

## **Torture In Opposition To Human Rights: A Discourse**

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Despite the absolute prohibition of torture in international law, it continues to be practiced in more than 100 countries, from totalitarian regimes to democracies. Countries frequently justify the use of torture as a necessary means to extract confessions, identify terrorists, and obtain intelligence critical to preventing future violence<sup>1</sup>. The practice of torture has been widespread and predominant in India since time immemorial. Unchallenged and unopposed, it has become a 'normal' and 'legitimate' practice all over. In the name of investigating crimes, extracting confessions and punishing individuals by the law enforcement agencies, torture is inflicted not upon the accused, but also on bona fide petitioners, complainants or informants amounting to cruel, inhuman and degrading treatment, grossly derogatory to the dignity of the human person. Torture is also inflicted on the women and girls in the form of custodial rape, molestation and other forms of sexual harassment.<sup>2</sup> Torture is inhuman and against the human rights. Hence, the present paper is an attempt to highlight regulations and control mechanism against torture at the international and national level.

### **I. What Is Torture?**

Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>3</sup> Torture has not been defined in the Constitution or in other penal laws. The task of defining torture is as difficult and debatable as any other social phenomenon. In the words of Adriana P Bartow: "Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also so 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."<sup>4</sup> "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.<sup>5</sup>

### **Human Rights**

Human rights are moral principles or norms that describe certain standards of human behavior, and are regularly protected as legal rights in municipal and international law. They are commonly understood as inalienable fundamental rights "to which a person is inherently entitled simply because she or he is a human being," and which are "inherent in all human beings" regardless of their nation, location, language, religion, ethnic origin or any other status. They are applicable everywhere and at every time in the sense of being universal, and they are egalitarian in the sense of being the same for everyone. They require empathy and the rule of law and impose an obligation on persons to respect the human rights of others. They should not be taken away except as a result of due process based on specific circumstances; for example, human rights may include freedom from unlawful imprisonment, torture, and execution.<sup>6</sup> Hence, Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible. Universal human rights are often expressed and

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<sup>1</sup> Available at <http://physiciansforhumanrights.org/issues/torture/>

<sup>2</sup> DivyaVikram. (2010) *India's Response Against the act of Torture*, Retrieved from <https://indialawyers.wordpress.com/https://indialawyers.wordpress.com/2010/07/22/india%E2%80%99s-response-against-the-act-of-torture/>

<sup>3</sup> Avinash Rajput. *Human Rights Violation in Custodial Torture*, Retrieved from [http://www.academia.edu/http://www.academia.edu/2207092/Human\\_Rights\\_violation\\_in\\_Custodial\\_Torture](http://www.academia.edu/http://www.academia.edu/2207092/Human_Rights_violation_in_Custodial_Torture)

<sup>4</sup> Quoted in *D. K. Basuv. State of West Bengal*, AIR 1997 SC 610

<sup>5</sup>*Ibid.*

<sup>6</sup> Human Rights. [www.wikipedia.org](http://www.wikipedia.org). retrieved on 20<sup>th</sup> June 2015 from [https://en.wikipedia.org/wiki/Human\\_rights](https://en.wikipedia.org/wiki/Human_rights)

guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.<sup>7</sup>

The contemporary legal definition of torture, contained in the United Nations Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment and Punishment, is: any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>8</sup>

## **II. Human Rights And Torture**

Human rights and the practice of torture are contradictory to each other. Human rights support human dignity, self-respect, liberty from atrocity. Torture and Human rights cannot go hand in hand. Justifications for the use of torture, or more euphemistically, "coercive interrogation," depend on accepting the principle that there is an appropriate balance between liberty and security that may include depriving individuals of their human dignity by subjecting them to torture or cruel, inhumane, or degrading treatment. Posner and Vermeule<sup>9</sup> claim that "the tradeoff thesis holds that governments should, and do, balance civil liberties and security at all times" and that "during emergencies, when new threats appear, the balance shifts" to favor security over liberty. The governments at international and national level have evolved various strategies and control mechanism against the use of torture.

### **Control Mechanism Against Use Of Torture**

The effort to eradicate torture works at many levels of international, regional, and national decision-making and often involves both public and civil society initiatives, working in complementary roles.<sup>10</sup> In addition to the prohibition of torture in contemporary international law and practice, the capacity to provide a sanctioning response to torture has also been extended to the institutions of private law. Thus, in certain regional jurisdictions, torture is viewed as not only a criminal wrong, but also as a civil wrong with a tortious character. This latter area represents an important change in the capacity to control and punish torture through the institutions of civil society. This has led to multiple initiatives driven by international and regional institutions dealing with human rights law.

### **Control mechanism at the International Level**

The most important U.N. treaty for controlling, regulating, and prohibiting torture and related practices is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The drafting of the Convention Against Torture was commenced by the U.N. Commission on Human Rights in 1978, and the document was adopted by the General Assembly in 1984.<sup>11</sup> In its final form, the Convention Against Torture was based substantially on the Declaration Against Torture. In Article 2 it stipulates explicitly that countries under the Convention are under obligation to take effective measures in the form of legislative, administrative, judicial and other to prevent acts of torture. This particular provision formally established the specific legal obligation of the state "to prevent, investigate, prosecute and punish those responsible for torture, and to provide redress to victims"; and the proposed understanding of the definition of torture in Article 1.

The United Nation have tried to eradicate torture both by educative and persuasive methods and three of the most important mechanisms of United Nation dedicated to the eradication of torture are as following:

- i) the Committee Against Torture, established pursuant to Article 17 of the Convention Against Torture,
- ii) the U.N. Special Rapporteur on Torture, created pursuant to the U.N. Commission on Human Rights' Resolution 1985/33 and
- iii) the U.N. Voluntary Fund for Victims of Torture set up pursuant to U.N. General Assembly Resolution 36/151 of December 16, 1981.

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<sup>7</sup> Available at <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>

<sup>8</sup> Available at <http://www.scribd.com/doc/22049924/The-Fall-and-Rise-of-Torture>

<sup>9</sup> Eric A. Posner and Adrian Vermeule, Book Review Torture with Apologies Terror in the Balance: Security, Liberty, and the Courts, *Texas Law Review February*, 3 (2008)

<sup>10</sup> Amnesty International and Its Work for Human Rights, available at <http://www.web.amnesty.org/web/aboutai.nsf>

<sup>11</sup> General Assembly, Resolution 32/62, U.N. GAOR, 32nd Session., Supp. No. 45, U.N. Doc. A/32/355 (1977).

The First U.N. Congress on the Prevention of Crime and the Treatment of Offenders in 1955 adopted the Standard Minimal Rules for the Treatment of Prisoners<sup>12</sup>, which is considered as a great leap in the direction of curbing and eradicating torture from the systems of administration of justice.

Amnesty International has developed 12 Point programme for the prevention of torture. According to Amnesty International legislative prohibition is not enough. Immediate steps are needed to confront torture and other cruel, inhuman or degrading treatment or punishment wherever they occur and to eradicate them totally. Amnesty International calls on all governments to implement the 12 Point Program for the Prevention of Torture. It invites concerned individuals and organizations to join in promoting the program. Amnesty International 'believes that the implementation of these measures is a positive indication of a government's commitment to abolish torture and to work for its abolition worldwide. The 12 Points Programme includes: Official Condemnation of Torture, Limits on Incommunicado Detention, No Secret Detention, Safeguards during Interrogation and Custody, Independent Investigation of Reports of Torture, No Use of Statements Extracted Under Torture, Prohibition of Torture in Law, Prosecution of Alleged Torturers, Training Procedures, Compensation and Rehabilitation, International Response, Ratification of International Instruments.

### **Control mechanism at the National Level in India**

Neither the Indian Constitution nor statutory law contains an express prohibition of torture. The Indian Supreme Court has, however, construed Article 21 of the Constitution as including a prohibition of torture.<sup>13</sup> In *Mullin v Union Territory of Delhi*, the Supreme Court declared: "Now obviously, 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."<sup>14</sup>

The Penal Code stipulates criminal offences that could be used to punish torturers but contains no explicit criminal offence of torture. While the Indian Evidence Act and the Criminal Procedure Code contain safeguards against the extraction of confessions by means of torture, they do not explicitly prohibit the use of torture as means of obtaining evidence.<sup>15</sup> The acts governing the exercise of police powers include rules against excessive use of force but no express prohibitions of the use of torture.

Consequently, there is no definition of torture in Indian legislation. Even though the Supreme Court has not defined torture in its decisions, it has held that certain acts constitute torture.<sup>16</sup> Now obviously, 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.

There are no explicit provisions in the Indian Constitution regulating the incorporation and status of international law in the Indian legal system. However, Article 51 (c) stipulates, as one of the directive principles of state policy, that: "The State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised people with another."

International treaties do not automatically become part of national law. They have to be transformed into domestic law by a legislative act. The Union has the exclusive power to implement international treaties.<sup>17</sup> To this end, it has passed the Geneva Conventions Act but has not yet adopted any law incorporating the

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<sup>12</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31st July 1957 and 2076 (LXII) of 13 May 1977

<sup>13</sup> *Sunil Batrav. Delhi Administration*, AIR 1978 SC 1675.

<sup>14</sup> AIR 1981 SC 746.

<sup>15</sup> See sections 24 of the Indian Evidence Act and Section 164 of the Criminal Procedure Code

<sup>16</sup> See A. S. Anand JJ. in *D. K. Basu v. State of West Bengal*, *supra*, para.10: "'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 human civilisation. 'Torture' is a wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is no way to heal it. Torture is anguish squeezing in you, chest, cold as ice and heavy, as a stone paralyzing as steep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself." - Adriana P. Bartov."

<sup>17</sup> Article 253 provides that: "Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body." Entry 14 of the Union List of the Seventh Schedule empowers Parliament to legislate in relation to "entering into treaties and agreement and implementing of treaties and agreement with foreign countries and implementing of treaties, agreements and conventions with foreign countries."

provisions of the International Covenant for Civil and Political Rights.<sup>18</sup> The status of customary international law in domestic law follows the common law of England. Accordingly, a rule of customary international law is binding in India provided that it is not inconsistent with Indian law.<sup>19</sup>

While national legislation has to be respected, even if it contravenes rules binding on India under international law, Indian Courts, in particular the Supreme Court, have consistently construed statutes so as to ensure their compatibility with international law.<sup>20</sup>

The judicial opinion in India as expressed in numerous recent judgments of the Supreme Court of India demonstrates that the rules of international law and municipal law should be construed harmoniously, and only when there is an inevitable conflict between these two laws should municipal law prevail over international law.<sup>21</sup> The Supreme Court has even gone a step further by repeatedly holding, when interpreting the fundamental rights provisions of the Constitution, that those provisions of the International Covenant on Civil and Political Rights, which elucidate and effectuate the fundamental rights guaranteed by the Constitution can be relied upon by courts as facets of those fundamental rights and are, therefore, enforceable.<sup>22</sup>

The Supreme Court and High Courts have adopted a pro-active stance in directing the Government and/or law-enforcement bodies to take various steps to tackle torture and have repeatedly criticised the latter for failing to do so. Civil liberties and human rights groups in India have played a major role, through public interest litigation and other means, to seize the Supreme Court and to highlight and combat the prevalence of torture.<sup>23</sup> The National Human Rights Commission (NHRC), which was established by the Protection of Human Rights Act, 1993 is the main body entrusted with promoting and protecting human rights.<sup>24</sup> The Act also provides for the establishment of State Human Rights Commissions (“SHRC”) and Human Rights Courts (“HRC”) at the district level in each state. The Human Rights Act vests the NHRC with a broad mandate but it only has the power to issue recommendations and does not have any effective enforcement mechanism at its disposal. The scope of the NHRC’s work and the zeal of victims of human rights violations to seek the Commission’s attention are manifested by the fact that starting with 496 complaints in the first six months after it was established; the NHRC registered 50,634 complaints during 1999-2000.

The NHRC has taken a pro-active role in advocating against torture and urging the Government of India to ratify the Convention against Torture. In this regard, it noted in its Annual Report 1998-1999 that it is distressing to know that, even though the Permanent Representative of India to the United Nations signed the Convention on 14 October 1997, the formalities for ratification are yet to be completed. The Commission urged the earliest ratification of this key Convention and the fulfilment of the promise made at the time of signature, namely that India would “uphold the greatest values of Indian civilization and our policy to work with other

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<sup>18</sup>The Geneva Conventions Act, 1960.

<sup>19</sup>*Gramophone Co. of India Ltd v. BirendraBahadurPandey*, AIR 1984 SC 667, at 671: “The comity of Nations require that Rules of International Law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or no, Municipal Law must prevail in case of conflict.”

<sup>20</sup>*S.C. Vosjala & Others v. State of Rajasthan & Others*, 1997 (6) SCC 241: “(it is) now an accepted rule of judicial construction that regard must be had to international conventions and norms of construing domestic law when there is no inconsistency between them and there is a void in domestic law;” *Apparel Export Promotion vs. A.K. Chopra* 1999 (1) SCC 759: “In cases involving violation of human rights, the courts must ever remain alive to the international instruments and conventions and apply the same to a given case where there is no inconsistency between the international norms and the domestic law occupying the field.”

<sup>21</sup>See also Verma, CJ., in *Vishakav. State of Rajasthan*, (1997) 6 SCC 241, at 251 for cases, here gender equality and guarantees against sexual harassment, in which there is no domestic law: “(a) any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Art.51 (c) and the enabling power of Parliament to enact laws for implementing the international conventions and norms by virtue of Art.253 with Entry 14 of List 1 of the Schedule.”

<sup>22</sup>*People’s Union of Civil Liberties v. Union of India & others*, supra, affirming jurisprudence of Supreme Court in earlier cases concerning Article 9 (5) ICCPR that provides for a right to compensation for victims of unlawful arrest or detention. Remarkably, the Supreme Court has found Article 9 (5) ICCPR to be enforceable in India even though India has not adopted any legislation to this effect but had even entered a specific reservation to Article 9 (5) ICCPR when ratifying the Convention in 1979, stating that the Indian legal system did not recognise a right to compensation for victims of unlawful arrest or detention. See also the case of *Prem Shaker Shuklav. Delhi Administration*, AIR 1980SC 1535

<sup>23</sup>In the early years of Public Interest Litigation, the court focused on the rights of prisoners and prison conditions. See *HussainaraKhatonv. State of Bihar*, (1 to 6) (1980) 1 SCC 81, *KadraPahadiyav. State of Bihar*, (1981) 3 SCC 671, *Sunil Batrav. Delhi Admn.*, (1980) 3 SCC 488, *VeenaSethiv. State of Bihar*, (1982) 2 SCC 583, *Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India*, (1984) 6 SCC 731, *Citizens for Democracy v. State of Assam*, (1995) 3 SCC 743.

<sup>24</sup>Protection of Human Rights Act, 1993 (India); National Human Rights Commission, The Protection of Human Rights Act, 1993 (1994)

members of the international community to promote and protect human rights.”<sup>25</sup> It is important to note, however, that these measures by the NHRC have not been successful.<sup>26</sup>

Another body, the National Police Commission (NPC), was appointed by the Government of India in 1977 with wide terms of reference covering police organisation, its role, functions, accountability, relations with the public, political interference in its work, misuse of powers, evaluation of its performance etc.<sup>27</sup> The NPC made several recommendations aimed at reducing the use of torture, which were subsequently not implemented by the Government.<sup>28</sup> In 1996 a writ petition was filed in the Supreme Court by two retired police officers requesting that the Government of India be ordered to implement the recommendations of the NPC. Following the Supreme Court's orders in this case, a Committee on Police Reforms was set up by the Government under the leadership of J.F. Ribeiro (a retired police officer). The report of the Ribeiro Committee was finalised in October 1998 but no subsequent action has yet been taken.

Several proposals for reform, such as inserting a section 113 B) into the Evidence Act,<sup>29</sup> the passing of a State Liability in Tort Act, compensation for custodial crimes and for victims of rape and sexual assault have all failed to win sufficient political support to be enacted. Equally, the recommendation to incorporate a specific right against torture and to compensation, proposed by the National Commission to Review the Working of the Constitution in February 2002 still awaits implementation.<sup>30</sup> Moreover, while several positive measures such as human rights training programmes for the police have been implemented, various officials from State Governments have made statements which could be seen as giving law enforcing personnel a license for human rights violations.

### **Pronouncements On Torture And Custodial Violence In India**

The courts in India have come down heavily upon the police for inordinate delay and incompetence in investigation of crimes, harassment of innocent people ostensibly in discharge of police functions, torture in custody for extorting confession, falsifying evidence for securing convictions and for corruption and lawlessness.<sup>31</sup> By taking tough stand on abuse of power by police officers the courts underlined the need for police to put an end to the dubious tradition inherited from British Raj.<sup>32</sup>

In *Niranjan Singh v. Prabhakar Rajaram Kharote*<sup>33</sup> Justice Krishna Iyer observed that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” is a part of the Universal Declaration of Human Rights. The content of Article 21 of our Constitution read in the light of Article 19 is similarly elevating. But romance about human rights and rhetoric about constitutional mandates lose credibility if, in practice, the protectors of law and minions of the State become engines of terror and panic to put people into fear. We are constrained to make these observations as our conscience is in consternation when we read the facts of the case which have given rise to the order challenged before us in this petition for special leave. Grant of bail is within the jurisdiction of the Sessions Judge but the court must not, in grave cases, gullibly dismiss the possibility of police-accused intimidating the witnesses with cavalier ease. In our country, intimidation by policemen, when they are themselves accused of offences, is not an unknown phenomenon and the judicial process will carry credibility with the community only if it views impartially and with commonsense the pros and cons, undeterred by the psychic pressure of police presence as indicted.

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<sup>25</sup>See NHRC, Annual Report, 1998-1999, III.C, 3.22.

<sup>26</sup>See NHRC, Annual Report 1999-2000, pp. 45 and 65, 66.

<sup>27</sup>This was the first Commission appointed at the national level after Indian independence.

<sup>28</sup>These recommendations included: A). Surprise visits by senior officers to police stations to detect persons held in illegal custody and subjected to ill treatment; B) the magistrate should be required by rules to question the arrested person if he has any complaint of ill treatment by the police and in case of complaint should get him medically examined; C) there should be a mandatory judicial inquiry in cases of death or grievous hurt caused while in police custody; D). Police performance should not be evaluated on the basis of crime statistics or number of cases solved; and E) training institutions should develop scientific interrogation techniques and impart effective instructions to trainees in this regard. For a comprehensive reading and understanding of most recommendations of the NPC see Commonwealth Human Rights Initiative, *Some Important Recommendations of (i) National Police Commission, (ii) Ribeiro Committee on Police Reforms and (iii) Padmanabhaia Committee on Police Reforms*, 2001.

<sup>29</sup>According to this proposal, a court may, in cases concerning the prosecution of a police officer for an alleged offence of having caused bodily injury to a person, presume that the injury was caused by the police officer if there is evidence that the injury was caused during the period when the person was in the custody of the police.

<sup>30</sup>It recommended the insertion of a new subsection 2 and 3 to section 21, reading respectively: “No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment” and “every person who has been illegally deprived of his right to life or liberty shall have an enforceable right to compensation.” See Report of the National Commission to review the working of the Constitution, Vol. I, Universal Publishers, Delhi, 2002.

<sup>31</sup>Menon N. R. M. “Role of the Police in the Management of Rule of Law and in the Protection of Human Rights: Some Insights from Indian Experience in Democratic Governance” *Administrator*, 61(June 1994)

<sup>32</sup>Thomas, K. V. “Police and Human Rights”, *The Indian Police Journal*, 55 (Januray-June 1993)

<sup>33</sup>AIR 1980 SC 785

Similarly the Supreme Court has held in *Gauri Shankar Sharma v. State of U.P.*<sup>34</sup> on the issue of proof of death in police custody held that the High Court should also have realised that 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. It is only in a few cases, such as the present one, that some direct evidence is available. On the request of mitigation of the sentence<sup>35</sup> because of passage of time and changed circumstances (the request that the convict may not be sent to jail and the sentence of fine should suffice) the court took a serious view and held that 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. We, therefore, do not think we would be justified in reducing the punishment imposed by the trial Court.

In *Raghubir Singh v. State of Haryana*<sup>36</sup> in a case of custodial death where the death was being explained by police as suicidal hanging, Justice KrishnaIyer observed that “we are deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of the law gore human rights to death. The vulnerability of human rights assumes a traumatic, torturous poignancy (when) the violent violation is perpetrated by the police arm of the State whose function is to protect the citizen and not to commit gruesome offences against them as has happened in this case. Police lock-up if reports in newspapers have a streak of credence, are becoming more and more awesome cells. This development is disastrous to our human rights awareness and humanist constitutional order. Expecting State to organise special strategies<sup>37</sup> he further observed that the State, at the highest administrative and political levels, we hope, will organise special strategies to prevent and punish brutality by police methodology. Otherwise, the credibility of the rule of law in our Republic vis-à-vis the people of the country will deteriorate. He concluded the judgement with the disconcerting note sounded by Abraham Lincoln:<sup>38</sup>

“If you once forfeit the confidence of our fellow citizens you can never regain their respect and esteem. It is true that you can fool all the people some of the time, and some of the people all the time, but you cannot fool all the people all the time. "These observations have become necessary to impress upon the State police echelons the urgency of stamping out the vice of 'third degree' from the investigative armoury of the police.

In *Khatri and Others(I) v. State of Bihar*<sup>39</sup> (*Bhagalpur Blinding Case*) Justice P. N. Bhagwati observed that “these seventeen petitioners in the two Writ Petition who are under trial prisoners in the central Jail, Bhagalpur complain that they have been deprived of their eyesight by the police while they were in police custody after their arrest in connection with certain criminal cases. These cases represent two more instances of the cruel and barbaric manner in which the administrators of law deal with persons arrested by them. The police are supposed to enforce the law and not to break it, but here it seems that they have behaved in a most lawless manner and defied not only the constitutional safeguards but also perpetrated what may aptly be described as a crime against the very essence of humanity. It is a barbaric act for which there is no parallel in civilized society and deserves the strongest condemnation from all sections of the community. It is difficult to believe how any person, much less an enforcer of law, can be so ruthless and inhuman as to deprive fellow human beings of their eyesight. It shows to what depths of depravity the administrators of law can sink in the State of Bihar.”

In *SheelaBarsev. State of Maharashtra*,<sup>40</sup> the Supreme Court of India laid down detailed guidelines for ensuring protection against torture and ill-treatment of women. Considering as writ, a letter addressed by SheelaBarse, a journalist, complaining of custodial violence to women prisoners whilst confined in the police lock up in the city of Bombay, the Hon'ble Court addressed the issue of protection against torture and ill-treatment at length. The petitioner stated in her letter that she interviewed fifteen women prisoners in the Bombay Central Jail with the permission of the Inspector General of Prisons between 11 and 17th May, 1982 and five out of them told her that they had been assaulted by the police in the police lock up. Of these five who complained of having been assaulted by the police, the petitioner particularly mentioned the cases of two, namely, Devamma and PushpaPaeen who were allegedly assaulted and tortured whilst they were in the police lock up. Taking up the question as to how protection can be accorded to women prisoners in the lock ups the

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<sup>34</sup> AIR 1980 SC 709 para 14

<sup>35</sup> *Id.*, para 16

<sup>36</sup> AIR 1980 SC 1087 para 2, (1980) 3 SCC 70

<sup>37</sup> *Id.*, para 3

<sup>38</sup> *Id.*, para 4

<sup>39</sup> (1981) 1 SCC 623

<sup>40</sup> AIR 1983 SC 378

court proposed to give the following directions as a result of meaningful and constructive debate in Court in regard to various aspects of the question argued before the court.

- i) We would direct that four or five police lock ups should be selected in reasonably good localities where only female suspects should be kept and they should be guarded by female constables. Female suspects should not be kept in a police lock up in which male suspects are detained.
- ii) We would further direct that interrogation of females should be carried out only in the presence of female police officers/constables.
- iii) Whenever a person is arrested by the police without warrant, he must be immediately informed of the grounds of his arrest and in case of every arrest it must immediately be made known to the arrested person that he is entitled to apply for bail. The Maharashtra State Board of Legal Aid and Advice will forthwith get a pamphlet prepared setting out the legal rights of an arrested person and the State of Maharashtra will bring out sufficient number of printed copies of the pamphlet in Marathi which is the language of the people in the State of Maharashtra as also in Hindi and English and printed copies of the pamphlet in all the three languages shall be affixed in each cell in every police lock up and shall be read out to the arrested person in any of the three languages which he understands as soon as he is brought to the police station.
- iv) We would also direct that whenever a person is arrested by the police and taken to the police lock up, the police will immediately give intimation of the under Section 54 of the Code of Criminal Procedure, 1973 to be medically examined. We are aware that Section 54 of the Code of Criminal Procedure, 1973 undoubtedly provides for examination of an arrested person by a medical practitioner at the request of the arrested person and it is a right conferred on the arrested person. But, very often, the arrested person is not aware of this right and on account of his ignorance, he is unable to exercise this right even though he may have been tortured or maltreated by the police in police lock up. It is for this reason that we are giving a specific direction requiring the Magistrate to inform the arrested person about this right of medical examination in case he has any complaint of torture or maltreatment in police custody.
- v) We have no doubt that if these directions which are being given by us are carried out both in letter and in spirit, they will afford considerable protection to prisoners in police lock ups and save them from possible torture or ill-treatment.

In *Bhagwan Singh v. State of Punjab*<sup>41</sup> the Supreme Court observed and held that "It may be a legitimate right of any police officer to interrogate or arrest any suspect on some credible material] but it is needless to say that such an arrest must be in accordance with the law and the interrogation does not mean inflicting injuries. It should be in its true sense and purposeful namely to make the investigation effective. Torturing a person and using third degree methods are of medieval nature and they are barbaric and contrary to law. The police would be accomplishing behind their closed doors precisely what the demands of our legal order forbid. In *Dagduv. State of Maharashtra*,<sup>42</sup> the Supreme Court observed as under (Para 87 of AIR): "The police, with their wide powers are apt to overstep their zeal to detect crimes and are tempted to use the strong arm against those who happen to fall under their secluded jurisdiction. That tendency and that temptation must in the larger interest of justice be nipped in the bud."

It is a pity that some of the police officers, as it has happened in this case, have not shed such methods even in the modern age. They must adopt some scientific methods than resorting to physical torture. If the custodians of law themselves -Indulge in committing crimes then no member of the society is safe and secure. If police officers who have to provide security and protection to the citizens indulge in such methods they are creating a sense of insecurity in the minds of the citizens. It is more heinous than a game keeper becoming a poacher.

In *Nilabati Behera alias Lalita Beherav. State of Orissa and others*<sup>43</sup> the Hon'ble Justice Dr. A. S Anand concurring with the judgement delivered by Justice J.S. Verma held that "It is axiomatic that convicts, prisoners or under-trials are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of the State, to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under-trials or other prisoners in custody, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is "not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of no exceptions. The wrongdoer is accountable and the State is responsible if the person in custody of the police is deprived of his life except

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<sup>41</sup> AIR 1992 SC 1689; (1992) 3 SCC 249

<sup>42</sup> (1977) 3 SCC 68; AIR 1977 SC 1579

<sup>43</sup> AIR 1993 SC 1960, para 30

according to the procedure established by law. I agree with Brother Verma, J. that the defence of "sovereign immunity" in such cases is not available to the State and in fairness to Mr. Altaf Ahmed it may be recorded that he raised no such defence either".

Referring to the issue of relief under public law by exercise of writ jurisdiction<sup>44</sup> the Hon'ble court further observed that "Adverting to the grant of relief to the heirs of a victim of custodial death for the infraction or invasion of his rights guaranteed under Article 21 of the Constitution of India, it is not always enough to relegate him to the ordinary remedy of a civil suit to claim damages for the tortious act of the State as that remedy in private law indeed is available to the aggrieved party. The citizen complaining of the infringement of the indefeasible right under Article 21 of the Constitution cannot be told that for the established violation of the fundamental right to life, he cannot get any relief under the public law by the courts exercising writ jurisdiction. The primary source of the public law proceedings stems from the prerogative writs and the courts have, therefore, to evolve 'new tools' to give relief in public law by moulding it according to the situation with a view to preserve and protect the Rule of Law. While concluding his first Hamlyn Lecture in 1949 under the title "Freedom under the Law" Lord Denning in his own style warned:

"No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do; and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient; our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up to date machinery, by declarations, injunctions and actions for negligence. This is not the task for Parliament the courts must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfare State; but abused they lead to a totalitarian State. None such must ever be allowed in this country."

Distinguishing the public law proceedings from the private law and violations of fundamental rights vis-a vis tortious acts<sup>45</sup> the Hon'ble Court held that "The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law.

### **III. Conclusion**

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" is a part of the Universal Declaration of Human Rights. The content of Article 21 of Indian Constitution read in the light of Article 19 is similarly elevating. But romance about human rights and rhetoric about constitutional mandates lose credibility if, in practice, the protectors of law and minions of the State become engines of terror and panic to put people into fear. It is an obligation of the State, to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under-trials or other prisoners in custody, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of

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<sup>44</sup>*Id.*, para 31

<sup>45</sup>*Id.*, para 33



no exceptions. The wrongdoer is accountable and the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law.

It may be a legitimate right of any police officer to interrogate or arrest any suspect on some credible material but it is needless to say that such an arrest must be in accordance with the law and the interrogation does not mean inflicting injuries. The purpose of interrogation in its true sense is to make the investigation effective. Torturing a person and using third degree methods are of medieval nature and they are barbaric and contrary to law. The police should not try to accomplish behind their closed doors precisely what the demands of our legal order forbid. Torture is an anti-thesis of the human rights of the arrested persons and no civilised nation can afford to allow existence of torture in any form, whatsoever.