CHAPTER- IV

TORTURE: AN ANTITHESIS OF HUMAN RIGHTS AND AN OFFENCE TO HUMAN DIGNITY

4.1 Introduction

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.”¹ “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.²

4.2 Definition of Torture

Torture is a general term for modes of inflicting pain associated first with punishment peculiarly severe excruciating and cruel kind, more specifically with the use of such modes by judicial or quasi judicial authorities for the purpose of forcing an accused or suspected person to confess a crime or of extracting evidence.³ Legal Glossary defines ‘torture’ as “the infliction of excruciating

¹ Quoted in D. K. Basu v. State of West Bengal, AIR 1997 SC 610
² Ibid.
³ Encyclopedia Britannica, 100 (1973)
pain." In D.K. Basu case it was held that 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. Chamber's dictionary defines 'torture' as 'putting to the rack or severe pain to extort a confession or as a punishment, extreme pain, anguish. Article 1 of the "Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984)" defines torture as '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 third person information or a confession, punishing him for an act he or a third 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. In ancient period, torture was an effective instrument in the hands of State to enforce its dictate on the subject. Greek and Romans societies witnessed widespread use of torture to force the slaves as menial labourers and prevent them escaping territorial boundaries of the State.

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4 Legal Glossary, 869 (Ministry of Law and Justice, Government of India, 1998)
7 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984).
'Third-degree' is the most popular term relating to police torture. Major Richard Sylvester of Washington, who was the President of the Association of Chiefs of Police in 1910, explained that the “first degree” was the arrest, the “second degree”, transportation to some place of confinement and “third degree” the interrogation of the arrested man as to his guilt. All these steps, he argued were essential parts of arresting process. According to Chamber’s Dictionary, “third degree” is an American police method of extracting a confession by bullying or torture or any ruthless, prolonged and intensive interrogation usually denoting physical and mental intimidation. According to Encyclopaedia Britannica, “third degree” a slang term now in common usage in United States and frequently employed in Great Britain, designates the use of force or duress by police and prosecuting authorities to extort confessions from persons in their custody. It says further that methods of third degree are many, including beatings, threats of violence, prolonged questioning and like.

4.3 Regulations and Control Mechanism against use of Torture

4.3.1 International Level

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

10 Supra note 6 at 1465.
11 Encyclopaedia Britannica, 1049 (1973)
treatment. Posner and Vermeule\textsuperscript{12} 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 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.\textsuperscript{13} 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. The most notable initiative is the emergence of a private law dimension that greatly empowers private enforcement against public actors who are implicated in the practice of torture. This development embodies the extension of sanctions against torture from the public to the private sphere.

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. 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 "exercise legislative and judicial jurisdiction over the matters covered therein"; and the proposed understanding of the definition of torture in Article 1.

The wide jurisdictional reach of Article two, strengthening the capacity of state action to prohibit torture has become a cause of concern for various countries including the United States. Furthermore, Article 7(1) of the Convention Against Torture imposes upon every state that is a party to this Convention a solemn duty to extradite anyone found in its jurisdiction whom is alleged to have committed torture or to "submit the case to its competent authorities for the purpose of prosecution." The practical weakness of this approach is that states may be reluctant to prosecute nationals of another state, especially government officials, because of the fear of reciprocal actions against their own citizens, hence the U.S. reservations.

As important as the United Nations' appeals to state responsibility may be, practice has shown that a great deal more needs to be

done to constrain the behavior of state officials bent on committing acts of torture. For example, one of the most interesting methods of seeking to police and prevent torture is the "urgent action" technique developed by Amnesty International. Urgent action is launched on behalf of prisoners and others who are in immediate danger of serious human rights violations, such as torture or extrajudicial execution. The Urgent Action Network is made up of more than 80,000 volunteers in more than eighty-five countries. First, the Amnesty International Secretariat in London issues the urgent action to the national sections, who then distribute it to the members of the Urgent Action network in the relevant country or territory. The members are asked to send appeals by the fastest means possible to the people, organizations, and institutions indicated. The number of appeals varies in each case. A case can generate anywhere between three and 5000 appeals.

Urgent action is a tool of enforcement that is not limited by the constraints of diplomatic protocol, nor does it require political action from bureaucrats within the United Nations, who may be torn between their obligations to seek states' financial and political support and their desires to expose the states' wrongdoings. The urgent action method of intervention identifies the victim, the range of potential victimizers in the chain of command, the venue where torture occurs, and the nature of the torture practice under scrutiny. The urgent action technique is especially effective due to its methods of electronic distribution and global, cross-cultural mobilization of opinion. The technique also identifies officials in the chain of responsibility, bringing transparency to otherwise anonymous processes.

15 http://www.web.amnesty.org/web/aboutai.nsf
Further Articles highlight the importance of state compliance in
the effective application of the Convention Against Torture. Article
2 limits the processes that provide for the easy justification of
torture through variously formulated national security imperatives.
Article 2 specifically holds that torture cannot be validated by the
claim to exceptional circumstances as in, for example, "war or a
threat of war, internal political instability or any other public
emergency." Article 2 follows the principle of the Nuremberg
Charter that an order from a superior officer or public authority
cannot serve as a legal defense.16

Article 4 of the Convention Against Torture makes clear that the
crime of torture is of a "grave nature." States must therefore regard
it as within the category of crimes for which the defendant may be
extradited under Article 8. Articles 5 through 7 of the Convention
Against Torture incorporate the well-established principle of state-
conditioned universal jurisdiction: the state is obliged to either
institute criminal proceedings against the torturer or to extradite
the person to another state to stand trial there. The principles of
jurisdiction based on nationality or territoriality do not constrain
these precepts.

4.3.2 The United Nations Efforts for Eradication of Torture

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:

16 Agreement for the Prosecution and Punishment of the Major War Criminals
of the European Axis Powers and Charter of the International Military
Charter].
(1) the Committee Against Torture, established pursuant to Article 17 of the Convention Against Torture,

(2) the U.N. Special Rapporteur on Torture, created pursuant to the U.N. Commission on Human Rights' Resolution 1985/33 and

(3) the U.N. Voluntary Fund for Victims of Torture, set up pursuant to U.N. General Assembly Resolution 36/151 of December 16, 1981.

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, which is considered as a great leap in the direction of curbing and eradicating torture from the systems of administration of justice.

4.3.2.1 Committee against Torture

The Committee Against Torture (CAT) is the body of 10 independent experts that monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties.

All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Convention and then every four years. The Committee examines each report and

addresses its concerns and recommendations to the State party in the form of "concluding observations".

In addition to the reporting procedure, the Convention establishes three other mechanisms through which the Committee performs its monitoring functions: the Committee may also, under certain circumstances, consider individual complaints or communications from individuals claiming that their rights under the Convention have been violated, undertake inquiries, and consider inter-state complaints.

Committee Against Torture mainly functions to monitor the implementation of the Convention and this body is elected through a secret ballot. Through the procedures in Articles 19, 20, and 21 of the Convention Against Torture, this Committee carries out its task. According to Article 19, the parties to the Convention submit to the Committee, by way of the U.N. Secretary-General, reports on the measures they have taken under the Convention. These reports are then subject to the Committee's revision and comments, and information from them can be included in the Committee's annual report.¹⁸ If a state's report or some other source discloses information which is well-founded and contains allegations that a state party systematically practices torture, the Committee has the power under Article 20 to invite that state party to examine the

¹⁸ Invitation is given to the representatives of the states concerned "to attend the meeting when their reports are considered." They are allowed and expected to answer additional questions which may be put to them by the Committee and to give clarification, about certain aspects of the reports already submitted. After such clarification, the Committee may make general comments on the report and also indicate whether it appears to it that some obligations of the state concerned have not been discharged. These comments are then transmitted to the state concerned which may reply to them.
allegation and to present explanations regarding the allegation.\textsuperscript{19} The investigation may comprise a visit to the institutions allegedly practicing torture. The Committee communicates the outcomes of the investigation to the state party concerned, along with the comments and suggestions of the Committee Against Torture. However, the competence conferred upon the Committee by Article 20 is optional; the state party may, at the time of ratifying or acceding to the Convention Against Torture, declare that it does not recognize this competence.\textsuperscript{20}

The Committee usually holds two regular sessions each year but a special session may be convened at the request of a majority of its ten members or of a state party to the Convention Against Torture. All proceedings of the Committee are confidential and the Committee invites the concerned state party to cooperate with the Committee at all stages of the proceedings. Also, in order to be able to include a summary account of the investigation findings in its annual report, the Committee is required to consult the state party concerned. The expenses incurred in connection with all of the Committee's activities are borne by the state parties to the Convention Against Torture. The Committee itself adopts its procedural rules.

\textsuperscript{19} The procedure set out in Article 20 of the Convention Against Torture is confidential and pursues the cooperation of the state. The only exception to the confidentiality rule is if, after all the proceedings regarding an investigation under Article 20 have been completed, the Committee decides to include a summary account of the results into its annual report. In this case the work of the Committee is made public. Otherwise, all the work and documents relating to its functions under Article 20 are confidential.

\textsuperscript{20} So long as the state concerned maintains its reservation, the Committee Against Torture may not exercise the powers conferred upon it by Article 20.
Article 22 of the Convention Against Torture gives individuals the right to complain directly to the Committee Against Torture. The accused state party must recognize the competence of the Committee to consider complaints filed by the individuals, and as of January 1, 2000, only forty out of 119 states have made such a declaration. Another limitation on the filing of individual complaints is that, according to the Committee's rules of procedure, a communication can not be admitted if it is anonymous. This is mitigated, however, by the rule that all individual complaints are examined of official power. Because torture is so ubiquitous, especially in states that are often undemocratic and unwilling to honor the rule of law, the state itself will have difficulty discussing or negotiating the systematic use of torture by its operatives without having to engage in a discourse about its own bases of authority and legitimacy.

The critical question is whether the methods used by the Committee Against Torture correspond to social realities or whether they blindly accept the word of the accused state. Estimates indicate that the Committee's methods are simply not effective in counteracting the problems of power and authority generated by those who routinely practice torture.

The Committee's critical weakness is the futility generated by the combination of its structures and procedures. Its structure comprises a group of experts thoroughly vetted by state parties themselves, presenting a conflict of interest for those whose impartiality is most vital to the process. While the bureaucratic culture required by the Committee's links with the United Nations brings with it such assets as professionalism, broad discretion,
and widespread respect, this bureaucracy also has disadvantages. For example, overbearing state dominance threatens the Committee's capacity for practical implementation of a higher level of independent-minded action.

The problem of confidentiality presents another procedural difficulty for the Committee. Confidential diplomatic dialogue between bureaucrats and the accused state's authorities simply may not address the urgency of the problem from the victim's point of view or the practical problem that the more culpable the state party, the more that state will want to obstruct any investigation. This list of impediments is by no means exhaustive, but it does demonstrate that, despite the symbolic importance of the Committee Against Torture, serious structural and procedural limitations compromise its efficacy.

4.3.2.2 The Special Rapporteur on Torture

Special Rapporteur is a title given to individuals working on behalf of the United Nations who bear a specific mandate from the UN Human Rights Council (or the former UN Commission on Human Rights, UNCHR), to investigate, monitor and recommend solutions to human rights problems. They are also called "Special Procedures". Appointed by the UN Secretary General, these experts are "of high moral character and recognized competence in the field of human rights." They act independently of governments. They do not receive any financial compensation for their work, but they receive personnel and logistical support from the Office of the United Nations High Commissioner for Human Rights. Some of these experts are called Special Representatives or Independent Experts. Special Rapporteur often conducts fact-finding missions
to countries to investigate allegations of human rights violations. They can only visit countries that have agreed to invite them. Aside from fact-finding missions, Rapporteur regularly assess and verify complaints from alleged victims of human rights violations. Once a complaint is verified as legitimate, an urgent letter or appeal is sent to the government that has allegedly committed the violation.

An attempt to combat torture produced the U.N. Special Rapporteur, a position established to complement the Committee Against Torture. The U.N. Commission on Human Rights appointed a Special Rapporteur to seek credible information on torture and to respond without delay. While the Committee examines specific allegations of torture, the Rapporteur monitors torture in general.21

The Rapporteur may ask the government of an individual state party to provide information on its legislative and administrative measures to prevent torture, and to remedy its consequences. Furthermore, the Special Rapporteur can examine questions of torture in states which are parties to the Convention, all U.N. member states, and even all states with U.N. observer status. Finally, in an effort to protect the right to physical and mental integrity, the Rapporteur may bring accusations of torture to the attention of the government concerned, consult with government representatives, and make on-site consultative visits.22

Like those of the Committee Against Torture, the formation and proposed functions of the U.N. Special Rapporteur were an

22 Ibid
optimistic gesture to combat torture, but the Rapporteur also shares the Committee's inefficacy. In addition to the burden of a staggering workload, lack of funding poses a major problem for the Special Rapporteur. The United States has increased funding, but the Special Rapporteur still receives only marginal financial support. Other states should follow suit to fully empower the Rapporteur in eradicating torture.

4.3.2.3 The U.N. Voluntary Fund for Victims of Torture

The effects of torture should not be under-estimated. Physical and mental consequences of torture can endure for several years and may be irreversible, often affecting not only thousands of victims themselves, but also their relatives. One of the means of mitigating the subsequent effects of torture on victims and their families is to provide them with medical, psychological, social, legal and economic aid. With this in mind, the General Assembly created the United Nations Voluntary Fund for Victims of Torture in 1982. The purpose of the Fund is to receive voluntary contributions and distribute them to non-governmental organizations and treatment centers for assisting victims of torture and their relatives whose human rights have been severely violated as a result of torture, as well as for the funding of projects for training healthcare professional specialized in the treatment of victims of torture.

The Fund is administered by the United Nations Secretary-General with a Board of Trustees acting in an advisory capacity and comprising five members with wide experience in the field of human rights. The members serve in their personal capacity and are appointed by the Secretary-General for a renewable three-year term of office on the basis of equitable geographical distribution.
The inadequacy of available resources is a limiting factor in the field of assistance to victims; as a consequence, programmes of assistance are subjected to interruptions. For some 100 organisations the support of the United Nations Voluntary Fund remains essential.

The fund receives projects which focus on providing medical, psychological, economic, social and legal assistance to victims of torture and to members of their families. A few projects also share the objective of organizing training seminars for health professionals specialized in the treatment of torture victims. In 1981, the United Nations established the Voluntary Fund for Victims of Torture. While critics argue that establishing the Fund implies a passive acceptance of torture, the complete eradication of torture continues to be one of the priorities of the United Nations. The Fund, administered by the U.N. Secretary General based on the advice of the Board of Trustees, was set up as a means of humanitarian, legal, and financial aid to persons who have been tortured and to their families. Thus, the formation of this mechanism reflects both a genuine commitment to remedy past occurrences of torture and an honest admission that the United Nations cannot yet meet its goal of preventing all future instances of torture. The Fund's main problem is that it depends entirely on voluntary contributions from governments, private organizations, institutions, and individuals, rather than on regular financing through the United Nations' budget. The subsidies the Fund does

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receive are used to finance rehabilitation projects to provide victims and their families with medical treatment, physiotherapy, psychiatric, and psychological care. Funds are also used to support projects focused on training specialists, usually from the medical profession, in special techniques needed to treat the victims of torture. The Voluntary Fund parallels the other U.N. mechanisms: if properly implemented, it could make real progress toward the goal of ending torture; but, in its current state, it has very little practical effect.

4.4 Amnesty International

Twelve-Point Program for the Prevention of Torture (1983)

Torture is a fundamental violation of human rights, condemned by the General Assembly of the United Nations as an offense to human dignity and prohibited under national and international law. Yet torture persists, daily and across the globe. In Amnesty International's experience, 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 12Point 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.
1. Official Condemnation of Torture

The highest authorities of every country should demonstrate their total opposition to torture. They should make clear to all law enforcement personnel that torture will not be tolerated under any circumstances.

2. Limits on Incommunicado Detention

Torture often takes place while the victims are held incommunicado—unable to contact people outside who could help them or find out what is happening to them. Governments should adopt safeguards to ensure that incommunicado detention does not become an opportunity for torture. It is vital that all prisoners be brought before a judicial authority promptly after being taken into custody and those relatives; lawyers and doctors have prompt and regular access to them.

3. No Secret Detention

In some countries torture takes place in secret centers, often after the victims are made to "disappear." Governments should ensure that prisoners are held in publicly recognized places, and that accurate information about their whereabouts is made available to relatives and lawyers.

4. Safeguards during Interrogation and Custody

Governments should keep procedures for detention and interrogation under regular review. All prisoners should be promptly told of their rights, including the right to lodge complaints about their treatment. There should be regular independent visits of inspection to places of detention. An
important safeguard against torture would be the separation of authorities responsible for detention from those in charge of interrogation.

5. Independent Investigation of Reports of Torture

Governments should ensure that all complaints and reports of torture are impartially and effectively investigated. The methods and findings of such investigations should be made public. Complainants and witnesses should be protected from intimidation.

6. No Use of Statements Extracted Under Torture

Governments should ensure that confessions or other evidence obtained through torture may never be invoked in legal proceedings.

7. Prohibition if Torture in Law

Governments should ensure that acts of torture are punishable offenses under the criminal law. In accordance with international law, the prohibition of torture must not be suspended under any circumstances, including states of war or other public emergency.

8. Prosecution of Alleged Torturers

Those responsible for torture should be brought to justice. This principle should apply wherever they happen to be, wherever the crime was committed and whatever the nationality of the perpetrators or victims. There should be no "safe haven" for torturers.
9. Training Procedures

It should be made clear during the training of all officials involved in the custody, interrogation or treatment of prisoners that torture is a criminal act. They should be instructed that they are obliged to refuse to obey any order to torture.

10. Compensation and Rehabilitation

Victims of torture and their dependents should be entitled to obtain financial compensation. Victims should be provided with appropriate medical care and rehabilitation.

11. International Response

Governments should use all available channels to intercede with governments accused of torture. Inter-governmental mechanisms should be established and used to investigate reports of torture urgently and to take effective action against it. Governments should ensure that military, security or police transfers or training do not facilitate the practice of torture.

12. Ratification of International Instruments

All governments should ratify international instruments containing safeguards and remedies against torture, including the International Covenant on Civil and Political Rights and its Optional Protocol which provides for individual complaints.

4.5 National Level

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. 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.

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. 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.

26 AIR 1981 SC 746.
27 See sections 24 of the Indian Evidence Act and Section 164 of the Criminal Procedure Code.
28 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
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There are no explicit provisions in the Indian Constitution regulating the incorporation and status of international law in the Indian legal system. However, Articles 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.29 To this end, it has passed the Geneva Conventions Act

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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. Bartow.

29 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."
but has not yet adopted any law incorporating the provisions of the
International Covenant for Civil and Political Rights.\textsuperscript{30} 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.\textsuperscript{31}

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.\textsuperscript{32}

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

\textsuperscript{30} The Geneva Conventions Act, 1960.
\textsuperscript{31} Gramophone Co. of India Ltd \textit{v.} Birendra Bahadur Pandey, 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."

\textsuperscript{32} S.C. Vosjala \& Others \textit{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 \textit{v.} 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."
between these two laws should municipal law prevail over international law.\textsuperscript{33}

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.\textsuperscript{34}

\textbf{4.6 Domestic Responses}

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

\textsuperscript{33} See also Verma, CJ., in \textit{Vishaka v. 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."

\textsuperscript{34} \textit{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 \textit{Prem Shaker Shukla v. Delhi Administration}, AIR 1980SC 1535
and to highlight and combat the prevalence of torture.\textsuperscript{35} 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.\textsuperscript{36} 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 members of the international community to promote and protect human rights." It is important to note, however, that these measures by the NHRC have not been successful.

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. The NPC made several recommendations aimed at reducing the use of torture, which were subsequently not implemented by the Government. 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

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39 This was the first Commission appointed at the national level after Indian independence.
40 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.
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, 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. 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 licence for human rights violations.

41 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.

42 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.
4.7 Criminal Accountability of Perpetrators of Torture

4.7.1 The Substantive Law

4.7.1.1 Criminal Offences and Punishment

The Indian Penal Code criminalizes certain acts that can amount to torture. The following criminal offences might be used to prosecute those responsible for torture: the offence of voluntarily causing hurt to extort confession or to compel restoration of property is punishable by up to seven years imprisonment and liable to a fine. If the hurt caused is grievous, the maximum punishment is ten years imprisonment and liability to pay a fine. Wrongful confinement to extort confession or compel restoration of property carries a maximum punishment of three years imprisonment and liability to pay a fine. A public servant

43 Section 319 Penal Code: "Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt."
44 Section 330 Penal Code: "Whosoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detention of any offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."
45 Section 320, Grievous hurt: "The following kinds of hurt only are designated as "grievous":- First- Emasculation; secondly- Permanent privation of the sight of either eye; thirdly- Permanent privation of the hearing of either ear; fourthly- Privation of any member or joint; fifthly- Destruction or permanent impairing of the powers of any member or joint; sixthly- Permanent disfiguration of the head or face; seventhly- Fracture or dislocation of a bone or tooth; eighthly- Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits."
46 Section 331 Penal Code: Voluntarily causing grievous hurt to extort confession, or compel restoration of property.
47 Section 348 Penal Code: "Whoever wrongfully confines any person for the purpose of extorting from the person confined, or any person interested in the person confined, any confession or any information which may lead to
disobeying the law, with intent to cause injury to any person, is liable to a punishment of up to one year imprisonment and/or a fine. A public servant concealing the design to commit an offence that it is his/her duty to prevent commits an offence, the punishment of which depends on the imprisonment or fine provided for the concerned offence.

As far as general offences against physical and sexual integrity are concerned, assault or use of criminal force incur up to three months imprisonment and/or a fine. Culpable homicide carries, depending on the circumstances, a punishment ranging from various terms of imprisonment up to imprisonment for life and a fine. Murder which covers acts where the offender intended to cause death or inflicted bodily injury or committed other acts sufficient or likely to cause death is punishable with death or life imprisonment and a fine. However, culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the

48 Section 166 Penal Code: “Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.”

49 Section 119 Penal Code.

50 Section 352 Penal Code: “Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.”

50 Sections 299 and 304 Penal Code

51 Sections 300 and 302 Penal Code.
powers given to him by law, and causes death by committing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty.\textsuperscript{52} If death is caused by negligence, the maximum punishment is imprisonment of two years and/or a fine. Rape carries a punishment ranging from seven years to life imprisonment\textsuperscript{53} whereby rape in custody is considered to be an aggravating circumstance carrying a heavier punishment.\textsuperscript{54}

Cruelty to a child is punishable with up to six months imprisonment and/or a fine according to the Children Act, 1960.\textsuperscript{55}

Moreover, the commission of acts of torture in the course of armed conflict is punishable under the Geneva Convention Act as a grave

\begin{itemize}
  \item \textsuperscript{52} Section 300, Exception 3 Penal Code.
  \item \textsuperscript{53} Sections 375 and 376 (1) Penal Code.
  \item \textsuperscript{54} Id. Sec. 375: "Whoever, being a police officer commits rape within the limits of the police station to which he is appointed; or in the premises of any station house whether or not situated in the police station to, which he is appointed; or on a woman in his custody or in the custody of a police officer subordinate to him; or being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or (e) commits rape on a woman knowing her to be pregnant; or commits rape on a woman when she is under twelve years of age; or commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years."
  \item \textsuperscript{55} Section 41 (1) of the Children Act, 1960: "Whoever, having the actual charge of, or control over, a child, assaults, abandons, exposes or willfully neglects the child or causes or procures him to be assaulted, abandoned, exposed or neglected in a manner likely to cause such child unnecessary mental and physical suffering shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both."  
\end{itemize}
breach of the Geneva Conventions and carries a punishment of up to fourteen years imprisonment or life imprisonment.\(^5\)

**4.7.1.2 Disciplinary Sanctions**

Government Service Rules are in the domain of the concerned states, except the Central Civil Service Rules that apply to the employees of the Government of India and the All India Service Rules that apply to All India Services (IAS (Indian Administrative Service), IPS (Indian Police Service) and IFOs). Thus, all public servants, including members of the Indian Police Service, are subject to disciplinary sanctions ranging from censure to dismissal.\(^5\) Members of the Army are also subject to a range of disciplinary measures for wrongdoing, including torture.\(^5\)

**4.7.2 The Procedural Law**

**4.7.2.1 Immunities**

Indian legislation contains various provisions providing immunity from prosecution to certain groups of public officials for any offence committed in the discharge of duties unless specifically sanctioned by the Central or State Government. This applies to judges and magistrates, public servants not removable from their office save by or with the sanction of the Government and members of the armed forces of the Union.\(^5\) Members of the

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56 See Article 3 Geneva Conventions Act, 1960.
57 Section 311 of the Constitution and The All India Services (Discipline and Appeal) Rules, 1955, as well as the Central Service Rules of India and the individual States, the Police Act, 1861 and the provisions of the Police Acts of the individual Union States.
58 See Sections 71-79 and 80, 83 and 84 Army Act 46 of 1950.
59 Section 179 of the Cr.P.C: "(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have
armed forces are also expressly protected from arrest for "anything
done or purported to be done in the discharge of official duties
except after obtaining the consent of the Central Government.\textsuperscript{60}
Moreover, no prosecution may be instituted except with the
sanction of the Central or State Governments for the use of armed
force or civil force to disperse an assembly.\textsuperscript{61} The Armed Forces
Special Power Acts for Jammu and Kashmir as well as Punjab and
Chandigarh also contain provisions providing immunity from
prosecution unless sanctioned by the Central Government.\textsuperscript{62}
According to recently introduced legislation to prevent terrorism,
"no prosecution or other legal proceedings shall lie against any
serving member or retired member of the armed forces or other
para-military forces in respect of any action taken or purported to

\begin{itemize}
\item \textsuperscript{60} Section 45 (1) Cr. P.C
\item \textsuperscript{61} Section 132 (1) in conjunction with sections 129, 130 and 131 of the Cr.P.C
\item \textsuperscript{62} Section 132 (1) in conjunction with sections 129, 130 and 131 of the Cr.P.C
\end{itemize}
be taken by him in good faith, in the course of any operation
directed towards combating terrorism."^63

The jurisprudence on the need for a prior consent of the
government to prosecute alleged offences of government officials
has not been consistent. While the Supreme Court has suggested
that such sanction is not required when the alleged act was not
done in furtherance or discharge of the officer's official duties,^64 it
has not followed this approach in later similar cases.^65 This also
applies to the restriction that the government, in granting or
deny ing authorisation, "shall pass an order giving reasons subject
to judicial review."^66

4.7.2.2 Statutes of Limitation

The Criminal Procedure Code stipulates the following limitation:
six months for offences punishable with only a fine; one year for
offences punishable with imprisonment for a term not exceeding
one year; and three years for offences punishable with
imprisonment for a term more than one year but not exceeding
three years.67 There is no statute of limitation for criminal offences
carrying heavier punishments. However, several statutes enacted
by Indian states, which have the power to legislate on the
operation of the police forces, bar actions based on criminal

^63 Section 57 Prevention of Terrorism Act, 2002. However, according to Section
58 of the Act, "any police officer who exercises powers corruptly or
maliciously, knowing that there are no reasonable grounds for proceeding
under this Act, shall be punishable with imprisonment which may extend to
two year, or with fine, or with both."


109.

^67 Section 468 (1) and (2) Cr.P.C See for commencement of the period of
limitation etc., sections 469-473 Cr. P.C.
complaints against police officers unless the complaint was brought within a specified time limit. In Patel v State of Gujarat, the Supreme Court considered a statute from that State which barred prosecutions against police officers unless the complaint was brought within one year of the alleged offence. (This case alleged and arrest based on false grounds). The Supreme Court upheld the validity of the limitation period as it construed the statute as applying to any act that could be committed only by virtue of the offender's official position. The same Court came to a different decision in Unnikrishnan v. Alikutty\textsuperscript{68} where an individual tried to initiate criminal proceedings against police officers for alleged acts of torture. Such a prosecution would have been barred by the statute of the concerned State which prevented courts hearing cases based on complaints against police officers unless the complaint was filed within six months of the date of the alleged offence.

The court in this case interpreted the statute as not applying to acts amounting to an abuse of authority.

4.7.3 Investigations into Torture

4.7.3.1 Investigations by Police and Magistrate

A victim of torture may lodge a complaint with the NHRC, the police or a magistrate. An investigation may also be instituted following directions by the High Court or the Supreme Court to the Government concerned. Courts can also order investigations by an outside agency such as the Central Bureau of Investigation (CBI). The procedure differs depending on whether a complaint is lodged

\textsuperscript{68} Crim App 747, 2000 SOL.
with the police or the magistrate. Complaints to the police may be made by any person in writing or are to be recorded when made orally. The procedure to be followed by the police depends on whether the offence in question is cognizable or non-cognizable. Cognizable offences are investigated by the police. If the officer in charge of a police station refuses to record a complaint concerning a cognizable offence, the complainant may send the substance of the complaint, in writing, to the relevant Superintendent of Police. If the Superintendent is satisfied that such information discloses the commission of a cognizable offence, he or she shall either investigate the case him/herself or direct an investigation to be made by any police officer subordinate to him. As a general rule, the officer-in-charge of the police station is required to examine information received to establish whether there is reason to suspect that a cognizable offence has been committed. Thus, upon receiving information about the commission of a criminal offence, the officer-in-charge is to draw up a First Information Report, which is to be sent to the competent Magistrate, and to commence investigations. However, a police officer has certain discretion since he or she shall not investigate if “it appears to (him) that there is no sufficient ground for entering on an investigation.” In such cases, the police officer must inform the complainant about the reasons for not proceeding with the investigation.

Complaints against public officials may be investigated by the police or the CBI, later often following recommendations by the

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69 The seized Magistrate may hold its own inquiries and direct police investigations, section 202 Cr.P.C, and has the power to issue summons and arrest warrants, section 204 Cr.P.C
70 Section 154 (3) Cr.P.C
71 Section 157 1 (b) Cr. P.C
72 Section 157 (2) Cr. P.C
NHRC, the Supreme Court or High Court. In its investigation, the police have the power to arrest a person suspected of having committed a cognizable offence without a warrant. Members of the armed forces, however, may only be arrested with the consent of the Central Government. In respect of medical evidence, a detainee has the right to have a medical examination in case of complaints relating to torture by police. The Supreme Court has also directed the State to carry out medical examinations of detainees at regular intervals of 48 hours. In cases of custodial

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73 Section 45 Cr.P.C.
74 Section 54 Cr.P.C. See also the NHRC Guidelines regarding Arrest, in: NHRC, Important Guidelines/Instructions, supra, p.55: “When the person arrested is brought to the police station, he should, if he makes a request in this regard, be given prompt medical assistance. He must be informed of his right. Where the police officer finds that the arrested person is in a condition where he is unable to make such a request but is in need of medical help, he should promptly arrange for the same. This must also be recorded contemporaneously in a register. The female requesting for medical help should be examined only by a female registered medical practitioner. (S.53 Cr.P.C.”; p.56: “As soon as the person is arrested, police officer effecting the arrest shall make a mention of the existence or non-existence of any injury(s) on the person of the arrestee in the register of arrest. If any injuries are found on the person of the arrestee, full description and other particulars as to the manner in which the injuries were caused should be mentioned in the register, which entry shall also be signed by the police officer and the arrestee. At the time of 74 Section 45 Cr.P.C.

74 Section 54 Cr.P.C. See also the NHRC Guidelines regarding Arrest, in: NHRC, Important Guidelines/Instructions, supra, p.55: “When the person arrested is brought to the police station, he should, if he makes a request in this regard, be given prompt medical assistance. He must be informed of his right. Where the police officer finds that the arrested person is in a condition where he is unable to make such a request but is in need of medical help, he should promptly arrange for the same. This must also be recorded contemporaneously in a register. The female requesting for medical help should be examined only by a female registered medical practitioner. (S.53 Cr.P.C.”; p.56: “As soon as the person is arrested, police officer effecting the arrest shall make a mention of the existence or non-existence of any injury(s) on the person of the arrestee in the register of arrest. If any release of the arrestee, a certificate to the above effect under the signature of the police officer shall be issued to the arrestee.”
deaths, an inquest, which is usually conducted by an executive magistrate, is mandatory.  

Generally, an investigation has to be completed expeditiously. Upon completion of the investigation, the competent police officer or the CBI sends a report to the area magistrate. This is either sent in the form of a charge sheet in cases were there is sufficient evidence against the suspect or as a final report in cases where the investigation is discontinued or closed, usually on the basis of insufficient evidence.

The Magistrate may either disagree with the conclusions of the report, in which case he or she calls for further investigations, or accept it and, as the case may be, take cognizance of the offence. The Magistrate should not accept a final report of closure without giving notice to the complainant and giving him or her opportunity of being heard. There is no specific legislation granting victims of crimes, including torture, specific procedural rights or rights of protection. Victims have few procedural rights under the Criminal Procedure Code apart from the right to submit evidence and to make submissions to the Magistrate as outlined above. While there is no express right to private prosecution, a petitioner may file a petition for an order of mandamus to compel a judicial inquiry into cases of custodial deaths and to prosecute the police officials

75  D. K. Basu v. State of West Bengal, supra. See also the NHRC Guidelines, supra, p.56: "If the arrestee has been remanded to police custody under the orders of the court, the arrestee should be subjected to medical examination by a trained Medical Officer every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. At the time of his release from the police custody, the arrestee shall be got medically examined and a certificate shall be issued to him stating therein the factual position of the existence or non-existence of any injuries on his person."

76 Bhagwant Singh v. Commr. of Police, (1985) 2 SCC 537, at pp.542-543.
concerned. Moreover, Courts can issue interim orders for the protection of victims or witnesses where there are intimidations and threats.

4.7.3.2 National Human Rights Commission

The NHRC may inquire, *suo moto* or on petition presented by a victim or any person on his behalf, into complaints of i) violation of human rights or abetment thereof; or ii) negligence in the prevention of such violation, by a public servant.\(^{77}\) It can only investigate allegations of human rights violations that have occurred within a year of filing the complaint.\(^{78}\) The NHRC has wide-ranging powers in carrying out its inquiry into the complaints of human rights violations. It can call for a report from the police, monitor the police investigations in other ways or conduct an inquiry itself. It may, where the inquiry discloses the commission of violation of human rights or negligence in the prevention of a violation, recommend to the concerned Government or authority the initiation of proceedings for prosecution or such other action as the NHRC may deem fit. The Government or authority has to report within one month on the action it took on the NHRC's recommendation. The NHRC publishes the results of its investigations and decisions taken together with the action taken by the concerned government or authority in this regard.

The procedure differs however with respect to the armed forces. Here, the NHRC may only seek a report from the Government, and, after the receipt of the report, if the NHRC decides to take any action; it must make its recommendations to the Government. The

\(^{77}\) Section 12 (a), The Protection of Human Rights Act 1993.

\(^{78}\) Section 36 (2), Id.
Government has three months to respond after which the NHRC can publish its recommendations made to the Central Government and the action taken by the Government following such recommendations.

Moreover, the NHRC, relying on Section 12 (h) of the Human Rights Act, can and has issued a considerable number of instructions and guidelines concerning such issues, as custodial deaths/rapes, "encounter deaths", visits to police lock-ups/guidelines on polygraph tests and arrests as well as human rights in prison.

4.8 Judicial Pronouncements

4.8.1 International

A development in both criminal and civil torture law can be studied in United States case law. Crucial issues relevant to torture concern questions of interrogation methods and the legal boundaries of generating evidence and confessions. The general evidentiary rule, in English common law, requires the statements be voluntary in order to be admissible. The courts would not accept statements "obtained by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression."79 The principle emphasizing the statements to be voluntary for admissibility purpose crystallized as law and gained constitutional approval in Brown v. Mississippi80 in the year 1936. The opinion was delivered by Chief Justice Hughes. It was decided that a defendant's confessions that is extracted by police violence

79 Home Office circular No. 31/1964, containing Principle (e), quoted from The Judges' Rules [1964] 1 WLR 152
cannot be entered as evidence and violates the Due Process Clause of the Fourteenth Amendment. The use of force and coercion to extract confessions was declared illegal in the year 1951, in Williams v. United States. Mr. Justice Douglas, delivered the opinion of the Court. The question in this case is whether a special police officer who in his official capacity subjects a person suspected of crime to force and violence in order to obtain a confession may be prosecuted under section 20 of the Criminal Code, 18 U.S.C. (1946 ed.) 52, now 18 U.S.C. 242. Section 20 provides in pertinent part:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States shall, be fined not more than $1,000, or imprisoned not more than one year, or both."

Petitioner was convicted of a violation of what is now 18 U.S.C. 242.

The totality of the circumstances test for determining whether confessions are voluntary provides unclear criteria for finding the line between permissible and impermissible conduct. To determine such distinctions, United States' courts could look to the Torture Convention for supplemental prescriptive guidance in defining minimum standards.

There are few more cases which reveal the development of torture in United States civil law. Filartiga v. Pena-Irala\textsuperscript{82} is the leading case in expanding the role of domestic courts in the application of human rights law in general and in the law relating to the prohibition of torture, in particular. The court found that torture perpetrated by a person invested with official authority violates universally accepted human rights norms, regardless of the nationality of the parties. Whenever an alleged torturer is found and served with process by an alien within US territory, constitution provides federal jurisdiction This case emerged prior to the United States' ratification of the Convention Against Torture. Filartiga determined that, based on the Alien Tort Claims Act\textsuperscript{83}, torture constitutes a civil wrong simply because it violates customary international law. It expanded the scope of the legal remedies to include private litigants as plaintiffs, providing an important vehicle through which a torturer could be subject to legal proceedings.

In Kadic v. Karadzic,\textsuperscript{84} another U.S. appellate court held that mass rape, coerced prostitution, and other forms of physical violence directed at Croatian women by the Bosnian Serb military constituted torture as defined in the Convention Against Torture. One important aspect of this case was that the level of "state action" required for "official" torture entailed not actual authority but merely the "semblance of official authority."

\begin{footnotes}
\item[82] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
\item[84] Kadic v. Karadzic, 70 F.3d 232 (2d. Cir. 1995).
\end{footnotes}
Finally in *Ortiz v. Gramajo*, the District Court of Massachusetts held that the kidnapping, beating, and rape of a nun constituted torture. In order to qualify as an official act, the torture need not occur while the defendant has direct custody over the victim; rather the torture needs only the "consent or acquiescence of a public official."

In the similar manner and fashion the mandate against torture and related practices has evolved in Europe. A series of cases before the European Court of Human Rights provides a survey of the Court's application of its provision against torture. In 1967, the governments of Denmark, Norway, Sweden, and the Netherlands brought before the Commission allegations that the Greek government had committed acts that amounted to significant violations of Article 3 of the Convention. Article 3 provides that "no one shall be subjected to torture or inhuman or degrading treatment or punishment." An essential feature of Article 3 is that it is non-derogable: in no circumstance can torture or cruel and inhuman treatment be excused or tolerated for any reason.

Based on hearings and investigations by the Sub-Commission, the Court concluded that Greek security officials had inflicted torture and ill-treatment on several individuals in their custody,

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86 The European Commission of Human Rights (the Commission) is an investigative body which refers cases to the European Court of Human Rights, a regional court whose decisions are binding on its member states. Both are governed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).
88 European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3.
particularly through the application of "falanga" or severe beating of all parts of the body. The Commission found that the purpose of the torture had been "the extraction of information including confessions concerning the political activities and associations of the victims and other persons considered to be subversive." The Greek government had directly and indirectly prevented the Commission from completing its investigation of several cases. Upon these findings and based on the Greek government's denunciation of both the report and the European Convention of Human Rights, the Commission forced Greece out of the Council of Europe for human rights violations, isolating Greece from the international community.

In 1976, the Commission ruled on allegations of torture and other forms of inhuman treatment in the conflict in Northern Ireland. The British authorities had developed practices of detention and interrogation which included: (1) forcing detainees or prisoners to stand for long hours; (2) placing black hoods over their heads; (3) holding detainees or prisoners prior to interrogation in a room with a continuing, loud, hissing noise; (4) depriving them of sleep; and (5) depriving them of food and drink. The Commission found that this constituted not only inhuman and degrading treatment but actual torture within the meaning of Article 3. According to the Commission, the combined application of methods which prevent the use of the senses, especially the eyes and the ears, directly affects the personality physically and mentally. The will to resist or

90 Report on Greek Case, supra note 87, at 504
91 Ibid
93 Ibid
to give in cannot, under such conditions, be formed with any
degree of independence. Those most firmly resistant might give in
at an early stage when subjected to this sophisticated method to
break down or even eliminate the will.\textsuperscript{94}

After the Commission filed its report, the Irish government referred
the case to the European Court of Human Rights.\textsuperscript{95} The Court,
however, did not accept the Commission's qualification of Article 3
violations in the instant case. Rather, the Court distinguished
between torture on the one hand and inhuman or degrading
treatment on the other, noting that torture constitutes an
"\textit{aggravated and deliberate} form of cruel, inhuman or degrading
treatment or punishment."\textsuperscript{96} (emphasis added) The Court ruled
that the use of the five techniques breached Article 3 because
these practices constituted cruel, inhuman and degrading
treatment. It refused, however, to characterize them as torture.\textsuperscript{97}

The Court also applied the "\textit{aggravated and deliberate}" distinction
in later cases.\textsuperscript{98} In \textit{Tyrer v. United Kingdom}, a fifteen-year-old
British student assaulted a schoolmate and was sentenced to three
strokes of a birch rod. This punishment entailed removing his
trousers and underwear and then bending him over a table in
order for the strokes to be administered. According to the Court,
this form of corporal punishment was a direct violation of Article
3.\textsuperscript{99}

\textsuperscript{94} \textit{Id.} at 2.
\textsuperscript{96} \textit{Id.} at 67.
\textsuperscript{97} \textit{Ibid}
\textsuperscript{99} \textit{Id.} at 17.
In *Soering v. United Kingdom*, the Court considered whether a convicted murderer subjected to extradition might experience torture upon extradition to the United States. The Court did not suggest that the death penalty itself might violate Article 3, but rather distinguished between the death penalty and death row. The Court concluded that the death row phenomenon would be a breach of Article 3, but did not express any opinion as to whether putting someone on death row was itself torture.

In 1996, the Court found torture per se for the first time in the case of *Aksoy v. Turkey*. Mr. Aksoy was arrested and held in custody by Turkish security forces. Upon his release, he was admitted to a hospital and diagnosed with bilateral radial paralysis, or paralysis of both arms caused by damage to nerves in the upper arms. The Turkish public prosecutor decided that “there were no grounds to institute criminal proceedings against Mr. Aksoy.” The Turkish authorities have not been called to responsibility in criminal or civil proceedings for the alleged ill-treatment of Mr. Aksoy.

Mr. Askoy alleged that he had been subjected to extremely serious forms of ill-treatment. This included being locked up with two

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101 Protocol No. 6 was adopted to amend the Convention, abolishing the death penalty in the Contracting States. However, the United Kingdom was not a party of the Protocol No. 6 at the time the Soering case was decided, and thus the risk of subjection to the death penalty itself was not the determining factor in this case. See *Id.* at 448, 460.

102 The ECHR recognized that the U.S. has a well-developed judicial system where fundamental rights are protected. A narrow majority (6-5) of the Commission therefore concluded that extraditing Mr. Soering to the U.S. would not constitute treatment contrary to Article Three of the Convention.


104 *Id.* at 2266–67.
other detainees in a cell measuring approximately 1.5 x 3 meters, with only one bed, and only two meals a day. Interrogated about whether he knew a man called Metin, his torturers stated, “If you don’t know him now, you will know him under torture.” On the second day, he was stripped naked, his hands were tied behind his back, and he was strung up by his arms in a so-called Palestinian hanging. While he was hanging, electrodes were connected to his genitals, and water was thrown over him, causing electrocution. He was blindfolded for the duration of this ordeal (about thirty-five minutes). During the next two days he was repeatedly beaten without being suspended. This continued for four days.\textsuperscript{105} Not surprisingly, the Turkish authorities denied these allegations.\textsuperscript{106}

Both the Commission and the Court accepted Mr. Aksoy’s version of the facts. The Commission noted that: “there was no evidence that Mr. Aksoy had suffered any disability prior to his arrest or any evidence of any untoward incident, since his release from police custody.” While the bilateral radial paralysis could have been caused in other ways, it was consistent with the form of torture known as Palestinian hanging; and, most importantly, the Turkish authorities offered no alternative explanation for Mr. Aksoy’s injuries.\textsuperscript{107} Governmental officials claimed that “it was inconceivable that Mr. Aksoy could have been ill-treated,” but the Commission found this argument unconvincing. The officials’

\textsuperscript{105} Id. at 2265–66.
\textsuperscript{106} According to the Turkish government authorities, however, no torture occurred. Mr. Aksoy’s custody, they claimed, ended after he signed a statement denying any involvement with PKK and he made no complaint about having been tortured. See id. at 2266.\textsuperscript{106}
\textsuperscript{107} Id. at 2268
outright rejection of the allegation without any further consideration or investigation damaged their credibility.\textsuperscript{108}

Furthermore, the Commission sent a delegation which had heard the earlier evidence to Turkey on two separate occasions, and the delegation concluded that Mr. Aksoy had been tortured.\textsuperscript{109} The Court accepted the facts as established by the Commission, and articulated an important shift in the burden of proof in torture cases: \textsuperscript{110}

Where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, failing which a clear issue arises under Article 3 of the Convention.

Finally, the Court's opinion in the Askoy case underscored the importance of Article 3 and offered guidelines for evaluating potential violations:

Article 3, enshrines one of the fundamental values of democratic society. The Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention . . . it makes no provision for exceptions and no derogation . . . even in the event of a public emergency threatening the life of the nation . . . . In order

\textsuperscript{108} Id. at 2272.
\textsuperscript{109} Id. at 2271. Between the filing and acceptance of the application, Mr. Aksoy was shot and killed. According to his representatives (his father pursued the case after Mr. Aksoy's death), Mr. Aksoy had been threatened with death and pressed to withdraw his application to the ECHR. The Turkish authorities, on the other hand, maintained that Mr. Aksoy's death was connected to an internal dispute among PKK factions and charged another PKK member with Askoy's murder.
\textsuperscript{110} Id. at 2278.
to determine whether any particular form of ill-treatment should be qualified as torture, the Court must have regard to the distinction drawn in Article 3 between this notion and that of inhuman or degrading treatment. This is to attach only to deliberate inhuman treatment causing very serious and cruel suffering.\footnote{Id. at 2279}

A more recent torture case was \textit{Selmouni v. France}.\footnote{Selmouni v. France, 1109 Eur. Ct. H.R. (1999).} The Court found that the French police had beaten, sodomized, and threatened Mr. Selmouni while he was in their custody. The Court rejected the French government's argument that Mr. Selmouni was ineligible because he did not exhaust domestic remedies.\footnote{See European Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 38, Protocol No. 11, Art. 35, p. 1.} It noted that the medical certificates and reports sufficiently convinced the Commission of the credibility of the applicant's allegations concerning the large number of blows he received, as well as their intensity.\footnote{Ibid} The Court, therefore, declared Mr. Selmouni's application admissible and found violations of Article 6, Section 1, as well as Article 3.\footnote{Selmouni v. France, 1109 Eur. Ct. H.R. (1999), para. 87.}

very serious and cruel suffering"; a condition distinguishable from inhuman and degrading treatment. The Court further noted that the distinction between torture and inhuman and degrading treatment was also reflected in the Convention Against Torture and decided to apply the guiding principle and the severity requirement to the instant case. This meant they acknowledged that the acts of violence and other types of abuse, namely psychological and sexual abuse, experienced by Mr. Selmouni were of such intensity that they could cause substantial pain, and could also be classified as "heinous and humiliating for anyone, irrespective of their condition." Considering that all parts of Mr. Selmouni's body were abused, the abuse was repeated and sustained for a number of days, and all of this was substantiated by medical reports, the Court's final determination was that "the physical and mental violence, considered as a whole, committed against the applicant's person caused 'severe' pain and suffering and was particularly serious and cruel. Such conduct must be regarded as acts of torture for the purposes of Article 3 of the Convention." However, the European Court of Human Rights refrained from committing to a particular set of criteria for the severity requirement, or creating a list of acts which would always be considered torture, or characterizing the evidence necessary to

119 Id., para. 63.
120 The Court noted that "The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment . . . also makes such a distinction, as can be seen from Articles 1 and 16." Id., para. 97
121 Id., para. 102.
122 Id., para. 103
prove either. Thus, the outcome of an individual case remains unpredictable.123

4.8.2 National Pronouncements on Torture and Custodial Violence by Police

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.124 By taking tough stand on abuse of power by police officers the courts underlined the need for police to put and end to the dubious tradition inherited from British Raj.125

In Niranjan Singh v. Prabhakar Rajaram Kharote 126 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

125 Thomas, K. V. “Police and Human Rights”, The Indian Police Journal, 55 (Januay-June 1993)
126 AIR 1980 SC 785
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 case. 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.

Similarly the Supreme Court has held in Gauri Shankar Sharma v. State of U.P. 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 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

127 AIR 1980 SC 709 para 14
128 Id., para 16
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\textsuperscript{129} in a case of custodial death where the death was being explained by police as suicidal hanging, Justice Krishana Iyer 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, torturesome 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 of fences 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\textsuperscript{130} 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:\textsuperscript{131}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{129} AIR 1980 SC 1087 para 2, (1980) 3 SCC 70
\item \textsuperscript{130} Id., para 3
\item \textsuperscript{131} Id., para 4
\end{itemize}
\end{footnotesize}
"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*[^132^] (*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 *Sheela Barse v. State of Maharashtra*, 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 Sheela Barse, 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 Pushpa Paeen 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 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.

133 AIR 1983 SC 378
(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*\(^ {134}\) 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 *Dagdu v. State of Maharashtra*,\(^ {135}\) 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."

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134 AIR 1992 SC 1689; (1992) 3 SCC 249
135 (1977) 3 SCC 68; AIR 1977 SC 1579
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 Behera v. State of Orissa and others*\(^{136}\) 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

\(^{136}\) AIR 1993 SC 1960, para 30
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. 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 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\textsuperscript{138} 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

\textsuperscript{138} ld., para 33
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.

4.9 The Prevention of Torture Bill, 2010

The Prevention of Torture Bill, 2010 was introduced in Lok Sabha on 19 April, 2010 with the following statement of objects and reasons:

"The Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment was adopted by the United Nations General Assembly on 9th December, 1975 [Resolution 3452(XXX)]. India signed the Convention on 14th October, 1997. Ratification of the Convention requires enabling legislation to reflect the definition and punishment
for "torture". Although some provisions relating to the matter exist in the Indian Penal Code yet they neither define "torture" as clearly as in Article 1 of the said Convention nor make it a criminal offence as called for by Article 4 of the said Convention. In the circumstances, it is necessary for the ratification of the Convention that domestic laws of our country are brought in conformity with the Convention. This would necessitate either amendment of the existing laws such as Indian Penal Code or bringing in a new legislation.

2. The matter was examined at length in consultation with the Law Commission of India and the then Learned Attorney General of India. After considerable deliberations on the issue, it was decided to bring in stand alone legislation so that the aforesaid Convention can be ratified. The proposed legislation, inter alia, defines the expression "torture", provides for punishment to those involved in the incidents of torture and specifies the time limit for taking cognizance of the offence of torture.

3. The Bill seeks to achieve the above objects.”

The bill with the above statement of objects and reasons has been passed by Lok Sabha on 6th May 2010 having the following contents:

**Short Title and Commencement**

1. (1) This Act may be called the Prevention of Torture Act, 2010.

   (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.

**Definitions**

2. In this Act, unless the context otherwise requires,—

(a) words and expressions used in this Act shall have the
same meanings respectively assigned to them in the Indian
Penal Code; and

(b) 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.

**Torture**

3. Whoever, being a public servant or being abetted by a public
servant or with the consent or acquiescence of a public servant,
intentionally does any act for the purposes to obtain from him or a
third person such information or a confession which causes,—

(i) Grievous hurt to any person; or

(ii) Danger to life, limb or health (whether mental or physical)
of any person, is said to inflict torture:

Provided that nothing contained in this section shall apply to
any pain, hurt or danger as aforementioned caused by any
act, which is inflicted in accordance with any procedure
established by law or justified by law.
Explanation.—For the purposes of this section, 'public servant' shall, without prejudice to section 21 of the Indian Penal Code, also include any person acting in his official capacity under the Central Government or the State Government.

Punishment for Torture

4. Where the public servant referred to in section 3 or any person abetted by or with the consent or acquiescence of such public servant, tortures any person—

(a) for the purpose of extorting from him or from any other person interested in him, any confession or any information which may lead to the detection of an offence or misconduct; and

(b) on the ground of his religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, shall be punishable with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Limitation for cognizance of offences

5. 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 six months from the date on which the offence is alleged to have been committed.
Previous Sanction necessary for prosecution

6. No court shall take cognizance of an offence punishable under this Act, alleged to have been committed by a public servant during the course of his employment, except with the previous sanction,—

   (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;

   (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 State Government, of that Government;

   (c) in the case of any other person, of the authority competent to remove him from his office.

Critique of the Prevention of Torture Bill, 2010:

The Prevention of Torture Bill, 2010 as drafted by the Government of India and passed by Lok Sabha on 6th May 2010, states in the preamble that the law is being enacted "to ratify the Convention and to provide for more effective implementation". While recognition of torture as a criminal offence is welcome, the Bill contains only four operative paragraphs relating to (1) definition of torture, (2) punishment for torture and (3) limitations for cognizance of offences and (4) previous sanction for prosecution. It excludes many of the key provisions of the United Nations Convention Against Torture hereinafter mentioned as UNCAT.
These three provisions also fall far short of obligations that the ratifying parties to the UNCAT must undertake and existing national standards on administration of criminal justice system. These provisions suffer from the following ailments:

I. Restrictive definition of torture

Section 3 of the Prevention of Torture Bill, 2010 provides:

"3. Whoever, being a public servant abetted by a public servant or with the consent or acquiescence of a public servant, intentionally does any act which causes –

(i) grievous hurt to any person; or

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

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

Explanation:- For the purpose of this section ‘public servant’ shall without prejudice to section 21 of the Indian Penal Code, also include any person acting in his official capacity under the Central Government or the State Government."

The above definition is narrow and restrictive and does not capture the spirit and essence of the UNCAT. Despite widespread prevalence of custodial death as a result of torture, it makes no reference to death as a result of torture. This means acts of torture that result in death is likely to be prosecuted as a murder and may not incorporate the gravity of the crime of torture committed as
part of the death. To limit the definition is to give space for violations.

There is neither any reference to other cruel, inhuman or degrading treatment or punishment" anywhere in the Bill nor intimidation and coercion are included in the Bill. This means that acts of serious violence – that do not constitute torture - will not be covered. It equally means that death threats including to a victim's family may not be covered. The Bill does not conform to the requirement in article 16 of UNCAT which requires that India undertake to prevent acts of cruel, inhuman or degrading treatment or punishment. Failing to legislate against cruel and inhuman treatment sends an unfortunate message.

It opens the possibility to abuse that will eventually lead to torture. The United States has provided very good evidence of this in recent years. The US permitted some forms of torture and discovered that these limits were being routinely exploited in practice.

**II. Lenient punishment for torture**

Section 4 of the Prevention of Torture Bill, 2010 relating to "punishment for torture" states,

"4. Where the public servant referred to in section 3 or any person abetted by or with the consent or acquiescence of such public servant, tortures any person –

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

The Bill foresees a maximum of 10 years imprisonment under the Prevention of Torture Bill, 2010.

The Bill does not address the most serious crimes of torture being committed in India today: deaths in custody as a result of torture. The Prevention of Torture Bill equates crimes by the law enforcement personnel as such torture with normal crimes. This is a serious omission considering that law enforcement personnel exercise the sovereign power of the State. They are entrusted to carry out duties of state and are empowered with special powers and have a consequence higher level of responsibility. Hence, the crimes committed by law enforcement personnel should be considered more seriously and harsher punishment that what is provided under the Indian Penal Code is called for. For India to comply with the UNCAT the Convention is clear that punishment should reflect the gravity of the crime committed as stated in Article 4.2 that "Each state party shall make these offences punishable by appropriate penalties which take into account their grave nature.

The Bill is pending in Rajya Sabha though the select committee in Rajya Sabha has submitted its report on 7th December 2010 and it is expected that while passing the Bill the upper house will take care of all the facts and criticism the Bill if facing after it has been passed by Lok Sabha without much discussion.
4.10 Sum Up

"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 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 antithesis of the human rights of the arrested persons and no civilised nation can afford to allow existence of torture in any form, whatsoever.