIII, Book IV; Available at: https://ia802703.us.archive.org/13/items/Arthashastra_English_Translation/Arthashastra_of_Chanakya_-_English.pdf; last viewed on 23 August 2017.

⁴ Khandekar, Indrajit, Pawar, Vishwajeet & Ors, "Torture Leading to Suicide: A case Report" 31(2) JIAFM 152.

was abolished under the Roman law. In the Middle Ages, torture was included in the proceedings of the Catholic Church in the 'Spanish Inquisition', which employed it to obtain confessions.⁵

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

1.7 During the Mohammeden era, the Shariat Law, 'an eye for an eye', was made applicable. The basic principles of Muslim criminal jurisprudence are still followed in many Islamic countries. Legislation of some Islamic Countries provides for certain brutal physical punishments eg. Public whipping, executing by lynching, or amputation of limbs. The British Raj was, by no means, less notorious in committing torture on persons in police custody. Men, women and children were beaten and tortured to make confessions to crimes which they had never committed. Same had been the fate of political workers if they did not provide the desired reply.

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

⁵ Curtice, Martin, "Article 3 of the Human Rights Act 1988: implications for clinical practice" *14 APT* 389 (2008).

⁶ <http://listovative.com/top-10-historys-worst-torture-methods/>

⁷ AIR 1997 SC 610

“Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also such intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone paralyzing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself.”

1.9 In Elizabethan times ‘torture warrants’ were legally issued⁸. Examination by torture was last used in England in 1640⁹. ‘Judicial torture’ was abolished by the Treason Act 1709 which is considered to be the first formal abolition of torture in any European state.

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

B. Reference to the Commission

1.11 India signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [adopted by General Assembly of the UN on 10th December, 1984 (Resolution No.39/46)] (known as the UN Convention against Torture, in short "CAT") on October 14, 1997 however, so far it has not been ratified. India has expressed its reservations against certain provisions contained in the Convention, such as Inquiry by the CAT (Art. 20); State complaints (Art.21) and individual complaints (Art.22).

⁸ John H. Langbein: *Torture and the Law of Proof*, 1977, University of Chicago Press

⁹ see *A and others (Appellants) v. Secretary of State for the Home Department* [2004]: para. 412

¹⁰ Alfred McCoy: *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror (New York 2006)* University of Wisconsin – Madison News

(i) *Observation of certain organisations.*

1.12 The *International Commission of Jurists*, and other organisations have urged India to adopt the reforms suggested by the Convention. The Universal Periodic Review is an interactive process carried out after every four years. Under this framework, the Human Rights Record of UN member States is reviewed. India has also been requested to ratify the Torture Convention by some State parties during the Universal Periodic Review of Human Rights.

1.13 The Working Group on Human Rights in India has called for intervention by the Government against torture.

(ii) *Government's stand*

1.14 The Central Government initially took the stand that under the Indian Penal Code, 1860 torture is a punishable offence. Later on, it was decided to go for standalone legislation and the Prevention of Torture Bill, 2010 was introduced in the Lok Sabha to give effect to the provisions of the Convention. The Bill was passed by the Lok Sabha on May 6, 2010. Rajya Sabha referred the Bill to a Select Committee which had proposed amendments to the Bill to make it more compliant with the torture Convention. However, the Bill lapsed with dissolution of the 15th Lok Sabha. India's is not agreeable to repeal the Armed Forces (Special Powers) Act, 1958 (AFSPA).

1.15 In a Civil Writ Petition¹¹ filed by Dr. Ashwani Kumar, the petitioner submitted before the Supreme Court that "*India faces problems in extradition of criminals from foreign countries because of this (having no*

¹¹ W.P. (Civil) No. 738 of 2016; In September 2016, the Supreme Court had issued notice to the Central Government on the PIL.

law against torture). *It's in our own national interest to have such a law*". The petitioner sought directions to the government to have a legal framework and proper guidelines in terms of the CAT to prevent torture, cruelty, inhuman or degrading treatment to jail inmates.

1.16 In 2012 the U.N. Special Rapporteur presented his Report on Death Penalty and Prohibition of Torture in the United Nations General Assembly. The report noted that while death penalty is not violative of the prohibition of torture and cruel, inhuman and degrading treatment, certain aspects related to it such as certain methods of execution and the incident of being on a death row may be covered under this convention. However, it must be noted that such a view on Torture and death penalty is applicable to only those countries which carry out under the guise of lawful sanctions, barbaric execution (e.g. death by stoning) which clearly have traits of torture.

1.17 Human rights concerns for death penalty and torture are often cited as grounds for refusing extradition requests. Countries that have abolished death penalty often need diplomatic assurances that rights of the person to be extradited shall not be breached. If it appears that death penalty may be given, or there are grounds for believing that if the person is extradited he may be tortured or subjected to cruel, inhuman and degrading treatment or denied any of the rights guaranteed to him by various international law instruments such as ICCPR and UNDHR. It would hardly be conducive to the object of the convention when a State party surrenders a suspect or fugitive knowingly to another State party where he will be in real danger of being subjected to torture, it would run contrary to the spirit and intention of the Convention itself, to expose a person to the real risk of torture or cruel, inhuman and degrading treatment. It has also been held that as such prolonged duration of a

death row inmate and the “... *ever present and mounting anguish of awaiting execution of death penalty...*”¹² would amount to torture.

1.18 Section 34C of The [Indian] Extradition Act, 1962 reads as under:

“Provision of life imprisonment for death penalty:- Notwithstanding anything contained in any other law for the time being in force, where a fugitive criminal, who has committed an extradition offence punishable with death in India, is surrendered or returned by a foreign State on the request of the Central Government and the laws of that foreign State do not provide for a death penalty for such an offence, such fugitive criminal shall be liable for punishment of imprisonment for life only for that offence.”

1.19 The prohibition of torture is a part of customary international law and is a part of *jus cogens*. Inclusion of extradition prohibitions in the Torture Convention enjoins more States to ensure accountability worldwide for acts of torture. The Convention has not created an international crime which had not previously existed but provided an international system under which the torturer - international criminal, could find no safe haven.¹³

1.20 In *Shatrughan Chauhan v. Union of India*,¹⁴ the Supreme Court while discussing the scope of torture in the execution of death sentence observed:

‘.....undue, inordinate and unreasonable delay in execution of death sentence does certainly attribute to torture which indeed is in violation of Article 21 and thereby entails as the ground for commutation of sentence. However, the nature of

¹² In *Soering v. UK*, Application (07/07/1989), the European Court of Human Rights held that extraditing a person from UK to Virginia- a state in US that imposes death penalty, would violate Article 3 of the Torture Convention.

¹³ *Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v. Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet, R v.* [1999] UKHL 17 (24th March, 1999).

¹⁴ (2014) 3 SCC 1.

delay i.e. whether it is undue or unreasonable must be appreciated based on the facts of individual cases and no exhaustive guidelines can be framed in this regard.'

1.21 The Court, in response to the Solicitor General's statement that the Law Commission of India was examining the issue, observed: "*So many matters are pending before the Law Commission. It should be taken up as a matter which requires extreme urgency.*"

1.22 Accordingly, the Central Government *vide* its letter dated 8th July, 2017 asked the Law Commission to examine the issue of ratification of UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment and submit a report on the matter.

CHAPTER - II

International Scenario

A. Human Rights Instruments

2.1 The right to freedom from torture is enshrined in number of human rights instruments which provide for protection of all individuals from being intentionally subjected to severe physical or psychological distress by, or with the approval or acquiescence of, government agents acting for a specific purpose, such as to obtain information. The prohibition of torture and other cruel, inhuman or degrading treatment is enshrined in the following regional and universal human rights instruments:¹⁵

- (i) Universal Declaration of Human Rights, 1948 (Art. 5)
- (ii) American Declaration of the Rights and Duties of Man, 1948 (Art. 27)
- (iii) European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (Art. 3)
- (iv) United Nations Convention Relating to the Status of Refugees, 1951
- (v) United Nations Standard Minimum Rules for the Treatment of Prisoners, 1955 (Art. 31)
- (vi) Draft Principles on Freedom from Arbitrary Arrest, Detention and Exile (1963).
- (vii) International Convention on the Elimination of All forms of Racial Discrimination, 1965 (ICERD)
- (viii) International Covenant on Civil and Political Rights, 1966 (Arts. 4, 7 and 10)
- (ix) American Convention on Human Rights, 1969 (Art. 5)
- (x) Declaration on the Protection of All Persons from being subjected to Torture and other Cruel Inhuman or Degrading Treatment or Punishment (1975).
- (xi) Optional Protocol to the International Covenant on Civil and Political Rights (1976)
- (xii) Code of Conduct for Law Enforcement Officials (1979) articles 2-3 & 5-6.

¹⁵ International Justice Resource Centre [I J R C]

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

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

2.3 The International Covenant on Civil and Political Rights, 1966 (ICCPR) - a multilateral treaty - is a key international human rights treaty, providing a range of protections for civil and political rights. The ICCPR, together with the Universal Declaration of Human Rights, 1948 and the International Covenant on Economic Social and Cultural Rights, are considered as the International Bill of Human Rights. By way

of Geneva Conventions there is a series of treaties on the treatment of civilians, prisoners of war (POWs) and soldiers who are otherwise rendered *hors de combat*, or incapable of fighting and to protect wounded and sick soldiers during wartime.¹⁶

2.4 One of the most universally recognised human rights, the prohibition on torture has attained the status of *jus cogens* or peremptory norm of general international law, also giving rise to the obligation *erga omnes* (owed to and by all States) to take action against those who torture. As such, the prohibition may be enforced against a State even if it has not ratified any of the relevant treaties, and the prohibition is not subject to derogation, even in times of war or emergency. *Jus cogens* are international norms considered so fundamental that no deviation from them is permitted. The *jus cogens* (peremptory norms), flow from Article 53 of the Vienna Convention on the Law of Treaties, which has deep impact on national and customary law¹⁷.

B. Convention against Torture (CAT)

2.5 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is an international human rights treaty, under the aegis of the United Nations that aims to prevent torture and other acts of cruel, inhuman, or degrading treatment or punishment around the world. “The Convention puts victims at the heart of its normative mechanism, partly by combating the impunity enjoyed by the perpetrators of such acts in authorising the arrest of alleged

¹⁶ Geneva Conventions, *available at*: https://www.law.cornell.edu/wex/geneva_conventions (visited on 26-10-2017).

¹⁷ Wet, Erika, de, “The Prohibition of Torture as an international norm of *jus cogens* and its implications for national and customary law” *15 EJIL* 97-121 (2004).

torturers on the sole ground of their presence in the territory under a State Party's jurisdiction and also by defining the widespread and systematic use of torture as a crime against humanity."..... "The Optional Protocol to the Convention against Torture established the Sub-Committee on the Prevention of Torture (SPT), whose task is to carry out inspection visits, in conjunction with national prevention agencies, to all places of detention in the State Parties to the Protocol. The Protocol requires State Parties to set up a visiting body or bodies for the prevention of torture and abuse (known as the national preventive mechanism) within one year after the coming into effect of the Convention for the State Party concerned."¹⁸ The right to freedom from torture includes the following rights and obligations:¹⁹

- (1) the right of individuals to be protected by the State from torture by its agents;
- (2) the State's duty to prosecute torturers; and,
- (3) the right of individuals not to be returned or extradited to another State where they may have the risk of being tortured.

(i) Obligation of States

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

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

¹⁸ Enforced disappearance, Torture and arbitrary detention, *available at*: <http://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/enforced-disappearance-torture-and-arbitrary-detention/> (visited on 26-10-2017).

¹⁹ Torture, *available at*: <http://www.ijrcenter.org/thematic-research-guides/torture/> (visited on 26-10-2017).

(ii) Jurisdiction

2.7 The concept of universal jurisdiction shall be applicable to decide the question of jurisdiction which shall not be based only on territory or the offender's nationality but also over the acts of torture committed outside the territory of the States even by persons who are not their nationals. This principle is already accepted in conventions against hijacking of aircraft and other terrorist activities which was accepted and is mentioned under Article 5(2) of the Convention.²⁰

(iii) A State Party's Undertakings

2.8 Most of the provisions of the CAT deal with the obligations of the State parties. These obligations may be summarised as follows:²¹

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

²⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *available at*: <http://legal.un.org/avl/ha/catcidtp/catcidtp.html> (visited on 26-10-2017).

²¹ *Ibid.*

training of law enforcement personnel, civil or military, medical personnel, public officials (Article 10);

(vii) Each State party shall ensure that its authorities make investigations when there is reasonable ground to believe that an act of torture has been committed (Article 12);

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

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

(iv) Documenting Torture and Cruel Treatment

2.9 The Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**Istanbul Protocol**) contains standard accepted in general for identifying victims of torture, and for documenting and reporting the abuse.

(v) Enforcement

2.10 The prohibition on torture, cruel, inhuman or degrading treatment or punishment is implemented in the U.N. system through the human rights treaty bodies, including the Human Rights Committee, the Committee Against Torture and the Sub-committee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The Committee against Torture (Committee) is a body of human rights experts that monitors implementation of the Convention by State parties. The Committee is one of eight UN-linked human rights treaty bodies. All State parties are obliged under the Convention to submit regular reports to the Committee on how rights are being implemented. The Committee against Torture has also set up a working

group for the examination of individual communications received under Article 22 of the CAT. The working group examines the admissibility and merits of the communications and makes recommendations to the Committee.²²

2.11 In addition, the UN Human Rights Council by special procedures may investigate and report on allegations of torture. For example, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is authorised to examine questions related to torture in all United Nations Member States. It may be through urgent appeals, country visits, and reporting.

2.12 Enforcement can be ensured through individual complaints' mechanisms to regional human rights tribunals, including the European Court of Human Rights, the Inter-American Court of Human Rights, Inter-American Commission on Human Rights, African Commission on Human and Peoples' Rights, and the African Court of Human and Peoples' Rights.

C. International Humanitarian Law

2.13 The infliction of torture is a "grave breach" of core international humanitarian law under the Geneva Conventions²³ (in particular Article 3), which are designed to limit the effects of armed conflict. Under the Geneva Conventions, States are obliged to enact a legislation necessary to provide effective penal sanctions against persons committing, or ordering to be committed such acts and are obligated to search for persons alleged to have committed, or to have ordered to commit such grave breaches and [to] bring such persons, regardless of their

²² Supra note 20.

²³ Third Convention relative to the Treatment of Prisoners of War, Geneva, 12 August, 1949

nationality before its own courts, if these persons are not extradited to another State Party. The conventions protect both civilians and military personnel from torture. The International Committee of the Red Cross (ICRC) has produced an information kit on *National Enforcement of International Humanitarian Law*.

D. International Criminal Law

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

2.15 The prohibition on torture also requires governments to take measures to prevent and punish torture and many States have criminalised torture in their national law. The Geneva Conventions and Convention against Torture obligate States to extradite or prosecute, those who are responsible for torture. Governments may exercise universal jurisdiction to prosecute those responsible for torture, and Member States of the International Criminal Court have an obligation to co-operate with the court in the investigation and prosecution of crimes, including torture, falling under their respective jurisdiction. In times of armed conflict, the International Committee of the Red Cross, monitors the compliance of international humanitarian law.²⁴

2.16 The principle of non-refoulement prohibits rendering victims of persecution to their persecutor, and applies to States in the context of

²⁴ Supra note 19.

their extradition and immigration policies. This obligation was first enshrined in Article 33 of the United Nations Convention Relating to the Status of Refugees 1951 which provides that “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. This duty is reiterated in Article 3 of CAT. For example, in the United States, asylum eligibility is established by showing that the applicant has suffered or has a “well-founded fear” that he or she will suffer “persecution.”²⁵ Persecution includes activities those do not fall within the relatively narrow definition of torture.

2.18 Even if an individual is not eligible for asylum, the State may not remove him or her to a country where he or she would face a real risk of torture.

E. Implementation of CAT in various Countries

(i) United Kingdom

2.19 The common law prohibited torture, but, the Privy Council continued to issue torture warrants until Felton’s case in 1628 and such practice was formally abolished only in 1640 at the time of Long Parliament. In Scotland, torture was prohibited by section 5 of the Treason Act 1708.²⁶

2.20 Section 134 of Criminal Justice Act, 1988 makes it an offence for any public official to ‘intentionally inflict severe pain or suffering on

²⁵ Code of Federal Regulations: Aliens and Nationality, U.S. General Services Administration, National Archives and Records Service, Office of the Federal Register, 2009 at p. 178

²⁶ Torture in UK Law, *available at*: <https://justice.org.uk/torture-uk-law/> (visited on 26-10-2017).

another in the performance ... of his official duties'. This provision was introduced to honour the UK's commitments under the 1984 Convention (CAT).²⁷

2.21 Under international law, torture is not only prohibited under such instruments as Article 3 of the European Convention on Human Rights (ECHR) and the Torture Convention, but it has become recognised as *jus cogens*, a peremptory norm of international law that binds all states whether they have signed instruments such as the Torture Convention or not²⁸. The prohibition against torture under Article 3 ECHR is also one of the few rights that cannot be derogated from in a state of emergency under Article 15.

2.22 The UK Government maintained that it would never return someone to a country where they face a risk of torture. The Human Rights Act 1998 is regularly relied upon in extradition and deportation cases to challenge the government's assessment of whether a risk of ill-treatment exists.²⁹

(ii) United States of America

2.23 In 1992 the United States became a party to the ICCPR, some provisions of which may be considered to have wider application than those of the CAT. The initial report of the United States under the Covenant, which provides general information related to compliance

²⁷ Ibid.

²⁸ See: *Prosecutor v Furundzija* [1998] ICTY 3, 10 December 1998, paragraphs 147-157

²⁹ See: *Saifi v. Brixton Prison*, [2001] 4 All ER 168.

with and implementation of obligations under the Covenant, was submitted to the Human Rights Committee in July 1994.³⁰

2.24 Torture is prohibited throughout the United States. It is categorically denounced as a matter of policy and as a tool of State authority. Every act constituting torture under the Convention constitutes a criminal offence under the law of the United States. No official of the Government, federal, state or local, civilian or military, is authorised to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture. United States law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a “state of public emergency”) or on orders from a superior officer or public authority, and the protective mechanisms of an independent judiciary are not subject to suspension.³¹

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

³⁰ United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, *available at*: <https://www.state.gov/documents/organization/100296.pdf> (visited on 26-10-2017).

³¹ *Ibid.*

Justice to obtain civil relief for abusive conditions in state prisons and local jails.³²

2.26 The United States Administration came under widespread criticism against detention of alleged leaders and members of suspected terrorist organizations in the Guantanamo Bay detention camp located within Guantanamo Bay Naval Base in the year 2001, post 9/11 terrorist attack. There were allegations of violation of human rights. The Supreme Court of the United States had consistently held that the detainees of Guantanamo had a statutory right to petition the federal courts for habeas corpus review and that the courts had jurisdiction to hear those detainees' petitions.³³

2.27 In the Periodic Report of the United States of America to the United Nations Committee Against Torture (Third, Fourth, and Fifth Reports)³⁴ submitted on 12 August 2013, the US Government quoted its former President Bush as saying in 2006 that “*a small number of suspected terrorist leaders and operatives captured during the war [were] held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency.*” The Report further said “*he then announced that 14 individuals were being transferred from Central Intelligence Agency (CIA) custody to DoD custody at Guantanamo.*” However, the Report negated existence of ‘any secret detention facilities’.

(iii) Russian Federation

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

³² Ibid.

³³ Vide: *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008)

³⁴ Available at <https://www.state.gov/j/drl/rls/213055.htm> [Last Accessed on 20 October 2017]

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

2.29 The Russian Federation ratified the ECHR in May 1998. In 2002 the Court found violations of the right to life (Art. 2), of the right to fair trial (Art. 6), of the prohibition of torture and inhuman or degrading treatment (Art. 3), of the right to liberty and security of the person (Art.5), of the right to respect for private and family life, home and correspondence (Art. 8), of the freedom of expression (Art. 10), of the right to effective remedy (Art. 13), and of the obligation to cooperate with the Court (art. 38).³⁵

2.30 In January 2003, the European Court admitted the applications concerning human rights violations in Chechnya. The applicants alleged that the Russian military violated their rights in the course of military operations in Chechnya in 1999-2000. In 2005, the Court in few cases³⁶ found that the Russian Federation had violated Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment), and Article 13 (right to an effective remedy) of the European Convention on Human Rights and Article 1 of Protocol No. 1 to the Convention (protection of property).

2.31 Judgments in cases³⁷ from Chechnya and other North Caucasus Republics, brought by Russian Justice Initiative and others, have since contributed to clarifying important issues such as what constitutes

³⁵ *Burdov v. Russia*, ECHR, IHRL 181 (ECHR 2009).

³⁶ *Khashiyev and Akayeva v. Russia*, 57942/00; 57945/00, Council of Europe: European Court of Human Rights, 19 December 2002, available at: <http://www.refworld.org/cases,ECHR,3e4bce247.html>.

³⁷ See also, *Kalashnikov v. Russia*, 47095/99, Council of Europe: European Court of Human Rights, 15 July 2002, available at: <http://www.refworld.org/cases,ECHR,416bb0d44.html>;

inhuman treatment of relatives, under what circumstances it is possible to hold that a disappearance is a violation of the right to life, and the obligations of a respondent state when it comes to cooperating with the Court.

(iv) China

2.32 China ratified the CAT in 1988. Since its ratification, the Committee has had four reviews and is currently in its fifth review cycle. The Committee against Torture - the international panel of experts that assesses State compliance under the CAT, last reviewed China in 2008. Since then, the government has made a series of reforms to its criminal justice system after domestic press exposed cases of severe torture of criminal suspects leading to wrongful convictions, deaths, and a public outcry.³⁸

(v) France

2.33 France is committed to combat torture and other cruel, inhuman or degrading treatment or punishment. France has ratified the CAT. France has also signed the Optional Protocol to the Convention against Torture. It has accordingly set up its national preventive mechanism in the form of a fully independent Controller-General for Places of Deprivation of Liberty, responsible for ensuring that the fundamental rights of detainees are respected.³⁹

³⁸ China: Tell the Truth on Torture at UN Review, *available at*: <https://www.hrw.org/news/2015/11/11/china-tell-truth-torture-un-review> (visited on 26-10-2017).

³⁹ France and the Fight against enforced disappearance, torture and arbitrary detention, *available at*: <https://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/enforced-disappearance-torture-and-arbitrary-detention/article/france-and-the-fight-against> (visited on 26-10-2017).

2.34 France is also a party to the European Convention for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its protocols. The Convention establishes a European Committee for the Prevention of Torture (CPT) responsible, in the same way as the SPT, for visiting and inspecting places of detention.⁴⁰

F. Pronouncements by various international adjudicatory forums.

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

(i) Defining Cruel Treatment and Torture

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

⁴⁰ *Ibid.*

Furthermore, the suffering and humiliation must in any event go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.⁴¹

2.37 In *Ireland v. United Kingdom*⁴², the European Court of Human Rights laid down factors to be taken into account in determining the severity of treatment like the age, sex, and state of health of the victim. The Court also examined certain methods of interrogation, none of which were found to cause acute *physical* injury, finding that forcing detainees to remain in stress positions for a long period of time, subjecting them to noise and depriving them of food, water and sleep amounted to ill-treatment, but refused to hold that the treatment amounted to torture. The case stresses the applicability of the prohibition, *even* in cases involving terrorism and public danger. The reluctance demonstrated in this case, to find that ill-treatment amounts to torture based on the level of severity, has been eroded by subsequent case law that can be read to lower the threshold under the European Convention for finding that torture has occurred⁴³.

2.38 In judging whether an applicant has suffered torture, rather than less severe forms of ill-treatment, the degree of ill-treatment used will help the court determine the intent with which such a treatment was meted out. Subjecting detainees to unnecessary physical force diminishes human dignity and is a violation of the European Convention of Human Rights⁴⁴.

⁴¹ *Wainwright v. United Kingdom*, Application no. 12350/04 (2007) 44 E.H.R.R. 40.

⁴² Application No. 5320/71 (1978). See also: *Labita v. Italy*, Application No. 26772/95, Judgment of 6 April 2000, *Selmouni v. France*, Application No. 25803/94, Judgment of 28 July 1999 and *Chahal v. The United Kingdom*, Application No. 22414/93, Judgment of 15 November 1996).

⁴³ See *Askoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260, *Aydin v. Turkey*, 1997-V Eur. Ct. H.R. 1866, 1873-74, 1891, and *Selmouni v. France*, Application No. 25803/94, Judgment of 28 July 1999 (each finding that the treatment endured by the applicants amounted to torture).

⁴⁴ *Selmouni v. France*, Application No. 25803/94, Judgment of 28 July 1999.

(ii) Psychological Suffering

2.39 Various human rights bodies have acknowledged that no physical element is necessary to establish torture or inhuman treatment. The European Court of Human Rights found that a suspected criminal could not be extradited to the United States because of the psychological harm he would suffer if he were to be sentenced to death and held on death row.⁴⁵

2.40 Actions aimed at humiliating individuals or causing psychological suffering may constitute torture or inhuman treatment, and also violate the right to human dignity.⁴⁶

2.41 In *Cantoral-Benavides v. Peru*⁴⁷, the Inter-American Commission found that ‘according to international standards for protection, torture can be inflicted not only via physical violence, but also through acts that produce severe physical, psychological or moral suffering to the victim.’ In that case, the Court found that the aggressive acts suffered by the victim could be classified as physical and psychological torture, and that the acts were planned specifically for the purpose of wearing the victim down and to obtain incriminating evidence from him.

2.42 In several cases, it had been found that there had been violation of rights of the relatives of victims of disappearance in the form of the anguish caused to their family members. The State’s failure to properly

⁴⁵ *Soering v. The United Kingdom*, Application No. 25803/94, Judgment of 28 July 1999. For other cases involving the inflicting of mental, but not physical violence, see *V. v. The United Kingdom*, Application No. 24888/94, Judgment of 16 December 1999 and *X and Y v. The Netherlands*, Application No. 8978/80, Judgment of 26 March 1985.

⁴⁶ See *Malawi African Association and Others v. Mauritania*, African Commission on Human and Peoples’ Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000).

⁴⁷ (1/A Court H.R. Judgment of August 18, 2000, Ser. C No. 69. (2000) IACHR6. See also *Maritza Urrutia v. Guatemala*, Judgment of November 27, 2003, Inter-Am. Ct. H.R., (Ser. C) No. 103 (2003), finding that the victim suffered physical violence amounting to torture, and mental violence constituting cruel and inhuman treatment.

investigate and punish the wrongdoers for the disappearances or murders had further added to their suffering.⁴⁸

(iii) Corporal Punishment

2.43 Corporal punishment is a cruel, inhuman and degrading treatment or punishment that violates the prohibition of torture. The Human Rights Committee has held that corporal punishment is prohibited by Article 7 of the Covenant⁴⁹. The African Commission has ruled that corporal punishment violates human right to dignity.⁵⁰

(iv) Treatment of Prisoners and Detainees

2.44 In *Antti Vuolanne v. Finland*⁵¹, the Human Rights Committee examined a case involving the solitary confinement of a Finnish infantryman. The Committee held that for punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the act of deprivation of liberty. In determining the severity of the alleged maltreatment, the court should consider all the circumstances of the case at hand, including the duration and manner of treatment, its physical and mental effects and the sex, age and state of health of the victim.

⁴⁸ See: *Quinteros v. Uruguay*, Human Rights Committee Communication No. 107/1981, Views of 21 July 1983; *Case of the 'Street Children' (Villagran-Morales) et al. v. Guatemala*, Inter-Am. Ct H.R., 19 November 1999; *Laureano v. Peru*, Communication No. 540/1993, Views of 25 March 1996; *Kurt v. Turkey*, Appl. No. 15/1997/799/1002, Judgment of 25 May 1998. In *Çakici v. Turkey*, Application No. 23657/94, Judgment of 8 July 1999, paragraphs 98-99).

⁴⁹ *Osbourne v. Jamaica*, Communication No. 759/1997, U.N. Doc. CCPR/C/68/D/759/1997 (2000).

⁵⁰ *Curtis Francis Doebbler v. Sudan*, African Commission on Human and Peoples' Rights, Comm. No. 236/2000 (2003).

⁵¹ Communication No. 265/1987, U.N. Doc. Supp. No. 40 (A/44/40) at 311 (1989).

2.45 In contrast, the Human Rights Committee found, in *Polay Campos v. Peru*⁵², that displaying the victim publicly in a case and isolating him for 23 hours a day in a small cell with only 10 minutes of sunlight a day violated Arts. 7 and 10 of the ICCPR.

2.46 In *International Pen & Others v. Nigeria*⁵³, the African Commission on Human and Peoples' Rights held that where the State had detained individuals sentenced to death in leg irons and handcuffs and had denied access to attorneys and necessary medicines, is violative of Article 5 of the African Charter.

2.47 The European Court of Human Rights has also developed case-law on presumptions regarding ill-treatment inflicted by State actors. For example, it has stated that “[W]here an individual is taken into custody in good health but is found to be injured by the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the victim’s allegations, particularly if those allegations were corroborated by medical reports, failing which a clear issue arises under Art.3 of the Convention.”⁵⁴

2.48 Interrogation of suspects of terrorist activities between 1971 and 1975 in Northern Ireland involving a combination of five particular techniques – wall-standing, hooding, subjection to white noise, deprivation of sleep and deprivation of food and drink has been held by the European Court of Human Rights an inhuman and degrading treatment and practice of torture which violated Article 3. The court

⁵² Communication No. 577/1994 (1997). *See also Loayza Tamayo Case*, Reparations, Judgment of November 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 42 (1998) (finding similar treatment violated the applicants’ rights under the American Convention).

⁵³ Comm. Nos. 137/94, 139/94, 154/96 and 161/97 (1998).

⁵⁴ *Yavuz v. Turkey* Application no. 32577/02, Judgment of 29 September 2008.

described ‘degrading’ as ‘*involving treatment such as to arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance*’⁵⁵. The Court said that inhuman or degrading treatment must ‘*go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment*’ to be deemed a violation of Article 3.⁵⁶

2.49 The ‘ill-treatment must attain a minimum level of severity’ to fall within the scope of Article 3 and that such assessment of this minimum is relative and depends on ‘all circumstances of the case’⁵⁷. In considering the issue of whether a punishment or treatment is ‘degrading’ within the meaning of Article 3, the Court noted that it would also have to take into account whether its object ‘is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3.’⁵⁸

2.50 In order to avoid violation of Article 3, the authorities are under an obligation to protect the health of persons deprived of liberty by providing requisite medical care during detention⁵⁹. In the case of mentally ill persons, the assessment of whether the treatment concerned is incompatible with Article 3 has to take into consideration ‘their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment.’⁶⁰

⁵⁵ *Ireland v. The United Kingdom* [1978]2 EHRR 25

⁵⁶ *Kudla v. Poland*, (2000) Application No.30210/96, 26th October 2000.

⁵⁷ *Ibid*

⁵⁸ *Keenan v. UK*, (2001) 33 EHRR 913.

⁵⁹ *Hurtado v. Switzerland* (1994) Application No.1754/90, 28th January; See also: *Khudobin v. Russia*, application no. 59696/00), 26th October, 2006; and *Pretty v. UK*, (2002) 35 EHRR 1

⁶⁰ See *Herczegfalvy v. Austria*[1992]; *Aerts v. Belgium* [1998].

2.51 Denying adequate medical treatment and force feeding while on hunger strike and not producing the relevant documents in respect of his medical treatment has been held to be violative of Article 3⁶¹.

2.52 The Commission has gone through in detail the scenario prevailing across the world with regard to various international conventions on torture. The Commission has noted that though India has signed the Convention against Torture, it is yet to be ratified. Not ratifying the Convention may lead to difficulties in cases involving extradition, as the foreign courts may refuse extradition or may impose limitations, in the absence of anti-torture law in line with the Convention, while granting extradition⁶².

⁶¹ *Nevmerzhitsky v. Ukraine* (2005) Application No.54825/00, 5th April

⁶² See *Saifi v. Brixton Prison & Anor*, Supra Note 29

Chapter III

Examination of issues relating to Torture by various Commissions

3.1 Torture is “is not merely physical, there may be mental torture and psychological torture calculated to create fright and submission to the demands or commands.”⁶³

3.2 The World Medical Association, in its Tokyo Declaration, 1975, defined "torture" as "the deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons, acting alone or on the orders of any authority to force another person to yield information, to make a confession or for any other reason."⁶⁴

3.3 In *Mehmood Nayyar Azam v. State of Chhattisgarh*,⁶⁵ the Court referred to the dictionary meaning of ‘harassment’ while dealing with harassment in custody observed:

“In P. Ramanatha Aiyar’s Law Lexicon, Second Edition, the term “harass” has been defined, thus: -

“Harass. “injure” and “injury” are words having numerous and comprehensive popular meanings, as well as having a legal import. A line may be drawn between these words and the word “harass” excluding the latter from being comprehended within the word “injure” or “injury”. The synonyms of “harass” are: To weary, tire, perplex, distress tease, vex, molest, trouble, disturb. They all have relation to mental annoyance, and a troubling of the spirit.” The term “harassment” in its connotative expanse includes torment and vexation. The term “torture” also engulfs the concept of torment. The word “torture” in its denotative concept includes mental and psychological harassment. The accused in custody can be put

⁶³ *Arvinder Singh Bagga v. State of U.P.*, AIR 1995 SC 117

⁶⁴ See: Speech by Dr. Justice A S Anand, former Chief Justice of India, in VIIIth International Symposium on Torture, (1999) 7 SCC 10 (J).

⁶⁵ AIR 2012 SC 2573

under tremendous psychological pressure by cruel, inhuman and degrading treatment.”

A. National Commission to Review the working of the Constitution

3.4 The National Commission to Review the Working of the Constitution (2002) set up by the Law Ministry specifically recommended for ‘prohibition of torture and cruel, inhuman or degrading treatment or punishment’ as one of the additions to the fundamental rights chapter as Article 21(2) on the basis of the dicta laid down in various Supreme Court judgments in recognition of torture in our constitutional jurisprudence.

3.5 In the relevant portion of the Commission’s Report it is stated:-

“3.9 Rights against torture and inhuman, degrading and cruel treatment and punishment.

3.9 Rights against torture and inhuman, degrading and cruel treatment and punishment grossly violate human dignity. The Supreme Court has implied a right against torture, etc. by way of interpretation of Article 21 which deals with Right to life and Liberty. The Universal Declaration of Human Right 1948 and the ICCPR prohibit such acts in Art. 5 and 7 respectively.

It is therefore, recommended that the existing Art.21 may be numbered as Clause (1) thereof and a new clause should be inserted thereafter on the following lines-

“(2) No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

B. Reports of the Law Commission of India

(i) 113th Report (1985): Injuries In Police Custody

3.6 In the 113th Report the Law Commission recommended the amendment to the Indian Evidence Act, 1872, by inserting section 114B

providing that in case of custodial injuries, if there is evidence, the court may presume that injury was caused by the police having the custody of that person during that period. Onus to prove contrary is on the police authorities. Law requires for adoption of a realistic approach rather than narrow technical approach in cases of custodial crimes. The amendment proposed by the Commission reads as under:

“114-B. (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 regard 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 of 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.”

(ii) 152nd Report (1994): Custodial Crimes

3.7 The Commission dealt with the issues of arrest and abuse of authority by the officials and making reference to all Constitutional and statutory provisions including Articles 20, 21 and 22 which are bound to be observed mandatorily as they deal with the life and liberty of persons. It also took into consideration the provisions of the Indian Penal Code, 1860 particularly sections 166 & 167 (disobeying directions of law by public officers), 220 (confining a person for corrupt and malicious reasons), 330 & 331 (illegal restraint and causing harm to body) sections 340-348 (wrongful restraint and wrongful confinement), sections 376(2) (aggravated form of rape committed by police officers etc.), 376B to 376D

(Custodial sexual offences) and sections 503 and 506 (criminal intimidation). The Commission also considered the provisions of Cr.PC, particularly section 41 (arrest), section 49 (restraints), section 50 (grounds of arrest), section 53 (medical examination of the accused), section 54 (medical examination at the request of the arrested person), sections 56-58 (action after arrest), sections 75-76 (arrest under warrant), section 154 (information in cognizable cases), section 163 (provision of inducements) section 164 (confession before magistrate), section 313 (examination of the accused in court), section 357 (compensation).

3.8 The Commission also considered the various provisions of the Indian Evidence Act, 1872, e.g., sections 24-27. The main recommendation of the Commission included amendment of IPC by inserting new provision for punishing the violation of section 160, Cr.PC. It also recommended amendment of Cr.PC by adding the provision section 41(1A) for recording the reasons for arrest and to add section 50A to inform the relatives etc. With regard to Indian Evidence Act, the Commission reiterated adding new provision, i.e. section 114B as recommended in the 113th Report.

(iii) 177th Report of the Law Commission (2001) titled “Law Relating to Arrest”

3.9 The Law Commission of India, in its 177th Report (suggested that amendments should be brought in Cr.PC by inserting section 55A which may read as under:

“Health and Safety of the Arrested Persons: 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 accused.”

(iv) 185th Report of the Law Commission (2003) : Review of the Indian Evidence Act, 1872

3.10 In the 185th Report, the Commission pointed out that a reference was in fact made by the Supreme Court to the 113th Report of the Law Commission in *State of MP v. Shyam Sunder Trivedi*⁶⁶. It was pointed out that in cases of custodial death or police torture, it is difficult to expect direct ocular evidence of the complicity of the police. Bound as they are by the ties of brotherhood, often police personnel would not come forward to give evidence and more often than not, police officers could – as happened in that case – feign total ignorance about the matter. Courts should not, in such cases, show an exaggerated adherence to the principle of proof beyond reasonable doubt. There will hardly be any evidence available to the prosecution to implicate the police. The Court called deaths in police custody as the “worst kind of crimes in civilized society, governed by rule of law. Men in ‘khaki’ are not above the law.” Section 330, 331 of the Penal Code make it punishable for persons who cause hurt for the purpose of extorting the confession by making the offence punishable with sentence up to 10 years of imprisonment but convictions, in such cases, are fewer because of the difficulties in proving evidence. The Court observed:

“Disturbed by this situation, the Law Commission in its 113th Report recommended amendments to the Indian Evidence Act so as to provide that in the prosecution of a police officer for an alleged offence of having caused bodily injuries to a person while in police custody, if there is evidence that the injury was caused during the period when the person was in the police custody, the Court may presume that the injury was caused by the police officer having the custody of that person during that period unless the police officer proves to the contrary. The onus to prove the contrary must be discharged by the police official concerned.”

⁶⁶ 1995(4) SCC 262

3.11 The Court further observed:

“Keeping in view the dehumanising aspect of the crime, the flagrant violation of the fundamental rights of the victim of the crime and the growing rise in the crimes of this type, where only a few come to light and others don’t, we hope that the Government and legislature would give serious thought to the recommendation of the Law Commission and bring about appropriate changes in the law....”

(v) **268th Report (2017): Amendments to Code of Criminal Procedure 1973: Provisions Relating to Bail.**

3.12 In its 268th Report, the Commission recommended insertion of section 41(1A) and amendment to 41B, Cr. PC requiring the police officer to intimate the rights of the person arrested, for bail and liberalising the process of bail.

C. Fourth Report of National Police Commission (1980)

3.13 The National Police Commission, in its Fourth Report (1980) took note of the fact that custodial torture had been prevalent and admitted that torture on a person in police custody was the most dehumanising. The police did not have a good image in the estimation of the public. Police practice torture in order to achieve quick results by short cut methods. Causing hurt is a punishable offence under sections 330-331 Indian Penal Code, 1860, but the atrocities were committed within the four walls of the police stations and thus, no evidence could be available and as a result thereof the conviction in torture by police cases has been a rare phenomenon. It was difficult to find as to who was the offender.

3.14 Thus, it may be seen that over the period of time, various Commissions, in their reports have consistently recommended to have

adequate provisions in our statutes to protect the rights of individuals to life and liberty as enshrined in our Constitution. The Commission is fortified in its conclusions and recommendations from the above analysis.

CHAPTER - IV

Constitutional / Statutory Provisions

A. Constitutional Provisions

4.1 Article 20(3) provides that a person accused of any offence shall not be compelled to become a witness against himself. The accused has a right to maintain silence and not to disclose his defence before the trial.⁶⁷ Test results of polygraph and brain finger printing tests have been held to be testimonial compulsions and thus have been held to be barred by Article 20(3).⁶⁸ Moreover recoveries under section 27 of the India Evidence Act, 1872 are not permitted to be procured through torture.⁶⁹

4.2 Article 21 provides that nobody can be deprived of his life and liberty without following the procedure prescribed by law. The Supreme Court has consistently held that custodial torture violates right to life enshrined in Article 21 of the Constitution. It is settled legal proposition that Article 21 may also supplement various requirements laid down in Article 20.⁷⁰

4.3 In *Sunil Batra v. Delhi Administration*,⁷¹ the Supreme Court in crystal clear words held that “*fundamental rights do not flee the person as he enters the prison although they may suffer shrinkage necessitated by incarceration.*”

4.4 Article 22 (1) & (2) provide for protection against arrest and detention in certain cases. It prohibits detention of any person in custody

⁶⁷ *Yogendra Kumar Jaiswal & Ors. v. State of Bihar & Ors.*, AIR 2016 SC 1474

⁶⁸ *Smt. Selvi v. State of Karnataka*, AIR 2010 SC 1974. See also *Raja Narainlalbansilal v. Maneck Phiroz Mistry*, AIR 1961 SC 29; and *Charoria v. State of Maharashtra*, AIR 1968 SC 938

⁶⁹ See: *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808; and *Smt. Selvi & Ors. v. State of Karnataka*, AIR 2010 SC 1974

⁷⁰ *Sampat Prakash v. State of J&K* AIR 1969 SC 1153; and *Kamla Kanhaihalal Kushalani v. State of Maharashtra*, AIR 1981 SC 814

⁷¹ AIR 1978 SC 1675; See also *Sunil Batra (II) v. Delhi Administration*, AIR 1980 SC 1579; and *In Re: Inhuman Conditions in 1382 Prisons*, AIR 2016 SCC 993.

without being informed the grounds for his arrest nor he shall be denied the right to consult and to be defended by a legal practitioner of his choice. “Every person who is arrested and detained in custody shall be produced before the nearest judicial magistrate within a period of twenty-four hours of such arrest.....and no such person shall be detained in custody beyond the said period without the authority of a magistrate.”

4.5 Similarly, a criminal trial which may result in depriving a person of not only personal liberty but also his right to life has to be unbiased and without any prejudice for or against the accused.⁷² It has also been held that a punishment which is too cruel or torturous is unconstitutional.⁷³

4.6 Informing about grounds of arrest is mandatory under Article 22 (1)⁷⁴ Right to consult and to be defended by legal practitioner of his choice is also mandatory.⁷⁵ More so, production of the accused before the nearest magistrate is a mandatory constitutional requirement.⁷⁶

B. Statutory Provisions

(i) Indian Evidence Act, 1872

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

⁷² *Nahar Singh Yadav v. Union of India*, AIR 2011 SC 1549

⁷³ *Inderjit v. State of Uttar Pradesh* AIR 1979 SC 1867

⁷⁴ *A K Gopalan v. State of Madras*, AIR 1950 SC 27; and *Hansmukh v. State of Gujarat*, AIR 1981 SC 28.

⁷⁵ *A K Gopalan*, supra, and *State of Madhya Pradesh v. Shobharam* AIR 1966 SC 1910

⁷⁶ *State of Uttar Pradesh v. Abdul Samad*, AIR 1962 SC 1506

4.8 Section 25 of the Act provides that a confessional statement of an accused to police officer is not admissible in evidence and cannot be brought on record by prosecution to obtain conviction⁷⁷. In *Aghnu Nagesia v. State of Bihar*⁷⁸, the Supreme Court held that “*if the first information report is given by the accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by section 25.*”

4.9 Sections 26 provides that confession by an accused while in police custody could not be proved against him. In fact, statement made in police custody remains unreliable unless it is subjected to cross examination or judicial scrutiny.⁷⁹

4.10 Section 27 provides as to how much of information received from an accused may be proved. For the application of section 27, the statement of the accused is required to be split into its components and the admissible part of it is to be separated. Only those portions which were immediate cause of discovery would be admissible in evidence.⁸⁰ In *Kathi Kalu Oghad*⁸¹, the Supreme Court held that:

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

⁷⁷ *Ram Singh v. Central Bureau of Narcotics*, AIR 2011 SC 2490

⁷⁸ AIR 1966 SC 119

⁷⁹ *Smt. Selvi v. State of Karnataka* (Supra note 54)

⁸⁰ *Mohmed Inayatullah v. State of Maharashtra*, AIR 1976 SC 480

⁸¹ Supra Note 54

section 27 necessarily infringes Article 20(3) cannot be accepted.

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

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

4.12 In *R Dinesh Kumar v. State & Ors.*⁸², the Supreme Court explained the scope of the proviso observing that the proviso to section 132 of the Evidence Act is a necessary corollary to the principle enshrined under Article 20(3) of the Constitution of India which confers a fundamental right that “no person accused of any offence shall be compelled to be a witness against himself”. Though such a fundamental right is available only to a person who is accused of an offence, the proviso to section 132 of the Evidence Act creates a statutory immunity in favour of a witness who in the process of giving evidence in any suit or in any civil or criminal proceeding makes a statement which criminate himself which deserves the most liberal construction. Without such an immunity, a witness who is giving evidence before the court to enable the court to reach a just conclusion (and thus assisting the process of law) would be in a worse position than an accused in a criminal case. Therefore, no prosecution can be launched against the maker of a statement falling within the sweep of Section 132 of the Evidence Act on the basis of the “answer” given by a person deposing as a “witness” before a court.

⁸² AIR 2015 SC 1816

(ii) Code of Criminal Procedure, 1973

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

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

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

4.16 Section 54 of the Code extends safeguard against any infliction of custodial torture and violence by providing for examination of arrested person by medical officer. Section 57 requires the police to produce the suspect / accused before the nearest magistrate within 24 hours of arrest. It corresponds to Article 22(2) of the Constitution.

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

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

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

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

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

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

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

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

4.25 Section 358 provides for compensation to persons groundlessly arrested.

(iii) Indian Police Act, 1860

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

(iv) Indian Penal Code, 1860

4.27 Sections 330, 331, 342 and 348 have, purposely been designed to deter police officers who are empowered to arrest a person and to

interrogate him during investigation of an offence resorting to third degree methods, which may amount to torture⁸³.

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

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

(v) Armed Forces Special Powers Act, 1983

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

4.31 The existing provisions under various statutes referred to hereinabove, convince the Commission to recommend that there is a necessity to amend section 357B to include a provision regarding payment of compensation in case of torture as well, in addition to payment of fine as provided under section 326A or section 376D of the Indian Penal Code, 1860. Similarly, the Commission is of the opinion that it shall be the responsibility of the State to explain the injuries sustained by a person while in custody, and therefore, recommends amendment to the Indian Evidence Act, 1872, by inserting section 114B on the lines of the Bill, viz., The Indian Evidence (Amendment) Bill, 2016, (Bill No.LXVII of 2016), as introduced in Rajya Sabha on 10 March 2017.

⁸³ *State of Madhya Pradesh v. Shaym Sunder Trivedi*, (1995) 4 SCC 260

Chapter - V

Judicial Response to Custodial Deaths & Violence

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

A. Custody means

5.2 The term “custody” has not been defined in any statute. Its dictionary meanings include: “Safe-keeping, protection, charge, care, guardianship, confinement, imprisonment, duration of person, guardianship, the act or duty of guarding and preserving, control of a thing or person.”⁸⁴

5.3 In *Black’s Law Dictionary*,⁸⁵ the expression “custody” has been explained to be the term very elastic and may mean actual imprisonment or physical detention and does not necessarily mean actual physical detention in jail or prison but rather is synonymous with restraint of liberty.

5.4 In *Niranjan Singh v. Prabhakar Rajaram Kharote*,⁸⁶ the Supreme Court while dealing with the meaning of ‘custody’ within the purview of Section 439 Cr.P.C. observed:

....When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's

⁸⁴ *Shorter Oxford English Dictionary* and *Webster's Third International Dictionary*

⁸⁵ Henry Campbell Black, M.A. (Sixth Edn.).

⁸⁶ AIR 1980 SC 785; See also *Sunita Devi v. State of Bihar*, AIR 2005 SC 498.

jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-peek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law.

5.5 The meaning of the term ‘custody’ has to be understood with reference to the context in which it is used.⁸⁷

5.6 The Bombay High Court, explained the distinction between arrest and custody in *Harbans Singh v. State*,⁸⁸ observing:

‘Arrest is a mode of formally taking a person in police custody, but a person may be in the custody of the police in other ways. What amounts to arrest is laid down by the legislature in express terms in S. 46, Cr.P.C., whereas the words ‘in custody’ which are to be found in certain sections of the Evidence Act only denote surveillance or restriction on the movement of the person concerned, which may be complete, as, for instance, in the case of an arrested person, or may be partial. The concept of being in custody cannot therefore be equated with the concept of a formal arrest and there is difference between the two. Where, after the statements recorded by the Customs Authorities, due to the night-fall, the accused are put up before a Magistrate only next morning, it cannot be said that the accused were arrested and as such any statement made by them cannot be said to be in violation of Section 24 of the Evidence Act.....

5.7 In *Directorate of Enforcement v Deepak Mahajan*,⁸⁹ the Supreme Court while differentiating between ‘custody’ and ‘arrest’ observed:

⁸⁷ *Roshan Beevi v. Joint Secy., Govt. of T.N.*, 1984 (15) ELT 289 (Mad.).

⁸⁸ AIR 1970 Bom79; see also: *State of Punjab v. Ajaib Singh*, AIR 1953 SC 10

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

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

B. Judicial Response

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

That there is not a single lawless group in the whole of the country whose record of crime comes anywhere near the record of that organised unit which is known as the Indian Police Force.'

...Where every fish, barring perhaps a few stinks, it is idle to pick out one or two and say that it stinks.

5.10 The State of Uttar Pradesh filed an appeal before the Apex Court for expunging these remarks, and the appeal was allowed.⁹⁰

⁸⁹ AIR 1994 SC 1775; see also: *Nirmaljeet Kaur v. State of M.P.* (2004) 7 SCC 558.

⁹⁰ *State of U.P. v. Mohd. Naim*, AIR 1964 SC 703

5.11 In *People's Union for Civil Liberties v. Union of India & Anr.*⁹¹, the Court observed:

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

5.12 In *Francis Coralie Mullin v. Administrator, U.T. of Delhi*⁹², the Supreme Court observed:

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

5.13 The Supreme Court, in *Charan Lal Sahu v. Union of India*⁹³, interpreted Articles 21, 48A and 51A(g) of the Constitution, observing:

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

5.14 In *Kartar Singh v. State of Punjab*⁹⁴, the Supreme Court observed as under:

“..... the recognition of the inherent dignity and of the equal and inalienable rights of the citizens is the foundation of

⁹¹ AIR 2005 SC 2419; (See also: *Dilip K. Basu v. State of W.B. & Ors.* AIR 1997 SC 3017 and *N.C. Dhoundial v. Union of India & Ors.* AIR 2004 SC 127; *Rubabbuddin Sheikh v. State of Gujarat & Ors.* AIR 2010 SC 3175; *Jaywant P. Sankpal v. Suman Gholap & Ors.*, (2010) 11 SCC 208; and *Narmada Bai v. State of Gujarat & Ors.*, (2011) 5 SCC 79).

⁹² AIR 1981 SC 746

⁹³ AIR 1990 SC 1480

⁹⁴ (1994) 3 SCC 569

freedom, justice and peace in the world. If the human rights are outraged, then the court should set its face against such violation of human rights by exercising its majestic judicial authority.”

5.15 Police atrocities in India had always been a subject matter of controversy and debate. This has been discussed in detail in *Prithipal Singh etc. v. State of Punjab and Anr. etc.*⁹⁵ In view of the provisions of Article 21 of the Constitution, any form of torture or cruel, inhuman or degrading treatment is inhibited. Torture is not permissible whether it occurs during investigation, interrogation or otherwise. It cannot be gainsaid that freedom of an individual must yield to the security of the State. Latin maxim *salus populi est suprema lex* - the safety of the people is supreme law; and *salus reipublicae suprema lex* - safety of the State is supreme law, co-exist.

5.16 The right to life has rightly been characterised as "'supreme' and 'basic'; it includes both so-called negative and positive obligations for the State". The negative obligation means the overall prohibition on arbitrary deprivation of life. In this context, positive obligation requires that State has an overriding obligation to protect the right to life of every person within its territorial jurisdiction. The obligation requires the State to take administrative and all other measures in order to protect life and investigate all suspicious deaths.

5.17 The State must protect victims of torture and ill-treatment. The problems of acute stress as well as a post-traumatic stress disorder and many other psychological consequences must be understood in correct perspective. Therefore, the State must ensure prohibition of torture, cruel, inhuman and degrading treatment to any person,

⁹⁵ (2012)1SCC10.

particularly at the hands of any State agency/police force.

5.18 Tolerance of police atrocities, amounts to acceptance of systematic subversion and erosion of the rule of law. Therefore, illegal regime has to be glossed over with impunity, considering the cases of grave magnitude.

5.19 In *Gauri Shanker Sharma etc. v. State of U.P.*⁹⁶, the Supreme Court held:

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

5.20 In *Munshi Singh Gautam v. State of M.P.*⁹⁷, the Supreme Court held that peculiar type of cases must be looked at from a prism different from that used for ordinary criminal cases for the reason that in a case where the person is alleged to have died in police custody, it is difficult to get any kind of evidence. The Court observed:

“Rarely in cases of police torture or custodial death, direct ocular evidence is available of the complicity of the police personnel, who alone can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that police personnel prefer to remain silent and more often than not even pervert the truth to save their

⁹⁶ AIR 1990 SC 709

⁹⁷ AIR 2005 SC 402

colleagues.....The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case, often results in miscarriage of justice and makes the justice-delivery system suspect and vulnerable. In the ultimate analysis society suffers and a criminal gets encouraged... The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kinds of crime in a civilised society governed by the rule of law and poses a serious threat to an orderly civilised society. Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/undertrial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in "khaki" to consider themselves to be above the law and sometimes even to become a law unto themselves. Unless stern measures are taken to check the malady of the very fence eating the crop, the foundations of the criminal justice-delivery system would be shaken and civilisation itself would risk the consequence of heading towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually lose faith in the efficacy of the system of the judiciary itself, which if it happens, will be a sad day, for anyone to reckon with."

5.21 The Supreme Court in *Mehmood Nayyar Azam v. State of Chhattisgarh*⁹⁸ dealt with a case of a social activist, who agitated the issue of exploitation of people belonging to poor and marginalised sections of the society and worked to create awareness about the same, was falsely roped in criminal cases, arrested and humiliated. While in police custody, he was abused and physically assaulted. The Court held that any form of torture or cruel, inhuman or degrading treatment would fall within the ambit of Articles 20 & 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. The term "harassment" in its connotative expanse includes torment and vexation. The Court held:

⁹⁸ AIR 2012 SC 2573

“If the functionaries of the Government become law-breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchy.... The right to life of a citizen cannot be put in abeyance on his arrest.”

5.22 In *D.K Basu v. State of W.B*⁹⁹ after perusing several reports on custodial violence Supreme Court held that, “Custodial violence including torture and death in lock ups strikes a blow at the rule of law which demands that the powers of executive should not only be derived from law but also that the same should be limited by law.”

5.23 The Court issued certain guidelines to be followed in the cases of arrest and detention including that the police personnel carrying out the arrest and investigation must carry visible identity card showing his designation, etc., and his designation should also be recorded in the register; arresting officer shall prepare the memo of arrest at the time of arrest which should be attested by a witness preferably the family member of the arrestee and it shall also be counter-signed by the arrestee and it would show the time and date for arrest; arrestee during the period of interrogation shall be entitled to have one friend or his relative with him unless the attesting witness of his arrest is his relative/friend; time, place of arrest and venue of custody of an arrestee must be notified by the police and legal aid organisations should be informed immediately; arrestee must be informed of his right to have someone informed of his arrest immediately after the arrest; entry should be made in the diary disclosing the place of detention and particulars of the police officials having his custody; arrestee, where he so requests be examined medically at the time of his arrest in case having major or minor injuries and the arrestee should be subjected to medical

⁹⁹ AIR1997 SC 3017

examination within 48 hours of his detention; copies of Memo of arrest and all other documents be sent to the illaqa magistrates; arrestee may be permitted to meet his lawyer during interrogation and aforesaid information regarding arrest and custody shall be communicated to the police control room and shall also be displayed on a conspicuous notice board.

5.24 The Court further observed :

“failure to comply with the requirements hereinabove mentioned shall apart from rendering the concerned official liable for departmental action, also render him liable to be punished for contempt of court and proceedings for contempt of court may be instituted in any high Court of the country having territorial jurisdiction over the matter.”

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

5.26 In *Rama Murthy v. State of Karnataka*,¹⁰⁰ the Supreme Court identified various issues facing prisons which required reforms and it included torture and ill-treatment.

5.27 The Apex Court in the case of *Sube Singh v. State of Haryana*¹⁰¹ has taken note of custodial violence and third degree methods used by police during interrogation and has discussed in detail the reasons behind such practice and has also suggested preventive measures as to how such violence can be tackled. The Court observed:

“The expectation of quick results in high-profile or heinous crimes builds enormous pressure on the police to somehow ‘catch’ the ‘offender’. The need to have quick results tempts them to resort to third degree methods. They also tend to

¹⁰⁰ AIR 1997 SC 1739.

¹⁰¹ AIR 2006 SC 1117

arrest “someone” in a hurry on the basis of incomplete investigation, just to ease the pressure.The three wings of the Government should encourage, insist and ensure thorough scientific investigation under proper legal procedures, followed by prompt and efficient prosecution.”

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

5.29 In *Raghubir Singh v. State of Haryana*¹⁰², where the violence employed by the police to extract a confession resulted in death of a person suspected of theft, the court observed that “*We are deeply disturbed by the diabolical recurrence of police torture resulting in terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of law gore human rights to death.*” The Court further observed that vulnerability of human rights assumes a traumatic, torturous poignancy, the violent violence is perpetrated by the police arm of the State whose function is to protect the citizen and not to commit gruesome offences against them.

5.30 In *State of U.P. v. Ram Sagar Yadav*,¹⁰³ the Supreme Court dealt with a case where the policemen murdered one Brijlal who not only refused to pay bribe of Rs.100 in a trivial matter of cattle trespass but also complained about demand of bribe to senior police officers. The Court observed that “*Police officers alone and none else can give evidence as regards the circumstances in which a person in their custody comes to*

¹⁰² AIR 1980 SC 1087

¹⁰³ AIR 1985 SC 416

receive injuries while in their custody The result is that persons on whom atrocities are perpetrated by the police in the sanctum sanctorum of the police station are left without any evidence to prove who the offenders are.” The Court recommended that the “*law as to the burden of proof in such cases may be re-examined by the legislature so that handmaids of law and order do not use their authority and opportunities for oppressing the innocent citizens who look to them for protection.*”

5.31 The Supreme Court in the case of *Prakash Kadam v. Ramprasad Vishwanath Gupta* ¹⁰⁴ , expressed its displeasure on fake encounters. Some police officers and staff were engaged by private persons to kill their opponent. If the police personnel act as contract killers, there could be very strong apprehension in the mind of the witnesses about their own safety that the police may kill the important witnesses or their relatives or give threats to them at the time of trial of the case to save themselves. The protectors have become the predators. As the Bible says “*If the salt has lost its savour, wherewith shall it be salted?*”, or as it was said in ancient Rome, “*Who will guard the Praetorian guards?*” The Court observed that in cases where a fake encounter is proved against policemen in a trial, they must be given death sentence, treating it as the rarest of rare cases. The policemen were warned that they will not be excused for committing murder in the name of ‘encounter’ on the pretext that they were carrying out the orders of their superior officers or politicians, however high. In the Nuremburg trials the Nazi war criminals took the plea that ‘orders are orders’, nevertheless they were hanged. If a policeman is given an illegal order by any superior to do a fake ‘encounter’, it is his duty to refuse to carry out such illegal order, otherwise he will be charged for murder, and if found guilty sentenced to death.

¹⁰⁴ (2011) 6 SCC 189

5.32 In *Mehboob Batcha v. State*,¹⁰⁵ respondents policemen wrongfully confined one Nandagopal in police custody on suspicion of theft from 30.5.1992 till 2.6.1992 and beat him to death with lathis, and also gang raped his wife Padmini in a barbaric manner. The accused also confined several other persons (who were witnesses) and beat them in the police station with lathis. The graphic description of the barbaric conduct of the accused in this case shocked the conscience of the Court and it observed that Policemen must learn how to behave as public servants in a democratic country, and not as oppressors of the people.

5.33 In *The State of Andhra Pradesh v. N. Venugopal*,¹⁰⁶ the Supreme Court held that there is no provision that authorise the police officers to torture the suspects during investigation/Trial or conviction. The Court held:

'The Court has to remember in this connection that an act is not "under" a provision of law merely because the point of time at which it is done coincides with the point of time when some act in the exercise of the powers granted by the provision or in performance of the duty imposed by it. To be able to say that an act is done "under" a provision of law, one must discover the existence of a reasonable relationship between the provisions and the act. In the absence of such a relation the act cannot be said to be done "under" the particular provision of law.

The High Court fell into the error of thinking that whatever a police officer does to a person suspected of a crime at a time when the officer is engaged in investigating that crime should be held to be done in the discharge of his official duty to investigate and as such under the provisions of the law that imposed this duty on him. This view is wholly unwarranted in law.'

¹⁰⁵ (2011) 7 SCC 45

¹⁰⁶ AIR 1964 SC 33.

5.34 In *Haricharan v. State of M.P.*,¹⁰⁷ Supreme Court reiterated that “life or personal liberty in Article 21 includes right to live with human dignity. Therefore, it also includes within itself guarantee against the torture and assault by the States or its functionaries.” The State mechanism must not be used for inflicting torture on people.

5.35 In *Nandini Satpathy v. P.L Dani & Anr.*¹⁰⁸, the Court held that not only physical threats or violence but psychological torture, atmospheric pressure, environmental coercion, tiring interrogation by police are violation of law.

5.36 In *Khatri & Ors v. State of Bihar (Bhagalpur Blinding case)*¹⁰⁹, which was an example of cruel and inhuman treatment to the prisoners which are insulting the spirit of Constitution and human values as well as Article 21. Supreme Court in this case dealt with the blinding of under-trial prisoners by the police by piercing their eyeballs with needle and pouring acid in them. This case shows the pattern of torture and its implicit endorsement by the State.

5.37 While commenting upon the aforesaid case, it has been observed that: “Formidable problem in an alleged case of police torture is to establish the guilt of the perpetrators of violence.”¹¹⁰ This could be due to the situation where offenders are hand-in-glove with the local police and the absence of neutral witness.

¹⁰⁷ (2011) 4 SCC 159

¹⁰⁸ AIR 1978 SC 1025

¹⁰⁹ AIR 1981 SC 928

¹¹⁰ India’s Response against the act of Torture, *available at*:

<https://indialawyers.wordpress.com/2010/07/22/india%E2%80%99s-response-against-the-act-of-torture/> (visited on 26-10-2017).

5.38 In *Bhagwan Singh & Anr. v. State Of Punjab*¹¹¹ a case of death in police custody the Supreme Court observed that the interrogation does not mean inflicting injuries. “*Torturing a person and using third degree methods are of medieval nature and they are barbaric and contrary to law. The police would be accomplishing behind their closed doors precisely what the demands of our legal order forbid.*”

5.39 In *Dagdu & Ors. v. State of Maharashtra*¹¹², the Supreme Court observed:

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

5.40 In *Ram Lila Maidan Incident v. Home Secy, Union of India*,¹¹³ the Supreme Court held:

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

¹¹¹ AIR 1992 SC 1689

¹¹² AIR 1977 SC 1579

¹¹³ (2012) 5 SCC 1

5.41 In *CBI v. Kishore Singh*¹¹⁴, a person was arrested without any complaint by constable Kishore Singh suspecting illicit relationship with one Smt. Gaj Kanwar, his relative. He was not only physically assaulted but his penis was chopped off with a sharp edged weapon. The Supreme Court while dealing with the appeal of the CBI against the order of reduction of sentence by the High Court and against acquittal of one accused observed that in a police station, there will be no witness except the policemen and the victim, since the police station is not a public place. The Court further observed:

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

5.42 In *S. Nambi Narayanan v. Siby Mathews & Ors.*¹¹⁵, the Supreme Court entertained a case in which a scientist of high repute had been taken into police custody without any justifying cause. The Court observed that non-interference in such a case would give the police a long rope to take anyone into custody without any reason. Though the Investigating Officer has reached the age of superannuation, he was directed to be prosecuted. Similar view was reiterated for inaction by the investigating agency in *Murad Abdul Mulani v. Salma Babu Shaikh & Ors.*¹¹⁶

5.43 In *Sheela Barse v. State of Maharashtra*¹¹⁷, the Supreme Court laid down guidelines regarding arrest in general, and arrest of women in particular. The Court directed that four or five police lock-up should be

¹¹⁴ (2011) 6 SCC 369

¹¹⁵ (2015) 14 SCC 664

¹¹⁶ (2015) 14 SCC 543

¹¹⁷ AIR 1983 SC 378

reserved for female suspects and they should be kept away from the male suspects and be guarded by female constables; interrogation of females should be carried out only in the presence of female police officers/constables; the District Judge would make surprise visits to police lock ups periodically with a view to providing the arrested persons an opportunity to air their grievances and ascertaining what are the conditions in the police lock ups and whether the requisite facilities are being provided and the provisions of law are being observed and the directions given by us are being carried out and the magistrate before whom an arrested person is produced shall enquire from the arrested person whether he has any complaint of torture or mal-treatment in police custody and inform him that he has right under Section 54 of the CrPC 1973 to be medically examined.

5.44 Therefore, it could be seen from the aforesaid judicial pronouncements that torture by a public servant or its implicit endorsement by the State have always been condemned by the Courts. Torture has been a contentious issue having a direct bearing on the right to life and liberty of an individual. The Commission is of the opinion that such heinous acts must be curbed through strong legislation providing stringent punishment, which will act as a deterrent.

5.45 Further, the Commission is of the view that there has to be some effective mechanism to protect the interests of the victims of torture, the complainants and the witnesses against ill-treatment, threats or physical and mental violence.

Chapter - VI

Compensation for Custodial Torture / Death

6.1 The doctrine of sovereign immunity – a concept of common law principle consistently followed in British jurisprudence in last several centuries that ‘King commits no wrong’ and, therefore, it was not possible to hold him guilty of personal negligence / misconduct, nor he could be held responsible for the negligence or misconduct of his servants. The doctrine evolved on the principle of sovereignty that a State cannot be sued in its own court.¹¹⁸

6.2 In *P & O. Steam Navigation Co. v. Secretary of State for India-in-Council*¹¹⁹, the legal position as was explained:-

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

6.3 The Law Commission of India, in its first Report (1956) titled “Liability of the State in Tort” observed that at the time of framing the Constitution the question as to what extent, if any, the Union and the States should be made liable for the tortious acts of their servants or agents was left for future legislation. Thus, in the changed circumstances

¹¹⁸ Doctrine of Sovereign Immunity, available at: <http://www.neerajaarora.com/doctrine-of-sovereign-immunity/> (visited on 26-10-2017).

¹¹⁹ (1869) 5 Bom HCR App A-1

/ conditions, the country should also formulate suitable legislation. The old distinction between sovereign and non-sovereign functions should no longer be involved to determine the liability of the State and therefore, State should be subjected to the general law liability for injuries caused to the citizens and also in case if the State employees commit wrong in discharge of their duties.

6.4 In *State of Rajasthan v. Vidyavati*¹²⁰, the claim for damages by the dependents of the person who died in an accident caused by the negligence of the driver of the Collector of Udaipur was allowed by the Rajasthan High Court and the Supreme Court, rejecting the plea of sovereign immunity of the State, holding it liable for the tortious act of the driver like any other employer.

6.5 However, in *Kasturi Lal v. State of U.P.*¹²¹, the Supreme Court took a contrary view and the plea of sovereign immunity was upheld. In that case, a partner of the Kasturilal Raliaram Jain, a firm of jewellers of Amritsar was taken into custody by police in Meerut on the suspicion of possessing stolen property. He stood released but the gold jewellery taken from him was not returned. The head constable in charge of the *malkhana* not only misappropriated the same but fled away to Pakistan. The firm claimed the recovery of ornaments or in the alternative for compensation. The Apex Court rejected the claim on the ground that the act was committed by the employees during the course of their employment which was in the characteristic of a sovereign power.

6.6 In *Rudal Shah v. State of Bihar*¹²², the Supreme Court taking a completely opposite stand, rejected the plea of sovereign immunity and

¹²⁰ AIR 1952 SC 933

¹²¹ AIR 1965 SC 1039

¹²² AIR 1983 SC 1086

awarded the compensation, as the petitioner had been illegally detained in jail for over fourteen years, after his acquittal in full-dress trial.

6.7 In *State of Andhra Pradesh v. Challa Ramakrishna Reddy*¹²³, the Supreme Court affirmed the view taken by the Andhra Pradesh High Court that where the fundamental right of the citizen is violated, the plea of sovereign immunity would not be available. The Court ruled:

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

6.8 In *Nilabati Behera v. State of Orissa & Ors.*¹²⁴, the Supreme Court said:

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

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

11. Where public officials or other agents acting in an official or quasi- official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under

¹²³ AIR 2000 SC 2083

¹²⁴ AIR 1993 SC 1960

whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

6.10 The UN General Assembly passed a resolution titled "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005" which deals with the rights of victims of international crimes and human rights violations. The relevant part dealing with compensation reads:

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

- (a) Physical or mental harm, including pain, suffering and emotional distress;
- (b) Lost opportunities including education;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Harm to reputation or dignity;
- (e) Costs required for legal or expert assistance, medicines and medical services."

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

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

6.12 The 154th Law Commission Report (1996) on the Code of Criminal Procedure, 1973 devoted an entire chapter to 'Victimology' in which the

growing emphasis on victim's rights in criminal trials was discussed extensively as under¹²⁵:

"1. Increasingly the attention of criminologists, penologists and reformers of criminal justice system has been directed to victimology, control of victimization and protection of victims of crimes. Crimes often entail substantive harms to people and not merely symbolic harm to the social order. Consequently the needs and rights of victims of crime should receive priority attention in the total response to crime. One recognized method of protection of victims is compensation to victims of crime. The needs of victims and their family are extensive and varied....

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

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

6.14 In *D.K. Basu* case ¹²⁶ the Supreme Court held that since compensation was being directed by the courts to be paid by the State holding it vicariously liable for the illegal acts of its officials the

¹²⁵ See also: *Suresh & Anr. v. State of Haryana*, (2015) 2 SCC 227

¹²⁶ *Supra*

reservation to clause 9(5) of ICCPR by the Government of India had lost its relevance. Thus an enforceable right to compensation in case of "torture" including "mental torture" inflicted by the State or its agencies is now a part of the public law regime in India.

6.15 In *Ram Lakhan Singh v. State of U.P.*¹²⁷, the Supreme Court dealt with a case under Article 32 of the constitution for compensation for loss of professional career, reputation, great mental agony, heavy financial loss and defamation - Illegal detention by respondent authorities after implicating petitioner, an Indian Forest Service officer in false vigilance cases at instance of the then Chief Minister of respondent State dishonouring the High Court Orders.

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

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

¹²⁷ (2015) 16 SCC 715

6.17 The Supreme Court, exercising its power under Article 32 and High Courts under Article 226 of the Constitution have awarded damages to the petitioners for the injuries suffered both on account of the tortious act of servants of the State and also on the ground that the State is liable to pay compensation for the violation of Fundamental Rights of the victims. A survey of the decided cases would reveal that the Courts in their judicial activist role adopted two ways to redress the victims of abuse of power by the public servants as palliative to the victims by way of right of compensation and to penalise the State for negligence of its servants.¹²⁸

6.18 The Supreme Court in the case of custodial torture while exercising jurisdiction under Article 142 of the Constitution, in *Smt. Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble*,¹²⁹ directed the State Government to pay compensation of Rs.1,00,000/- to the mother and children of the deceased. It was observed:

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

6.19 While deciding the aforesaid case, the Court referred to a Queen’s Bench judgment in *Jennison v. Backer*,¹³⁰ wherein it was observed:

¹²⁸ Vide: *State of Rajasthan v. Vidyawati*, AIR 1962 SC 993; *Basava Kaum D. Patil v. State of Mysore*, AIR 1977 SC 1749; *Veena Sethi v. State of Bihar*, AIR 1983 SC 339; *Bhim Singh v. State of J & K*, 1983 Supp. SCC 564; *Sebastian M. Hongrav v. Union of India*, AIR 1984 SC 571; *Bhim Singh v. State of J&K*, AIR 1986 SC 494; *Saheli v. Commissioner of Police*, AIR 1990 SC 513; *Sube Singh v. State of Haryana & Ors.*, AIR 2006 SC 1117; and *Dr. Mahmood Nayyar Azami v. State of Chattisgarh & Ors.*, AIR 2012 SC 2573.

¹²⁹ AIR 2003 SC 4567.

¹³⁰ 1972 (1) All E.R. 1006.

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

6.20 In *Dr. Rini Johar v. State of Madhya Pradesh*¹³¹ the Court held that arrest in violation of due procedure seriously jeopardises the dignity of the person arrested and the law does not countenance abuse of power which causes pain and trauma. The court, after considering the facts, awarded a compensation of five lakh rupees.

6.21 In *State of Maharashtra v. Christian Community Welfare Council of India*¹³², the Supreme Court held that “*the question whether such compensation paid by the State can be recovered from the officers concerned will depend on the fact whether the alleged misdeeds by the officer concerned is committed in the course of the discharge of his lawful duties, beyond or in excess of the same which will have to be determined in a proper enquiry*”.

6.22 The Compensation has to be determined by the Court by taking into consideration various aspects like the nature of injury caused; manner in which the injury is caused; the purpose for which the injury was inflicted; the extent to which the victim has suffered due to such injury. The Court may also take into consideration the nature of torture which could be physical, mental and psychological. The Court will have to keep in mind the amount required by the victim for the follow up treatment of the injuries suffered and the amount which may be required for rehabilitation of the victim to come out from the agony of torture. While undertaking this exercise of determining the compensation, the Court will have to keep in sight the socio-economic background of the victim which will be a determining factor while reaching to an amount of just and adequate compensation.

¹³¹ AIR 2016 SC 2679

¹³² AIR 2004 SC 7

6.23 Thus it is evident that the Courts have rejected the plea of sovereign immunity, which contradicts the essence of law of torts. The law of torts provides that liability follows negligence and the individuals and the States are responsible for the negligence of their agents / employees acting in the course of their employment. Since the negligence / torture which are unlawful and opposed to Article 21 of the Constitution, and since the statutory concept of sovereign immunity cannot override the constitutional mandate, the claim for violation of fundamental rights by the statutory authorities or their agents is not acceptable. Such authorities, therefore, cannot claim sovereign immunity.

Chapter – VII

Recommendations

7.1 While deciding on as to what amounts to torture by a public servant, the Commission has suggested definition of ‘torture’ wide enough to include inflicting injury, either intentionally or involuntarily, or even an attempt to cause such an injury, which will include physical, mental or psychological injury. Based on the analysis of various aspects of torture, the Commission has prepared a draft Bill titled “The Prevention of Torture Bill, 2017”, which is annexed to this Report. On the basis of the conclusions drawn from the foregoing chapters, the Commission makes the following recommendations:

(i) Ratification of Convention against Torture

7.2 In order to tide over the difficulties faced by the Country in getting criminals extradited, in the absence of an anti-torture law; and to secure an individual’s right to life and liberty, the Commission recommends consideration of the Convention Against Torture for ratification and in the event, the Central Government decides to ratify the Convention, then the Bill placed at **Annexure** may be considered.

(ii) Amendment to Existing Statutes

7.3 The Commission has analysed the existing legal provisions in Chapter IV. The Commission has come to the conclusion that the Criminal Procedure Code, 1973 and the Indian Evidence Act, 1872 require amendments to accommodate provisions regarding compensation and burden of proof, respectively.

a. Criminal Procedure Code, 1973

7.4 The Commission recommends amendment to section 357B to incorporate payment of compensation, in addition to payment of fine, as

provided under section 326A or section 376D of the Indian Penal Code, 1860.

b. Indian Evidence Act, 1872

7.5 The Commission endorses the recommendation made by the Law Commission of India *vide* its Report No.113, and, as reiterated in Report No.152, that the Indian Evidence Act, 1872 requires insertion of section 114B. This will ensure that in case a person in police custody sustains injuries, it is presumed that those injuries have been inflicted by the police, and the burden of proof shall lie on the authority concerned to explain such injury.

(iii) Punishment for acts of torture

7.6 In order to curb the menace of torture and to have a deterrent effect on acts of torture, the Commission recommends stringent punishment to the perpetrators of such acts. The draft Bill annexed to this Report provides for punishment extending up to life imprisonment and fine.

(iv) Compensation to Victims

7.7 The Courts will decide upon a justiciable compensation after taking into account various facets of an individual case, such as nature, purpose, extent and manner of injury, including mental agony caused to the victim. The Courts will bear in mind the socio-economic background of the victim and will ensure that the compensation so decided will suffice the victim to bear the expenses on medical treatment and rehabilitation.

(v) Protection of Victims, Complainants and Witnesses

7.8 The Commission recommends that an effective mechanism must be put in place in order to protect the victims of torture, the complainants and the witnesses against possible threats, violence or ill treatment.

(vi) Sovereign Immunity

7.9 Going by the law of torts, which states ‘liability follows negligence’ the Commission is of the opinion that the State should own the responsibility for the injuries caused by its agents on citizens, and principle of sovereign immunity cannot override the rights assured by the Constitution. While dealing with the plea of sovereign immunity, the Courts will have to bear in mind that it is the citizens who are entitled for fundamental rights, and not the agents of the State.

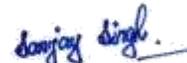
7.10 In light of the aforesaid discussions, the Central Government may take a decision on the issue of ratification of the Convention, and in case it is decided to go for ratification, then, the Prevention of Torture Bill, 2017 appended to the Report may be considered.

The Commission recommends accordingly.


[Dr. Justice B S Chauhan]
Chairman


[Justice Ravi R Tripathi]
Member


[Prof. (Dr.) S Sivakumar]
Member


[Dr. Sanjay Singh]
Member Secretary


[Suresh Chandra]
Member (Ex-Officio)


[Dr. G Narayana Raju]
Member (Ex-Officio)

THE PREVENTION OF TORTURE BILL, 2017

A
BILL

to provide for punishment for torture, other cruel, inhuman or degrading treatment inflicted by public servants or any person with the consent or acquiescence of any public servant; to protect the interest of the victims, complainants and witnesses from all kinds of ill-treatment and to compensate the victim suitably, and for matters connected therewith or incidental thereto;.

WHEREAS clause (3) of article 20, article 21 and clauses (1) and (2) of article 22 of the Constitution and other existing laws provide for protection of persons from torture, other cruel, inhuman and degrading treatment;

AND WHEREAS India has signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [adopted by General Assembly of the UN on 10th December, 1984 (Resolution No.39/46)] (known as the UN Convention against Torture) on October 14, 1997:

AND WHEREAS it is considered necessary to provide for effective implementation of the Convention;

BE it enacted by Parliament in the Sixty-eighth Year of the Republic of India as follows:

CHAPTER I
PRELIMINARY

1. (1) This Act may be called the Prevention of Torture Act, 2017. *Short title and commencement.*

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. In this Act, unless the context otherwise requires,- *Definitions.*

(a) any reference in this Act to any enactment or any provision thereof shall in any area in which such enactment or provision is not in force be construed as a reference to the corresponding law or the relevant provision of the corresponding law, if any, in force in that area;

(b) “prescribed” means prescribed by rules made under this Act; and

45 of (c) words and expressions used in this Act shall
1860. have the same meanings respectively assigned to them in the Indian Penal Code.

CHAPTER II
TORTURE AND PUNISHMENT

3. Whoever, being a public servant or being abetted by such servant or with the consent or acquiescence of the public servant,- *What amounts to torture.*

(a) intentionally inflicts on a person, or

(b) voluntarily causes to inflict on a person,-

(i) grievous hurt ; or

(ii) danger to life, limb or health ; or

(iii) severe or prolonged pain or suffering, whether physical or mental, caused to such person by cruel, inhuman and degrading treatment; or

(iv) death,

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 intimidates or coerces him or a third person,

commits the offence of torture:

Provided that nothing contained in this section shall apply to any pain or suffering arising from or caused by, inherent in or incidental to any act committed in accordance with the procedure established by law:

Provided further that where torture in custody of a public servant is proved, the burden of proving that the torture was not intentionally caused or, abetted by or was not with the consent or acquiescence of such public servant, shall shift to the public servant.

45 of 1860. Explanation I.- For the purposes of this section, “public servant” shall, without prejudice to section 21 of the Indian Penal Code, 1860 also include any person acting in his official capacity under the Central Government or the State Government.

Explanation II.- It is hereby clarified that the expression ‘torture’ shall include any intentional act resulting in concealment or covering up of the offence committed under this section.

Explanation III.- A mere mental agony or tension arising due to coercion shall not constitute the offence of torture.

4. (1) 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 or attempts to torture any person, 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, such public servant or person shall be punishable with imprisonment of either description for a term which may extend to ten years and shall also be liable to

Punishment for torture.

fine.

(2) Where death of any person is caused due to torture, the person committing the offence shall be punishable with death or imprisonment for life and shall also be liable to fine.

(3) The fine imposed under this section shall be just and reasonable to meet the medical expenses and rehabilitation of the victim.

(4) Any fine imposed under this section shall be paid to the victim.

(5) In addition to the fine imposed under subsection (3), the Central Government or the State Government, as the case may be, shall pay such adequate compensation including interim compensation for the rehabilitation of the victim, as may be determined by the court, and in case of erring public servant the compensation so paid shall be recoverable from such public servant, after holding an enquiry.

CHAPTER III

MISCELLANEOUS

5. (1) Every offence under this Act shall be tried by the Court of Sessions.

Cognizance of offences and trial.

(2) For the purpose of providing speedy trial, the Court of Sessions shall, as expeditiously as possible, on a day to day basis, make an endeavour to conclude the trial within a period of one year from the date of cognizance of the offence.

2 of 1974. **6.** (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no court shall take cognizance of an offence under this Act unless the complaint is made within a period of six months from the date on which the offence is alleged to have been committed:

Cognizance of Offences.

Provided that the court may on sufficient grounds being shown, condone the delay in filing the complaint beyond the said period of six months.

(2) Where the victim of torture is disabled for reasons of health, financial incapacity or otherwise he may cause a complaint to be filed by a duly authorised representative.

(3) Every complaint under this Act shall be registered by the police in accordance with law.

(4) A complaint against torture shall be investigated by such officer not below the rank of Deputy Superintendent of Police or the corresponding rank in any investigative agency as would ensure independent investigation under the supervision of the Superintendent of Police.

(5) The investigation shall be completed within a period of three months from the date of making of the complaint.

7. (1) No court shall take cognizance of an offence punishable under this Act, alleged to have been committed by a public servant while acting or purporting to act in the discharge of his official duty. except with the previous sanction of-

*Previous sanction
necessary for
prosecution.*

- (a) in the case of a person, who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government by an officer in the rank of Secretary to the Government of India;
- (b) in the case of a person, who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the Government, of that Government by an officer in the rank of Secretary to the State Government;
- (c) in the case of any other person, the authority competent to remove him from his office:

Provided that the decision regarding the grant of sanction to prosecute the offending public servant shall be taken not later than three months from the date of application therefore,

failing which the sanction to prosecute shall be deemed to have been granted:

Provided further that the sanction for prosecution shall not be refused by the Government or the competent authority, as the case may be, except for reasons to be recorded in writing.

(2) Any person aggrieved by the decision of the Government or the competent authority, as the case may be, under this section may prefer an appeal to the High Court within ninety days from the date of the decision in such form and manner and accompanied by such fees as may be prescribed.

(3) The High Court shall endeavour to dispose of the appeal as early as possible, preferably within a period of one year from the date of its filing.

8. For the avoidance of doubts, it is hereby declared that the fact that any act constituting an offence under this Act was committed -

- (a) at a time when there was a State of war, threat of war or where a proclamation of emergency was in operation; or
- (b) on an order of a superior officer or public authority,

Presumptions.

shall not be a defence to such offence.

9. (1) It shall be the duty and responsibility of the State Government to make arrangements for the protection of victims of torture, complainants and witnesses against all kinds of ill-treatment, violence, threats of violence, or physical harm or mental trauma or the recurrence of torture.

Protection of victims, complainants and witnesses.

(2) The protection under sub-section (1) shall be provided from the time of submission of the complaint to the conclusion of the trial and thereafter till such time as the State Government is reasonably satisfied that such protection is no longer required.

(3) The protection under sub-section (1) shall include necessary provision for providing

physical security to the victims, complainants and witnesses.

(4) The State Government shall inform the concerned Court about the protection provided to any victim, complainant or witness under this section and the court shall periodically review the need of protection being offered to the complainants, victims and witnesses under this section and pass appropriate orders in this behalf.

(5) The State shall ensure proper medical examination of every person remanded to custody in jail and the report of such medical examination shall be transmitted to the concerned trial court.

2 of 1974. **10.** (1) Notwithstanding anything contained in sub-section (3) of section 378 of the Code of Criminal Procedure, 1973, an appeal shall lie to the High Court against an order of the Court of Sessions granting or refusing bail.

Provisions relating to bail.

(2) Nothing in section 438 of the Code of Criminal Procedure, 1973 shall apply in relation to any case involving the arrest of any public servant on an accusation of having committed an offence under this Act.

11. The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

Act not in derogation of any other law.

12. (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

Power to make rules.

(2) In particular, and without prejudice to generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) steps required for prevention of cases of torture:

(b) involvement of civil society and steps for ensuring civil treatment to prisoners

consistent with their human rights:

(c) manner of training of law enforcement personnel, civil or military or medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subject to any form of arrest, detention or imprisonment:

(d) Monitoring of police custody;

(e) Impartial and prompt investigation procedures;

(f) The form and manner in which an appeal maybe preferred and the fee which shall accompany such memorandums of appeal under sub-section (2) of section 7;

(g) Assistance, where necessary, in filing complaints of torture;

(h) Procedure relating to payment of compensation to victims;

(i) any other matter in respect of which rules is required to be made under this Act.

(3) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

CHAPTER IV AMENDMENTS TO THE CODE OF CRIMINAL PROCEDURE, 1973

2 of 1974. **12.** In the Code of Criminal Procedure, 1973, for section 357B, the following section shall be substituted, namely:-

Substitution of new section for section 357B.

45 of "357B. - The compensation payable by the State Government under section 357A and sub-section (5) of section 4 of the Prevention of

Compensation to be in addition to fine under section 326A or section

1860. Torture Act, 2017, shall be in addition to the payment of fine to the victim under section 326A or section 376D of the Indian Penal Code or under sub-section (4) of section 4 of the said Act. *376D of Indian Penal Code or under section 4 of the Prevention of Torture Act, 2017.*

Explanation.- For the purposes of this section, the expression “victim” shall be construed as defined in clause (wa) of section 2.”.

CHAPTER IV
AMENDMENTS TO
THE INDIAN EVIDENCE ACT, 1872

1 of 1872. **13.** In the Indian Evidence Act, 1872, after section 114A, the following section shall be inserted, namely: *Insertion of new section 114B.*

“114-B. (1) In a prosecution of a police officer for an offence constituted by an act alleged to have caused death or bodily injury to a person, if there is evidence that the death or injury was caused during a period when that person was in the custody of the police, the court may presume that the death or injury was caused by the police officer having custody of that person during that period. *Shift of burden of proof.*

(2) The court, in deciding whether or not it should draw a presumption under sub-section (1), shall have regard 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 of 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.”