Chapter 2
Violation of Human Rights by States

The state has been and continues to be one of the classic concerns of political science. Political theorist with their great sensitivity to power concentrates on the state because they recognise that the state is the condensate of power. It has the capacity to shape and control the lives of individual in a way no other institution can. The nature of a state is partly determined by its authority, its capacity to maintain law and order, its administration of justice, and its effectiveness both at notional and real. Where do we locate the authority of the Indian State?

If we adopt an economic approach to answer this question, then we should realise that the authority of an Indian state lies not in the official, deficit. and debridden public economy, but in the unofficial, flourishing, and rampant black economy. Soon after assuming office in the beginning of 1991 the new Indian finance minister, Manmohan Singh, pointed out how, while the national economy was crashing, the stock market was flourishing and said that his government would not allow it to happen. He has not succeeded, at least so far. And while the government of India are starved of funds, and the country is virtually headed for a plan holiday, private enterprise has more funds than they need.

If we adopt the legal approach, then where can we locate the authority of the Indian State? Is it in the parliament of India and the legislative assemblies, which make laws and formulate policies? Or is it in the Washington based International monetary funds which seems to be so much on the minds of those who frame India’s economic trade, commerce, industrial, exchange, investment and monetary policies? Or is it in the bodies of the elected representatives or selected bureaucrats?

\footnote{See Times of India (New Delhi), 05/12/1991, p.1.}
The reality is that there are hundreds of extraconstitutional entities, which command more authority than the Indian State. In brief, the authority of the Indian State has largely slipped out of the hands of the government. The government commands very little authority, credibility, and effectiveness. How do you expect such a state to discharge responsibilities in respect of human rights? This is incompatible with the legal position.

In law, whether national or international, if there is a case of violation of human rights in India, as indeed there are many, the government of India would be responsible and accountable irrespective of whether that act was an act of the state or that of a non-state entity. We witness a de facto decentralisation of power thorough an illegal and undemocratic process, with the Indian State reduced to the position of a hapless spectator if not a dubious collaborator. If the word “State” mean an embodiment of coercive power, we have hundred of state and non-state entities- legal and illegal- within an Indian State. If the word “State” means an entity, which has responsibility, capability willingness and effectiveness to protect human dignity, we are marching towards a mirage. On the one hand we find that the Indian State has the almost the exclusive duty to promote and protect human rights; and on the other we see the disintegration of, and disrespect for, the State authority, this disharmony is the principal cause of the presence state of human rights in India.

We learn from Laski that human rights determine the status of a state; He says, “every state is known by the rights that it maintains”. Indian states has been making sincere efforts, not only to ensure enforcement of the fundamental, civil and political rights, but also of as many socio-economic rights as the limited resources of the country permit. Rule of law is the basis of the Indian system of rights.

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3 Ibid. p206.
It is true that conditions for enjoyment of Human Rights in our country leave much to be desired. The quality of a liberal democracy has recognisably come to be determined on the basis of relationship between State power and individual rights. Man in order to live peacefully, has had to form organised societies. To be able to achieve this objective, there have had to be social contracts of different types. It is on this account that so many institutions of law and state have emerged. In distant past, governance in societies was based on power and force and human rights were exceptional. In the course of historical development, human rights began to assume significance and substance.

Human Rights, being dynamic, inalienable and indivisible are fundamental to the dignified existence of individuals. They are neither utopian nor legal dicta to be concern to jurist and academics. They have direct impact on the quality of life in society. They allow us to fully develop and use our human qualities, our intelligence, our talents and our conscience and to satisfy our spiritual and other needs. They are based on mankind's increasing demand for life in which the inherent dignity and worth of each human being will receive respect and protection.

Undoubtedly, India has made honest efforts for the protection and promotion of human rights the world over and is the greatest champion of the Human Rights in the Third World. However, the fact remains that there is a wide gap between theory and practice. All that is preached is not always put into practice and India is no exception. Police atrocities are a common feature of Indian scenario. Women and children are particularly vulnerable groups. Some of the common feature of violations of human rights are the torture of arrested persons, the disappearance of suspects who ought to have been in regular police custody, deaths in fake encounters and at police stations, and undertrials denied in jails for years without trials\(^1\). The statue book is presently disfigured by laws like Terrorist and Disruptive Activities Prevention Act, the National Security Act, and the

armed Forces Special powers Act, which need closer scrutiny. Such laws make a mockery of human rights.

A demand was thus made in favour of the setting up of the National Human Rights institutions. These institutions are necessary corollary to the democratic machinery of governments. They are means of democratic empowerment for those who are less powerful and less advantaged. The national human right institution can complement existing democratic bodies within the government. In fact, national human rights institutions are fundamental mechanism in protecting people rights. It is necessary to stress the philosophical reasoning behind the need for setting up national human rights institutions and convince the government that such institutions will actually help the government to govern. It is utmost importance to stress the link between human rights and development of the nation. Placing emphasis on a states obligation under international law to observe human rights can be an effective means of persecution with government.

Generally speaking, national human rights institutions can be divided into two categories, i.e., (i) offices of the Ombudsman and (ii) Human Rights Commissions.

A. Ombudsman

An Ombudsman in terms of utility means "watchdog of the administration" or "the protector of the littleman". It is a unique institution, which leads to an open government by providing a democratic control mechanism over the powers of the government. The institution of ombudsman plays an important role of bringing renaissance and humanism in the working of the government. According to Garner, he is "an officer of Parliament, having as his primary function, the duty of acting as an agent for Parliament, for purpose of safeguarding citizens against abuse or misuse of administrative power by the
executive". The International bar Association resolution of 1974 provided the following definition of Ombudsman:

An office provided for by the Constitution or by action of the legislature or Parliament and headed by an independent high level public officials who is responsible to the legislature or Parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his/her own motion, and who has the power to investigate, recommend corrective action and issue reports.

Generally, the Ombudsman is a judge or a high officer of character, reputation and integrity. He is above party politics and is in a position to think and decide objectively. He makes reports to the Parliament and points out the reactions of the citizens against the administration. Very wide publicity is given to these reports. The publications of his reports make him the "watch-dog" or "public safety valve" against maladministration and protect the people from violation of their human rights. He has access even to the government files and documents.

The importance of establishing and maintaining such institutions, particularly in developing nations like India can be best explained in the words of Presidential Commission on the Establishment of One Party State in Tanzania:

In a rapidly developing country, it is inevitable that many officials, both of Government and of the ruling party, should be authorised to exercise wide discretionary powers. Decisions taken by such officials can, however, have the most serious consequences for the individual, and the Commission is aware that there is already a good deal of public concern about the danger of abuse of power. We have, therefore, given careful

thought to the possibility of providing some safeguards for the ordinary citizens.8

Similarly, in India, in the State of Gujrat, the Lokayukta Act states:
Provisions for the appointment of Lokayukta for the investigation of allegations against public functionaries in the State of Gujrat and also for safeguarding the dignity and prestige of public functionaries against false and frivolous allegation...9

In India, the Administrative Reform Commission10 in its interim report suggested to the Government of India to establish the institution similar to Ombudsman (Lokpal in the Centre and Lokayukta in the States). However, the institutions of Lokayukta were established in different states11. It is of utmost importance that the institutions must have significant powers and be without any challenge from government or private lobby group in order to provide the needed legitimacy when carrying out investigation.

B. Human Rights Commission

The other national human rights institution is “Human Rights Commission”. Most suitable definition of it can be given as under:

Human Rights Commissions deal with the protection of citizens against discrimination as well as with the protection of other human rights. They are generally designed to hear and investigate individual charges of human right violations or discriminatory acts committed in violation of existing law. Most

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8 Ibid.
9 Ibid at 5.
human rights Commissions are collegial bodies comprised of members who, in most cases, are selected by the Executive. In many cases the Commission enjoys statutory independence and is responsible for reporting on a regular basis to the legislative body.12

The Human Rights Commission can be domestic or international depending upon their scope and jurisdiction. These national human rights institutions may be the creation of national Constitutions or a specific statute. There are some advantages in establishing these institutions as a constitutional body. For example, the Constitution is a supreme law and any changes in the fundamental structure of the institutions would require the passing of a constitutional amendment Act for which special procedure has to be followed. Thus, the integrity of the institutions will be protected and it can work more effectively.

Hence it is felt that some independent machinery, filing outside the control of administration, for the protection of human rights of the people must be created. It is in this regard that the role played by the institution of Ombudsman and human Rights Commission becomes very important.


In order to meet the national as well as international demand for the Constitution of a National Human Rights Commission, State Human Rights Commission in States and Human Rights Courts for better protection of human rights and for matters connected therewith or incidental thereto, the human Rights Commission bill, 1993 was introduced in the Parliament on 14 May, 1993. Pending this bill in the Parliament, the President of India promulgated an Ordinance, i.e., "The protection of Human Rights Ordinance, 1993", on 28

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September 1993 under article 123 (1) of the Constitution. Subsequently, the Ordinance became as "The Protection of human Rights Act, 1993". The Act is deemed to have come into force on 28th September 1993, i.e., the date when the Protection of Human Rights Ordinance was promulgated. It extends to the whole of India. Provided that it shall apply to the State of Jammu and Kashmir only in so far as it pertains to the matters relatable to any of the entries enumerated in List I or List III in the Seventh Schedule to the Constitution as applicable to that State.

1. Human Rights and Human Rights Courts

For the purpose of providing speedy trial of offences arising out of violation of human rights, the State Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify for each district a Court of Session to be a Human Rights Court to try the said offences. Provided that nothing in this section shall apply if:

(a) a Court of Session is already specified as a special court; or

(b) a special court is already constituted, for such offences under any other law for the time being in force. Thus, we find that it is not mandatory but discretionary to specify any Court of Session to be a Human Rights Court for trying the offences dealing with human rights violation. In other words, where no Human Rights Court is specified, the Court of Session or any other Special Court already constituted shall continue to try offences relating to violation of human rights. National Human Rights Commission

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13 Article 123(1) of the Constitution provides: "If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinance as the circumstances appear to him to require".

14 The Act received the assent of the President on January 8, 1994 and published in the Gazette of India, Extra, Part II, and Section I dated 10th January 1994, pp.1-16 St.No. 10.

15 Section 1(3) of the Protection of Human Rights Act, 1993 (Hereinafter cited as Act of 1993).

16 See Section 2(e) read with Section 30 of the Act of 1993.
2. National Human Rights Commission

Doubts were expressed at that time regarding the ability of NHRC to deliver the goods. Due to this background, what the Commission needs is credibility and acceptance which will ultimately come from the work it does, its stand on human rights issues and the fate of its recommendations. The short duration of one and a half, for which it has been in existence, is not enough to assess the performance of NHRC, yet the issues it has taken up are more important from human rights prescriptive. Its advocacy for the abolition of TADA, its stand on custodial deaths, rights of women and children and the police atrocities have all led to an atmosphere where NHRC has made its presence felt. Honourable Justice R.N.Misra (former Chief Justice of India and presently Member, Rajya Sabha) was the First Chairperson and Honourable Justice M.N.Venkatachaliah, (former Chief Justice of India and presently Chairperson Constitutional Review Committee) was the second chairperson. Honourable Justice J.S.Verma (former Chief Justice of India) is the present Chairperson of the Commission.

The National Human Rights Commission has been constituted under the Protection of Human Rights Act, 1993. In the Act it is provided that the Commission shall consist of:

(a) A Chairperson who has been a Chief Justice of the Supreme Court;
(b) One Member who is or has been, a Judge of the Supreme Court;
(c) One Member who is, or has been, the Chief Justice of a High Court;
(d) Two Members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights.\(^\text{17}\)

In addition to this, there are three ex-officio members. They are the Chairpersons of the National Commission for Minorities, the National Commission for Scheduled Castes and Scheduled Tribes and the National Commission for Women. They shall also discharge all the functions of the National Human Rights Commission except that they will not inquire, suo moto

\(^{17}\) _id._ Section 3 (2).
or on a petition presented by a victim or any person on his behalf, into complaint of violation of human rights or abetment thereof or negligence in the prevention of such violation.

An officer of the rank of the Secretary to the Government of India is to be the secretary-general who shall be the Chief Executive Officer of the Commission and shall exercise such powers and discharge such functions of the Commission as it may delegate to him. The headquarters of the Commission shall be at Delhi and the Commission may, with the previous approval of the Central Government, establish offices at other places in India.

The appointment of Chairperson and other Members of the Commission is made by the President of India on the recommendations of a Committee consisting of:

a) The Prime Minister - Chairperson
b) Speaker of the House of the People - Member
c) Minister-in-charge of the Ministry of Home Affairs in the Government of India - Member
d) Leader of the Opposition in the House of the People - Member
e) Leader of the Opposition in the Council of States - Member
f) Deputy Chairman of the Council of States - Member
g) Provided further that no sitting Judge of the Supreme Court or sitting Chief Justice of a High Court shall be appointed except after consultation with the Chief Justice of India.

The Chairperson or any other member of the Commission shall only be removed from his office by order of the President on the ground of proved misdemeanor or incapacity after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson or such other

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18 Id. Sections 3(3) and 12 (a).
19 Id. Section 11 (a) and 3 (4).
20 Id. Section 4.
Member, as the case may be, ought on any such ground to be removed. The President may by order remove from office the Chairperson or any other Member if the Chairperson or such other Member, as the case may be-

a) is adjudged an insolvent; or
b) engages during his term of office in any paid employment outside the duties of his office; or
c) is unfit to continue in office by reason of infirmity of mind or body; or
d) is of unsound mind and stands so declared by a competent court; or
e) is convicted and sentenced to imprisonment for an offence which in the opinion of the President involves moral turpitude\(^1\).

The term of office of the Chairperson and other Members of the Commission has been fixed. The Chairperson shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of seventy years, whichever is earlier. Other members of the Commission shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment for another term of five years. Provided that no Member shall hold office after he has attained the age of seventy years. On ceasing to hold office, a Chairperson or a Member shall be ineligible for further employment under the Government of India or under the Government of any State\(^2\).

In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the President may, by notification, authorize one of the Members to act as the Chairperson until the appointment of a new Chairperson to fill such vacancy\(^3\). The terms and conditions of services of Members including their salaries, allowances can not be

\(^1\) Id., Section 5.
\(^2\) Id. Section 6.
\(^3\) Id. Section 7(1).
varied to their disadvantage after their appointment\textsuperscript{24}. This provision has been made to ensure independence in their working.

**Functions and Powers of the Commission**

From the basic objectives of the Act it is evident that the Protection of Human Rights Act, 1993 was enacted, inter alia, for better protection of human rights and for matters connected therewith or incidental thereto. In order to achieve these objectives, section 12 of the Act provides that the Commission shall perform all or any of the following functions, namely:

a) inquire, suo motu or on a petition presented to it by a victim or any person on his behalf, into complaint of

b) violation of human rights or abatement thereof or

c) negligence in the prevention of such violation, by a public servant;

d) intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court;

e) visit, under intimation to the State Government, any jail or any other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection to study the living conditions of the inmates and make recommendations thereon;

f) review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;

g) review the factors, including acts of terrorism that inhibit the enjoyment of human rights and recommend appropriate remedial measures;

h) study treaties and other international instruments on human rights and make recommendations for their effective implementation;

i) undertake and promote research in the field of human rights;

\textsuperscript{24} *Id.* Section 8.
j) spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means;

k) encourage the efforts of non-governmental organizations and institutions working in the field of human rights;

However, the Commission shall not entertain the complaints relating to following matters:

a) complaints in regards to events which happened more than one year before the making of the complaint;

b) complaint with regard to the matter which are sub judice or pending before the State Commission or any other Commission duly constituted under any law for the time being in force;

c) complaints which are vague, anonymous or pseudonymous;

d) complaints which are of frivolous nature; or

e) the complaints which are outside the purview of the Commission.15

In order to enable the Commission to discharge the above-mentioned functions in an effective manner, it is necessary that the Commission must be invested with powers of the Court. Section 13 of the Act ensures this by providing that the Commission shall, while enquiring into complaints under this Act, have all the powers of a civil court trying a suit under the Code of Civil Procedure, and in particular in respect of the following matters, namely:

a) summoning and enforcing the attendance of witnesses and executing them on oath;

b) discovery and production of any document;

c) receiving evidence on affidavits;

d) requisitioning any public record or copy thereof from any court or office;

e) issuing commissions for the examination of witnesses or documents:

15 See Section 36 of the Act, of 1993 read with Section 8 of National Human Rights Commission, 1994 (Hereinafter cited as Procedure Regulations, 1994).
f) any other matter which may be prescribed.

The Commission also has the power to require any person, subject to any privilege which may be claimed by that person under any law for the time being in force, to furnish information on such points or matters as, in the opinion of the Commission, may be useful for, or relevant to, the subject matter of the inquiry and any person so required shall be deemed to be "legally bound" to furnish such information within the meaning of section 176 and section 177 of the Indian Penal Code'. Every proceeding before the Commission shall be deemed to be a judicial proceeding for the purposes of considering punishment for false evidence known to be false. However, no statement made by a person in the course of giving evidence before the Commission shall subject him to, or be used against him in, any civil or criminal proceeding except a prosecution for giving false evidence by such statement, provided that it is made in reply to the question which he is required by the Commission to answer; or is relevant to the subject matter of the inquiry^.

Whenever the Commission has reason to believe that believe any document relating to the subject matter of the inquiry may be found in any building or place, the Commission or any other officer, not below the rank of a Gazetted Officer,

5) 176. *Omission to give notice or information to public servant by person legally bound to give it.* Whoever, being legally bound to give any notice or to furnish information on any subject to any public servant, as such, intentionally omits to give such notice or to furnish such information in the manner and at the time required by law, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

Or, if the notice or information required to be given respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

177. *Furnishing false information.* Whoever, being legally bound to give any notice or to furnish information on any subject to any public servant, as such, furnishes, as true, information on the subject which he knows or has reason to believe to be false, shall be punished with simple imprisonment for a term which may extend to six month, or with fine which may extend to one thousand rupees, or with both;

Or, if the information which he is legally bound to give respects the commission of an offence, or is required for the purpose of preventing the commission of an offence or in order to the apprehension of an offender, with simple imprisonment of either description for a term which may extend to two years, or with fine.

specially authorized in this behalf by the Commission may enter such building or place and may seize such document or take extracts or copies from the documents.

The Commission shall be deemed to be a civil court and whenever any person omits to produce document which he is legally bound to produce; or refuse oath or affirmation when duly required by the Commission to make it; or refuse to answer any statement; or intentionally insults or causes any interruption to any public servant sitting in judicial proceeding in the view or presence of the Commission, such person deemed to have committed an offence under the relevant provisions of the Indian Penal Code\(^{28}\). The Commission may after recording the facts constituting the offence and the statement of the accused forward the case to the Magistrate, having jurisdiction to try the same, who shall proceed to hear the case against the accused.

Another very important power given to the Commission to discharge its function effectively, is the power of investigation. Section 14 of the Act of 1993 permits the Commission to utilize the services of any officer or investigation agency of the Central Government or any State Government with the concurrence for the purpose of conducting any investigation pertaining to the inquiry. The Commission either proceeds to inquire into the matter itself or it may hand over the case for further investigation for which it maintains its own investigative machinery, headed by a person not below the rank of a Director General of police\(^{29}\). Thus the Commission does not depend upon the state for investigation.

**Procedure for Dealing with the Complaints**

Dealing with the complaints and grievances from members of the public is a basic function of the Commission. The manner in which such complaints are received and processed is of great importance, as it will determine the effectiveness of the institution.

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\(^{28}\) See Sections 175, 178, 179, 180 and 228 of the *Indian Penal Code*, 1860.

\(^{29}\) See Regulation 18 of *National Human Rights Commission (Procedure) Regulations, 1994*. 
All the complaints in whatever form received by the Commission are registered and assigned a specific number. Then they are placed before a Bench of two members, for the purpose of two weeks from the receipt of the complaint, for the purpose of admission. Every complaint is made in such manner so as to disclose a complete picture of the matter leading to the complaint. The complaint may be made in English or Hindi to enable to Commission to take immediate action. The Commission if so desire can further ask for any information and affidavits in support of allegations made in the complaint. Once the complaint is admitted, the Commission shall decide and direct for further inquiry or investigation. After the decision is taken by the Commission to hold inquiry or investigation in regard to the allegations in the complaint, the Secretariat calls for report/comments from the concerned government/authority. If the report/comments of the concerned government/authority are not received within the stipulated time the Commission may proceed to enquire into the complaint on its own.  

After the inquiry is completed the Commission may take any of the following steps:

a) Where after the inquiry it is found that there was violation of human rights or there was negligence in the prevention of violation of human rights by a public servant, the Commission may recommend to the concerned government/authority to initiate proceedings for prosecution or take any other appropriate action against the concerned person.

b) The Commission may approach the Supreme Court or the concerned High Court for such directions, orders or writs as the Courts may deem necessary.

c) The Commission may recommend to the concerned government/authority for...
the grant of immediate interim relief to the victim or to the members of the family.\(^\text{13}\)

d) The Commission is required to publish the inquiry report together with comments of the concerned government/authority and the action taken or proposed to be taken by the government/authority within the period of one week\(^\text{14}\).

Finally, the Commission is required to submit an annual report to the Central Government and to the State Government concerned and may at any time submit special reports on any matter which, in its opinion, is of such urgency or importance that it should not be deferred till submission of the annual report.

The Central Government and the State Government, as the case may be, shall cause the annual and special reports of the Commission to be laid before each House of Parliament or the State Legislature respectively, as the case may be, along with a memorandum of action taken or proposed to be taken on the recommendations of the Commission and the reasons for non-acceptance of the recommendations, if any.

During the last 17 months of its functioning, the Commission has received about 7,800 complaints from different States been in regard to violation of human rights. Of these 2,500 complaints had been disposed so far after investigation. The Commission receives about 300 complaints per week from all over the country\(^\text{15}\).

2. **State Human Rights Commission**

Section 21 provides that the State Government may constitute a body to be known as the State Human Rights Commission which may inquire into violation of human rights Commission which may inquire into violations of human rights only in respect of matters which are related to any of the entries enumerated in the State List (List II) and Concurrent List (List III) of the Seventh Schedule of the Constitution.

\(^{13}\) *Ibid.*, Section 18(3)

\(^{14}\) See Section 16 of the *(Procedure) Regulations, 1994.*

\(^{15}\) See *The Tribune*, 15/04/1995.
The State Commission shall consist of—

a) a Chairperson who has been a Chief Justice of a High Court;

b) one Member who is, or has been, a Judge of a High Court;

one Member who is, or has been, a district judge in that State;

c) two Members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights.

Every appointment of the State Commission is made on the recommendations of a Committee which consists of the

a) The Chief Minister — Chairperson

b) Speaker of the Legislative — Member Assembly

c) Minister in-charge of the Department — Member of Home, in that State:

and

d) Leader of the Opposition in the — Member Legislative Assembly

Provided further that where there is a Legislative Council in a State, the Chairman of that Council and the Leader of the Opposition in that Council shall also be members of the Committee. Provided also that a sitting Judge of a High Court or a sitting District Judge shall be appointed except after consultation with the Chief Justice of the High Court of the concerned State.

A person appointed as Chairperson shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of seventy years, whichever is earlier. The other members are appointed for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment for another term of five years. On ceasing to hold office, a Chairperson or a Member shall be ineligible for further employment under the Government of a State or under the Government of India.

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See Section 21(2) of the Act of 1993.

Id. Section 22.

Id. Section 24.
The Chairperson or any other member of the State Commission may be removed from his office in the same manner and on the same grounds as in case of the Chairperson and members of the National human Rights Commission.

Going through the provisions of the Protection of Human Rights Act, 1993, one may see that the Commission – both National and State- is only a fact-finding machinery. Formerly, whenever a complaint against custodial violence or custodial death had to be made, the individuals had to approach a court of law with a suit or to the government with a petition to make inquiries. The complaint may be inquired into by an officer of the department, of another department or by a judicial commission as the Government may decide. After the institution of the Commission at the National or State level, there is no need for the affected citizens to go from pillar to post with complaints of human rights violations. They can approach the Commission and in that way, this is a permanent forum for the citizens to make complaints of human rights violations.

The brief analysis which has been attempted above shows that the Commission has a functional autonomy, wide range of functions and necessary powers to accomplish them and its recommendations have also the prestige and authority. Thus, the Commission has necessary infrastructure for credibility and acceptance. However, some amendments should be made on the lines noted above so as to enhance the authority and effectiveness of the Commission. These suggestions may be briefly stated here:

a) The Central government should have no say in the money handed over to the Commission for its activities. Once the money is appropriated by Parliament, the Central government should pay the sum so approved to the Commission which should pay the sum so approved to the Commission which should be free to spend the money for its functions.

b) As regards armed forces, the Commission should have the jurisdiction to inquire into violation of human rights by them when such forces are deployed for the purposes of policing.

c) At present, the commission is not empowered to take any action against the violator of human rights on its own. It can only recommend action to government or any authority. In order to enhance its position and effectiveness, the Commission should be in a position to take action on its own. It should be empowered to start proceedings for prosecution against the person or persons concerned and also to take any further appropriate action.

There may be two schools of thought\(^6\) regarding the functioning of NHRC. First, there are essentially institutions that have no legitimacy or for that matter any democratic accountability, hence should be give very little powers. There work should be more in the nature of reporting and advising the government on human right violations and should not have any powers whatsoever that have even the slightest bearing on the functioning of the enforcement machinery of the government like the police and other departments. The second school of thoughts argues for the establishments of NHRCs in as many countries as possible. It believes that the establishments of them in all the countries are a sine qua non for any development of human right system within a society.

**Why NHRC has failed in India?**

The National Human Rights Commission is more than 12 years old. But it has made little impact on those who want to violate human rights; the police and security forces. The fatal flaw in the Act setting up the Human Rights Commission is that the military and paramilitary forces have been virtually excluded from the purview of the Commission. Unless there is a firm commitment to human rights on the part of the members of the Commission and the Government, which is ultimately the implementing authority, the commission will end up as another ornamental body.

After the Commission was set up it was imagined that the commission would foster among them the culture of good treatment and justice. But the police have not changed, either in its behavior or in its ways. The same third degree methods, employed during the British rule, are more or less in use.

True, after the constitution of the commission, the number of prosecution of and instances of punishments to policemen and their officials have gone up. But so have the tally of deaths in custody and cases of sheer brutality. When it comes to extracting a "confession", it is the same old lathi, whip or other forms of physical torture.

The commission has not been able to instil fear in the custodians of law and order that certain things should not be done to human beings. No amount of 'pious words' has had any affect on the force. The commission can well argue that it cannot take upon itself the responsibility, which should rest on the shoulders of society or political parties. Still it was expected to create the environment in which the men in khaki would act instinctively to protect human rights.

The government selects the members of the NHRC's and hence they are basically people who can be trusted and will not criticize the government. It may be noted that people who have close relations with the government need not necessarily be employees of the government. They in fact may be lawyers, NGO representatives or even members of the civil society. They are basically the puppets in the hands of the government to manipulate and fulfill the political objectives both in national and international context.

More powers to the commission are no answer. Maybe it should review its functioning because it is too cluttered with legal requirements and procedures. The commission is not a law court. Had that been the purpose, the government

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could have constituted another law court. The commission is far too liberal in granting compensation to the victims.

Moral ethos was meant to be strengthened. This effort is lacking. In fact, the commission has got lost in form. There is a meticulous pursuit of cases, which comes to its notice. That may be the reason for the arrears going beyond 50,000 cases. The complaint has the satisfaction that unlike in the court his case is disposed of within a reasonable period. However, the commission has not been able to cultivate a feeling of horror against brutality.

There are hundreds of examples of police tardiness and the authority's connivance. No amount of patience or perservance helps. Take the killing at Hashimpura in Meerut, which occurred more than a decade ago. The commission should have intervened long ago. The guilty policemen did not surrender for years and the authorities took no action because some of them were themselves mixed up with the happenings. The media, after initial notice, did not pursue the case. A few spirited public men, however, did not relent and got the surrender to the guilty policemen.

Such instances bring no credit to the national Human Rights Commission. Yet, if it motivated the police and made it feel obliged to bring the guilty to book, the commission would have done its job. It would have performed a still bigger duty of pricking the conscience of the guilty.

We saw that during the emergency, the police became an instrument at the hands of the rulers to carry out arbitrary actions with impunity. Ethical considerations in the force in particular and among civil servants on the whole dimmed, in many cases beyond the grasp of public functionaries. Madhya Pradesh was such a state where maximum numbers of prisoners were kept in jail during the operation of emergency. In Gwalior district Jail, political prisoners were kept along wide notorious dacoits and were allowed to be abused by them\(^\text{13}\). Police

atrocities in the emergency reached its climax when in Delhi, mostly students became its victims. Mahavir Singh, Delhi University student, was hung upside down, stripped naked and beaten. Shiv Kumar, a B.Sc. student was arrested and beaten with rods, shoes and gun butts to inhale chili dust.44

During the Emergency, for many a public functionary the dividing line between right and wrong, moral and immoral ceased to exist. The efforts made by the Committee for Coordination on Disappearance in Punjab is highly depressing.

It has prepared a detailed report on forced disappearances, arbitrary execution and secret cremations. The interim report covers seven cases but the committee challenges the facts provided by the state. Such a body if it acquires credibility, can build up pressure of public opinion to counter the bid for impunity. More than that, it can initiate a debate on vital issues of state power, its distribution and accountability.

The interim report covers the disappearance of Jaswant Singh Kharla, whose case was once on the front pages of almost all newspapers. The report says that in January 1995, Kharla, then general secretary of the Akali Dal's human rights wing, released official documents which established that the security agencies in Punjab had been secretly cremating thousands of bodies, labeled as unidentified. Kharla suggested that most of these cremations were of people who had been picked up by the state on suspicion of having separatist sympathies. And within the eight months, officers of the Punjab police kidnapped it from his Amritsar home.

In November 1995, a Bench of the Supreme Court under Mr. Justice Kuldip Singh instituted two inquires by the Central Bureau of Investigation. The first was aimed at determining what happened to Kharla. The second was intended to establish the allegations he had made. The report of the CBI's first inquiry (July 1996) held nine officers of the Punjab police responsible for his abduction. In December 1996, the report of the second inquiry disclosed a "flagrant violation of

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44 Ibid. p. 265.
human rights on a mass scale”. The court referred the matter to the National Human Rights Commission for a thorough investigation. The state agencies, however, continued to deny that there had been systematic human rights abuses. Whatever the CBI reports say or the subsequent efforts, Khurta remains ‘missing’. It is an official cliche.

The National Human Right Commissions have been criticized on various grounds. They suffer from various limitations that hinder their internal functioning. It is in this background that several reforms have been initiated. These reforms may be in the nature of granting more enforcement powers to the commission so that their recommendations are taken more seriously.

There is no doubt about it, that there is no other national institutions, including the judiciary that is well suited as the NHRC to promote these international human rights norms. This helps to promote amendments in national legislation as well as new laws, rules and regulations in consonance with the international treaty norms relating to human rights. The NHRC need to function in a manner that obtains extraordinary credibility from the institution itself and whatever legitimacy they acquire is through their actions and functions that are performed by its members. This moral legitimacy needs to be built upon the institutional framework upon which NHRCs exist and would eventually help in promoting an effective human rights community involving partners from all the sectors within a society.

Causes for the violation of Human rights

India is in a transition from a government-controlled economy to one that is largely market oriented. The private sector is predominant in agriculture, most non-financial services, consumer goods manufacturing, and some heavy industry. Economic liberalization and structural reforms begun in 1991 continue, although momentum has slowed. The country's economic problems are compounded by rapid population growth of 1.7 percent per year with a current total above 950

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million. Income distribution remained very unequal. Forty percent of the urban population and half of the rural population live below the poverty level. ‘Poverty’ is a violation of numerous rights Death by malnutrition or preventable diseases, or subsisting in conditions of poverty that offend human dignity, are deemed not to be matters of human rights concern, possible legal remedy and therefore do not receive sustained attention from the ‘international community’. Annually, more people worldwide are killed because of systemic and systematic violations of overlapping political, social and economic rights - poverty - than by civil and political rights violations brought by wars, repressive governments and armed movements, that is, those violations that have traditionally received most attention.

Economic inequalities are exacerbated by social inequalities. The existence of the caste system condemns large sections of the population to live with little hope of improving their living and in India there are one billion people, one billion people but 40% of them are poor because 300 million of them can’t consume what has been produced. This 40% has to be addressed. The people, who are working against globalisation, liberalisation and politics of privatisation, will have to face political and civil rights violations. It’s all connected: socio-economic rights and political and civil rights are inter-linked.

The underdevelopment of some sections of the society and the lack of an efficient system for the equitable distribution of the national wealth are other reasons for the violation of human rights. There has also been the rise of insurgency and militancy in many parts of the country. The reason for the dissatisfaction may be the lack of development, unemployment, denial of the basic amenities of life or any other reason, but the constitution and the law, which guarantees the fundamental rights to the citizens also make provisions and contain methods for the solution of the problems. Its thrust and direction is the solution of

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Footnotes:

all problems through discussion and dialogue and by nonviolent methods. A sensitive point of human right violation comes in the case of people killed in police encounters or dying in police custody. Assassinations by death squads, illegal detentions or detentions in abusive conditions are matters of human rights concern, possible legal remedy and worthy of attention from the 'international community'. Our law should be transparent enough to convince the people that the encounters are not fake and that the people dying in police custody did not die on account of revenge or malafide intentions.

There continued to be significant human rights abuses, despite extensive constitutional and statutory safeguards. Intense social tensions, violent secessionist movements and the authorities' attempts to repress them, and deficient police methods and training generate many of these abuses. These problems are acute in Jammu and Kashmir, where judicial tolerance of the Government's heavy-handed anti-militant tactics, the refusal of security forces to obey court orders, and terrorist threats have disrupted the judicial system. Separatist insurgent violence in the north-eastern states continued, along with reported incidents of security force abuses.

Serious human rights abuses include: Extrajudicial executions and other political killings and excessive use of force by security forces combating active insurgencies in Jammu and Kashmir and several north-eastern states; torture and rape by police and other agents of the Government, and deaths of suspects in police custody throughout the country; poor prison conditions; arbitrary arrest and incommunicado detention in Jammu and Kashmir and the Northeast; continued detention throughout the country of thousands arrested under special security legislation; lengthy pre-trial detention; prolonged detention while undergoing trial; occasional limits on freedom of the press and freedom of movement; legal and societal discrimination against women; extensive societal violence against women.

women; female bondage and prostitution; trafficking in women; child prostitution, trafficking, and infanticide; discrimination and violence against indigenous people and scheduled castes and tribes; widespread inter-caste and communal violence; increasing societal violence against Christians; and widespread exploitation of indentured, bonded, and child labour.

During 1998 India made further progress in resolving human rights problems. In Punjab the serious abuses of the early 1990’s were acknowledged and condemned by the Supreme Court. The Supreme Court delegated responsibility for investigation of these abuses in the Punjab to the National Human Rights Commission (NHRC), whose investigation continues. Continuing International Committee of the Red Cross (ICRC) prison visits in Jammu and Kashmir demonstrated some government transparency on human rights problems. However, researchers for international human rights organisations like Amnesty International (AI) and Human Rights Watch (HRW) was not permitted to visit Jammu and Kashmir or the Northeast; local non-governmental organisations were permitted access to these areas. The NHRC continued to play an important role in investigating and redressing human rights abuses.

Different Patterns of Violation of Human Rights.

1. Political and Other Extrajudicial Killing

Political killings by government forces have certain common features. These are summed up in the definition that Amnesty International uses: “unlawful and deliberate killings of persons by reason of their real or imputed political beliefs or activities, religion, other conscientiously held beliefs, ethnic origin, sex, colour or language, carried out by order of a government or with its complicity”. The alternative term “extrajudicial execution” is also used to refer to these killings. They are committed outside the judicial process and in violation of national laws and international standards forbidding the arbitrary deprivation of life. They are

See Amnesty International Report on Torture and Political Killings.

unlawful and deliberate: this distinguishes them from accidental killings and from
deaths resulting from the use of reasonable force in law enforcement\footnote{See \textit{Amnesty International Report on Torture and Political Killings.}}.

On March 1, the bodies of six residents of a Manipur fishing community,
including two women, were found in a river near Serou village in Thoubal
district: they were last seen alive near the village on February 25. Evidence
suggests that soldiers who were hunting for members of the People's Liberation
Army of Manipur, who had been active in the area, killed them. In a 1997 report,
Amnesty International concluded that the pattern of killings in the northeast
pointed to an official policy sanctioning extrajudicial killings\footnote{See \textit{Amnesty International Report 1997.}}.

According to the NHRC's most recent report, 259 complaints of alleged
human rights violations by the border security force had been registered between
January 1, 1990 and March 31, 1997. During the same period, only 31
investigations into allegations of human rights abuses by members of the army
had been completed, resulting in the conviction and sentencing of 81 armed forces
personnel, including 29 officers\footnote{See \textit{National Human Rights Commission annual Report 1998.}}.

Scrutiny by the NHRC and international human rights organizations, when
permitted, and the persistence of individual magistrates have resulted in greater
accountability of the security forces in Jammu and Kashmir over the years. The
NHRC in its 1996-1997 report noted that the security forces are making a
conscious and serious effort to exercise restraint. Despite this effort, the NHRC
continues to receive complaints alleging human rights violations by the security
forces, especially from Jammu and Kashmir and the northeastern states. The vast
majority of violations by security forces has gone and continues to go
uninvestigated and unpunished.

There were many allegations that military and paramilitary forces in the
northeast engage in arbitrary detention, abduction, torture, and extrajudicial
execution of militants, as well as rape. The Armed Forces Special Powers Act of
1958 and the Disturbed Areas Act remained in effect in several states, i.e., in Jammu and Kashmir, Nagaland, Manipur, Assam, and parts of Tripura. Human rights activists remain concerned about the reports of deaths that are described as having occurred during "encounters" between insurgent groups and security forces. Several activists allege that the "encounters" are staged and that those insurgents reported dead were killed after being detained by security forces.

During 1991-1992, there were massive encounter deaths in the north eastern states. The persons who died in these encounter deaths were - Ratul Tanti, Lakhi Nath, Sagar Das, Suksheshwar Deka, and Pabitra Deka.

Since 1980 clashes between police and Naxalite Maoist revolutionaries of the People's War Group (PWG) have taken place in northwestern Andhra Pradesh. Over the past few years, hundreds of policemen and suspected Naxalites have been killed, according to press reports and human rights organizations. According to local human rights groups, 174 persons were killed in police "encounters" in the first 8 months of the year. Seventeen years of guerrilla-style conflict have led to serious human rights abuses by both sides. Human rights groups allege that the police to cover up the torture and subsequent murder of Naxalite suspects, sympathizers, or informers usually fakes "encounters". These groups cite as evidence the refusal of police to hand over the corpses of suspects killed in "encounters," which are often cremated before families can view the bodies. Villagers in PWG-dominated areas complain of regular harassment and arbitrary detention by police. Police officials rarely if ever are held accountable for human rights abuses.

The NHRC is investigating some 285 reported cases of so-called "fake encounter deaths" allegedly committed by the Andhra police in connection with anti-Naxalite operations. In its report the NHRC stated that the evidence on

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54 See N. Jayapalan, "Human Rights", Atlantic Publisher and Distributor, 2000 p. 48.
56 See Andhra Pradesh Civil Liberties Union, report 1981.
record did not show in any of the cases "that any prior attempt" was made by the police to arrest the deceased persons. The report observed that in "none of these encounters, did police personnel receive any injury", while one or more persons from the other side died. The Commission further observed that "no attempt whatsoever" was made to ascertain the identity of the police officers that fired the bullets that caused the deaths, and that no attempt was made to investigate the circumstances under which the police opened fire. "As this appeared to be the pattern of the procedure followed by the police", the report concluded, "the Commission felt it necessary to conclude that the procedure followed by them was opposed to law".

While extrajudicial killings continued in areas buffeted by separatist insurgencies, the press and judiciary also continued to give attention to fake encounter killings and to deaths in police custody. The NHRC has focused on torture and deaths in custody. It has directed district magistrates to report all deaths in police and judicial custody and stated that failure to do so would be interpreted as an attempted cover up. Magistrates appear to be complying with this directive. However, the NHRC has no authority directly to investigate abuses by the security forces, and security forces therefore are not required to—and do not—report custodial deaths in Jammu and Kashmir or the northeast.

Killings and abductions of suspected militants and other persons by pro-government counter-militants continued as a significant pattern in Jammu and Kashmir. Counter-militants are former separatist militants who have surrendered to government forces but have retained their arms and paramilitary organization. Government agencies fund, exchange intelligence with, and direct operations of counter-militants as part of the counterinsurgency effort. In sponsoring and condoning counter-militant activity, which takes place outside the legal system, the Government cannot avoid responsibility for killings, abductions, and other

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abuses committed by these irregulars.

2. Political murders, disappearances, torture: Frequency and Methods

Though human rights organizations welcomed the Government's decision to accede to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, they believe that its decision not to accept Articles 20, 21, and 22 of the Convention would effectively undermine the U.N. Human Rights Commission's ability to investigate allegations of torture once the Convention is ratified. So far the Government had not ratified the Convention.

Political killings, extrajudicial executions and disappearances continue across India. State agents, non-State agents, fundamentalist religious groups and political hoodlums regularly use terror tactics and violence for their own purposes.

In India, torture is not prohibited by the Constitution. But the Ministry of Home Affairs has claimed that Indian laws contain adequate provisions for safeguarding human rights and that sufficient safeguards against police brutality and torture also exist. In order to extract confessions or for purposes of intimidation, the Police use extreme type of physical harm to the suspected persons. In Punjab suspects under interrogation were said to be routinely tortured. Many of the 780 untried political detainees held in Amritsar Central Jail complained to a judge in February that they had been tortured during several weeks of illegal detention in previous months before their arrest was formally acknowledged.

The most common forms of torture are: severe beatings; the crushing of leg muscles by heavy wooden rollers; the dislocation of joints, particularly the hips, following the suspension by hands behind the back or the prising apart of the legs; electric shocks; the application of chilli and other hot spices to open wounds and hanging people upside down.

Such methods were particularly common during the investigation of ordinary criminal offences, such as theft, and are most widely used against the poorer sections of Indian society, notably the adivasis, tribals and harijans. Cases of torture and death in custody are widely reported in press and in number of instances have been investigated by Civil Liberties Organisations. When Magisterial inquiries found that deaths in custody were due to police brutality the only punishment that the guilty officials were given is that they were usually suspended from duty or transferred. Sometimes police officials were later on reinstated.\(^1\)

In the State of Jammu and Kashmir the Amnesty International listed 706 cases of torture as on 31st January 1995 but the government has brushed aside the allegations by observing that "generalisations cannot substitute facts". The government held 273 of the 519 listed cases to militants killed in encounter and cross firing. In respect of 81 others go it held that reports were ever lodged with the police, while 32 persons were considered as intranced.\(^2\).

A good number of persons disappeared during the Army custody. Killing of arrested persons and suspects in the Army custody was a routine matter in Manipur.\(^3\) With the delayed legal proceedings, hundreds of people suffered from widespread fear psychosis.

In 1991, an investigation into the "disappearance" of Javed Ahmed Ahanger was carried out by an Additional District and Session Judge, Srinagar, on the direction of the Jammu and Kashmir High Court. His report was submitted to the court in 1992. After examining several witnesses, including police officers, the judge found that there was evidence to show that Javed Ahmed Ahanger had been arrested by members of the National Security Guard and that he had subsequently...

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\(^1\) See Black Laws 1984-1985, People’s Union For Civil Liberties, pp. 66-70


\(^3\) See Resistance, English Weekly, 21/10/1980, Imphal, Manipur.
"disappeared". He also expressed grave concern that despite the fact that a complaint was lodged with police by Javed Ahmed Ahanger's father in 1991, it was clear that no investigation had been carried out by police⁶.

Another such case of disappearance is of Harjit Singh, the son of Kashmir Singh, an employee of the Punjab State Electricity Board. "disappeared" after his arrest by Punjab police on 29 April 1992. Following appeals for his release, the police claimed that he was arrested on 11 May 1992 and that he was killed in an "encounter" on the following day. Harjit Singh's relatives dispute this claim and refer to several sightings of Harjit Singh in police custody.

In a hearing in October 1992 of the habeas corpus petition filed by Kashmir Singh regarding his son's "disappearance", a warrant officer was appointed by the High Court to search for Harjit Singh. The warrant officer, Kashmir Singh and a relative visited the Mal Mandi Interrogation Center, Amritsar on 17 October and reportedly caught sight of Harjit Singh behind the bars of a window on the first floor of the interrogation center. When they were finally granted access to the interrogation center by a police officer who initially refused them entry, Harjit Singh was not there. As a result of this incident, the High Court appointed a session's judge to inquire into whether Harjit Singh was present at the Mal Mandi Interrogation Center or whether he was killed in crossfire on 12 May 1992. The High Court requested the session's judge to conclude the inquiry within three months.

On 28 November 1995, the findings of this three-year inquiry were finally disclosed to the High Court of Punjab and Haryana. The report noted that the state authorities did not fully support their version of the arrest and subsequent death of Harjit Singh with evidence. It also revealed that the police did not follow arrest and detention procedures fundamental to ensuring the protection of the human

rights of prisoners and detainees as well as investigation procedures which would ensure independence and impartiality.

3. Encounter Deaths

A unique contribution of the police in India to the vocabulary of Human Rights is the phenomenon of death through encounter, initially implied an armed confrontation where fire was exchanged and in ensuing shooting, people were killed.

The government’s interpretation of an encounter is when a person is killed during a clash between security personnel and armed militant groups. In a common scenario members of the security forces are allegedly ambushed and during the crossfire suspects are killed. It is worth noting that in encounters, reported by the Indian media, members of the security forces are rarely killed or even injured. There is hardly any difference between an encounter and custodial murder. The state agencies become the law unto themselves and the police covert themselves into prosecutors, judge and executioner.

In Punjab, police has been following a policy of systematic elimination of youths after they are picked up from their own homes, their relative’s houses or even from jails. Some are shown to have been killed in “encounters”, a few in “inter-gang warfare”, some as “intruders from Pakistan” and some in “escape bid.”

The Sangrur jail killing report is an eye opener. The death of Mr. Balbir Singh and Gumail Singh by Sangrur police, murder of Bobby and Bharpur Singh alias Bittu and other many such like cases have been reported by Human Rights Organisation.

On July 13, 1991 in Pilibhit district of Uttar Pradesh 10 Sikh pilgrims were

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55 See Amnesty International Report, 1996.
killed by U.P. police in false encounters. The Government conceded the demand of agitated members in the Lok Sabha to send a team of the House to inquire into these killings.\(^\text{30}\)

The Kashmir Monitor, a human rights group, compiled the following figures on encounter deaths. Table V

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<th>Year</th>
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National Human Rights Commission has directed that all deaths in encounters are immediately investigated by an independent agency, but members of the security forces are rarely held accountable for these killings. The NHRC itself may inquire into alleged human rights abuses by security forces in Jammu and Kashmir, but does not have the statutory power to investigate such allegations if it is not satisfied with the responses to its inquiries. Authorities generally have not reported so-called encounter deaths occurring in Jammu and Kashmir to the NHRC.

Many incidents of violence in Kashmir go unattributed and unpunished. The government denies that torture is practiced systematically and as a matter of policy in Kashmir. However, it has not made public any investigations into any of the many documented cases of torture, nor has it ever announce that a member of the security forces was prosecuted or punished for torture.

On February 23, 1995, in Wokha town in Nagaland, the soldiers of 12 Assam Rifles fired indiscriminately while trying to nab a militant, injuring two civilians seriously, including an eight-year-old girl.\(^\text{71}\)

On December 27, retaliating to the death of a lieutenant colonel and a jawan killed by the NSCN, the 16th Maratha Light Infantry opened fire in the civilian

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area of the Mokokchong town of Nagaland. The two-hour firing left 10 civilians dead, 89 shops and 48 houses gutted and over 20 vehicles charred.2

4. Draconian Legislation

Preventive Detention was authorised in India in the first half of the Twentieth century by the Defence of India Acts of 1915 and 1939, by the Government of India Act of 1919, the infamous Rowlatt Act 1919, and The Bengal Criminal Law Amendment Act of 1925. Under some of these detention laws a prisoner could be detained for six months without informing him of the grounds of his arrest. Only if the detention period was to be extended would the prisoner be informed of the grounds for his arrest and be referred to a special tribunal.3

Since independence, the Government of India had been passing legislation that violates the fundamental rights and liberties of the Indian people. These acts infringe fundamental rights, are devoid of the principles of natural justice and invest arbitrary powers in the hands of law enforcement agencies. They are passed with a specific purpose but are entirely misused. There are forty such laws presently on the statute book in India. What is most disturbing about all these pieces of legislation are the precedents set by their implementation. In essence new procedures, a new hierarchy of courts, new restrictions on the life and liberties of the people and in short, a new structure of democracy in the name of securing public order which gives wide powers to the law enforcement authorities are being created, gradually eroding the democratic process.

When the Constitution came into force on 26 January 1950, several provincial acts and ordinances providing for preventive detention became void because they were inconsistent with part three of the Constitution of India, which guarantees fundamental rights and liberties to the citizens. Article 22 of the constitution, which guarantees protection against arrest and detention and also laid down the scheme under which a preventive detention law could be enacted.

2 Ibid. p. 83.
Just one month after the Indian Constitution came into force, on 26 February 1950, the government of India enacted a central legislation: the Preventive Detention Act (PDA), 1950. It was originally enacted as a temporary legislation and was to expire in 1951 but its life was extended through various amendments until 1969. The Defence of India Act (DIA) was passed in 1962, the maintenance of Internal Security Act (MISA) in 1971 and Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPSA), 1974.

The cause of many of the state’s human rights violations comes directly from the legislation enacted to combat armed militancy.

Sweeping in their scope, these Acts counter vaguely defined offences and are draconian in implementation. They are open to abuses at both local and national levels. Two of the prominent emergency measures are the National Security Act (NSA), 1980 and, formally, the Terrorist and Disruptive Activities (Prevention) Act (TADA), 1985. Issues for concern include: the condoning of confessions as evidence (a procedure commonly frowned upon in normal legislation because it encourages torture); some Articles presume guilt with the suspect having to prove their innocence; the reason for detention can be withheld from the detainee; the identity of witnesses can be kept secret; a suspect can be detained for a maximum of one year (with the potential of additional detention periods); bail is unlikely; and, during detention, access to a lawyer, doctor or magistrate is forbidden and even family visits are considered a luxury (in other words if the family can bribe the Station House Officer).\(^4\)

Extraordinary situations require extraordinary powers. And extraordinary powers produce extraordinary results. A draconian law was introduced in 1985, TADA—where bail can be denied and confessions can be forcibly extracted. TADA was a harsh law. But was it a rational law? To think that only a draconian law “can protect the integrity and survival of a legal order” is to betray lack of faith in the Rule of Law. The harsher the law, the greater is the threat to liberty and

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human dignity. Power corrupts and absolute power corrupts absolutely is a dictum which could not have been ignored.

Ordinarily, the police investigators work on suspicion. They believe that the person they have caught is the right person. But what is forgotten is that they have no right to judge. The police when faced with difficulties argue that it is possible to tackle criminals unless the usual safeguards are relaxed for a period of time and they are allowed to assume the role of judge and jury. TADA law was just this.

It enabled the police to extract confessions not only from the concerned accused, but also from other accused. Some of the reasons given for the introduction of TADA were:

a) The bomb blast in Delhi in 1985,

b) The massacre of thousands of Sikhs after the assassination of Indira Gandhi. In Oct. 1984 the Prime Minister, Mrs. Indira Gandhi, was shot by her Sikh bodyguards. After her assassination, thousands of innocent Sikhs were butchered in Delhi and elsewhere. In retaliation, Sikh militants struck terror in the capital by planting transistors bombs and other explosive devices that left many innocents dead or maimed. And TADA was enacted in this background.

c) The spread of terrorism in Delhi, U.P., Haryana, Punjab, Rajasthan and other states of the country.

d) The Naxalite problem.

Civil liberties groups and Human Rights activists including the "People's Union for Democratic Rights (PUDR), the People's Union for Civil Liberties (PUCL) and the Committee for the Protection of Democratic Rights (CPDR) have been carrying out a sustained agitation against the indiscriminate use of TADA.

It is been stated in one of the newspaper that "the state has armed police aggression..."
further through the recent laws, such as NSA and TADA, which have virtually formalised this licence to kill. Police “encounter” deaths are rampant and no longer investigates, particularly in Andhra Pradesh and Punjab. Where words such as Naxalites and terrorist have become blanket, permits to rob the citizens of his basic fundamental right; the right to life\(^5\).

According to India’s then Minister of State for Home Affairs, M.M. Jacob, 1101 persons were arrested in 13 of the 25 states under the NSA in the first nine months of 1991 and a total of 26,915 had been detained under TADA between 1988 and 1991.\(^6\) In the case of latter the highest figure was recorded. For instance, in Kashmir Amnesty quotes unofficial sources as estimating that between 10,000 and 15,000 were detained without trial in the first seven months of 1990.\(^7\)

While it was Rajiv Gandhi’s Congress(I) government that brought in TADA, the five states that made great use of TADA in 1989-91 included three-Gujarat, Assam and Andhra Pradesh—were non Congress (I) administration were in power for atleast half this period. Shortly before the regional Telugu Desam (TD), a constituent of the National Front opposition to the Congress (I), lost office in the southern state of Andhra Pradesh in November 1989, a report by the Delhi based People’s Union for Democratic Rights noted that a total of 395 people had been killed by the security forces since the TD had come to power in 1983.\(^8\)

In September 1989 the persons who face the prosecution under TADA were adivasis, as were 100 of the 110 in the Bastar district of the neighbouring central Indian State of Madhya Pradesh.\(^9\) In Gujarat the Act was used against trade unionist and agitating landless labourers, three-quarters of those held under TADA at the end of 1989 were Muslims.\(^10\) Whereas in the neighbouring state

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\(^5\) See *Indian Express*, 19/02/1988.
\(^6\) See *Times of India* (Bombay), 5 December 1991; *Indian Express* (Delhi), 3 December 1991.
\(^8\) See *People’s Union for Democratic Rights, Civil Rights under NTR Regime* (Delhi: PUDR), 1989.
Rajasthan out of 228 TADA prisoners in October 1991, 119 were Muslims, 96 Sikhs and only 13 Hindus\(^3\).

The government used TADA as a tool to fight trade unions and to detain Muslims, Sikhs, Dalits, and political opponents. Over 76,000 people were arrested while TADA was in force from 1987 to 1995. The conviction rate for these arrests was less than two percent. In the period since 1987 to its repeal in 1995, some 17,544\(^4\) persons suspected of terrorist activities were detained in Punjab under its provisions.

Although the law that had been subject to the most extensive abuse—the Terrorist and Disruptive Practices (Prevention) Act (TADA)—lapsed in May 1995, 1,502 persons previously arrested under the act continued to be held as of January 1, 1997 in a number of states\(^5\). A small number of arrests under TADA continued for crimes allegedly committed before the law.

TADA, which has been lapsed for more than six years, seems to be re-awakened in the form of POTO. It is been regarded as new avatar of TADA. Prevention of Terrorism Ordinance (POTO) provides for stringent and punitive provisions against anyone remotely suspected of "harboring or concealing a terrorist; or those accused of abetting, conspiring, advocating, inciting, advising or facilitating such persons or those who can be considered members of a terrorist property or funds or are in possession of undisclosed information of terrorist activities except privileged communication to a legal practitioner"\(^6\).

Under this new ordinance, bail to the accused can be granted after detention of one year, but no anticipatory bail is permissible. POTO will adversely erode the right to liberty and security of a person. There is no provision for challenging the sufficiency of the prosecution evidence prior to the trial. This results in increase in undertrials. Moreover, it gives the power of determination of bail to

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\(^3\) See Tavleen Singh, The law that strikes Terror, _Indian Express_, 10/10/1991.

\(^4\) See _The Tribune_ 01/06/1994.

\(^5\) See NHRC annual report 1997.

\(^6\) See Radhika Sachdeva, "TADA in a new avatar?", _The Hindustan Times_, 18/11/2001
the public prosecutor. If the public prosecutor opposes bail, it should not be granted unless the "court is satisfied that there are grounds for believing that the accused is not guilty of committing such offence"\textsuperscript{87}. This new Ordinance has armed the police with wide powers to intercept all kinds of communications, make searches without warrants, and effect arrests on the basis of suspicion under preventive detention laws. Police Officers not below the rank of Superintendent of Police are authorized to seize the properties/proceeds from terrorism with prior approval of Director-General of Police. For the first time, the new Ordinance provides for punishment to the police in cases of wrongful arrests.\textsuperscript{88} It is not confined to any specified territory or situation, it can be applied even in cases of robbery, and murder or theft that would normally covered under the IPC.

The difference between POTO and TADA are given in Table VI.

\textbf{Table VI}

<table>
<thead>
<tr>
<th>TADA</th>
<th>POTO</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) Both the centers and the state can impose the TADA, (both are independent). The center does not require the permission of the state were it is going to impose TADA and vice versa.</td>
<td>1) It gives the police 48 hours after an arrest to record the confession before the judicial magistrate.</td>
</tr>
<tr>
<td>2) The TADA can be imposed by notification.</td>
<td>2) It will be applicable for five years</td>
</tr>
<tr>
<td>3) Just after the notification, the government will constitute a designated court headed by an executive magistrate.</td>
<td>3) Police Officer not below the rank of Superintendent of Police is authorized to seize the properties from terrorism with prior approval of Director-General of Police.</td>
</tr>
<tr>
<td>4) The accused can be detained without trial from 90 days to 1 year.</td>
<td>4) Interception of communication is permitted with prior approval from &quot;competent authority&quot; not below the rank of secretary, government of India/state.</td>
</tr>
<tr>
<td>5) The self-incriminating evidence will be accounted or entertained.</td>
<td>5) If person is convicted under this act, the onus of providing that he is not guilty will fall on that person;</td>
</tr>
<tr>
<td>6) The witness is not required to disclose his identity.</td>
<td>6) No provision of review for 5 years; &amp;</td>
</tr>
<tr>
<td>7) The next court after designated court is supreme court.</td>
<td>7) It is not confined to any specified territory or situation; it can be applied even in cases of robbery, murder, or theft that would be normally covered under the IPC.</td>
</tr>
<tr>
<td>8) This was to be revived after every two years.</td>
<td></td>
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</tbody>
</table>
Judiciary: a ray of hope in darkness

The basic mechanism for proper enforcement of all laws is an independent judiciary. The Constitution has assigned a significant role to the judiciary in our legal and constitutional system. It has been playing its role as a sentinel of human rights and constitutional rights. The main function of judiciary is to check whether use of torture is common in crime investigation and if it is, how it should be stopped, and also, modern equipment are provided for proper crime investigation. Moreover, the help, which the judiciary can give, will be moulded by the laws that we have, judicial activism notwithstanding. We have to guard against legislative inaction or failure as much as against administrative inaction or failure.

Ironically, the first case to come up before the Supreme Court of India in 1950 was to judge the validity of the provisions relating to the preventive detention of the communist leader Mr A K Gopalan. The majority of the judges in Gopalan’s case confirmed the validity of the Preventive Detention Act. Article 21 of the Indian Constitution guaranteed to every person the right to life and liberty, a right that could not be denied without violating the due procedure established by law. In A K Gopalan’s case, the Supreme Court distinguished “procedure established by law” from the "due process of the law" by stating that any procedure duly enacted by the legislature would be a "procedure established by law". This trend of the Supreme Court continues today.

The judiciary is the basic structure for protection of human rights at national level. The helpless victims of custodial crimes consider it their only ray of hope.


See Criminal Law Journal (Cr. L. J. 632 (637) 1970): Custodial crime is defined the period when some limitation is placed upon the liberty of the deceased and that limitation must be imposed, either directly or indirectly.
Therefore, a duty is cast upon the judiciary to help preserve the judicial process for the protection of the rights of individual in detention.\(^2\)

As observed by the Committee of Ministers of the Council of Europe\(^3\): -

Custody pending trial should be ordered only if there is reasonable suspicion that the accused has committed the alleged offence and that he is likely to absconds, interfere with the course of justice, or commit a serious offence.

The positive attitude of the court received a serious jolt during the dark days of emergency when the enforcement of a number of fundamental rights including right to life and personal liberty was suspended by the Presidential order. The Supreme Court in A.D.M. Jabalpur vs. Shukla,\(^4\) opined:

So long as the order of the President under Art. 369 during the emergency suspending the right to enforce Art. 21 remains in force, no person has any locus standi to move any writ petition ... to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiates by mala fides, factual or legal or is based on extraneous considerations.

Thus, during the emergency the fundamental rights of the prisoners received a serious set back due to the negative attitude of the Supreme Court. After the emergency, it shed its passivity and started upholding the individual’s basic rights and liberties. The new judicial activism was evident in a number of its judgements delivered in the post-emergency era. Public Interest Litigation is the leading instrument of this change. Thanks, to this kind of litigation, issues of locus standi.

\(^3\) Recommendation No.R (80) concerning custody pending trial.
burden of proof, time constraints, and legal aid has all been interpreted so as to benefit victims of human rights violations.95

Public Interest Litigation as an instrument for the protection of human rights has been popularised by the civil rights movement in the country. In the famous Asiad Case 198296 the apex court made it clear that the affected group might not be in a position to approach the court directly, in order to facilitate delivery of justice for that group, the court held that any citizen with social conscience can file the petition, which would be taken note of.

PIL as a judicial response to violation of human rights emerged out of long struggle for civil rights in India. Justice P.N.Bhagwati and Justice V.R.Krishna lyer took upon themselves the activist role in providing justice to the needy.

The concept of Public Interest Litigation has played a humanising role in the sphere of custodial violence, pertaining to pre-trial detainees. This is also evident from the second periodic report of the UNHCR97, which has stated that:

"The Supreme Court in India and the various High Courts of the individual states ensured the effective implementation of Human Rights through a liberalised review of administrative action. Such liberalisation has led to the growth of Public Interest Litigation and seizure of Court's jurisdiction in such matter even on the basis of post-cards or telegrams received from individuals or of stories or reports published in magazines or newspapers and the provisions of compulsory legal aid to the needy".

Public interest litigation is often concerned with redressal of damage to the public at large. Sometimes petitions are presented to secure group rights; as for example, in the case of bonded labour, where individuals are not in a position to

come forth to assert their rights before the courts. Sometimes a representative action can be brought by the affected class itself. This is obviously a remedy most suited to enforcement of Human Rights of large groups of people.

The Supreme Court has permitted such litigations in Vina Sethi v. State of Bihar\(^a\), Kadra Pahadiya and Ors. Vs. State of Bihar\(^b\), Sunil Batra vs. Delhi Administration\(^c\).

It has also permitted for compensation to the affected whether it is police excesses, environmental disaster or the like. In Pratul Kumar Sinha vs. State of Bihar\(^d\), police atrocities lead to the death of three young persons. One of them was bachelor while the other two were married and left behind their young widows. The Court issued directions for the ex-gratia payment of Rs. 25,000 to the families of the deceased. The court further held that if the state government so desires it would be free to take such action as it considers necessary to recover this amount from the tortfeasors.

In enriching the contents of fundamental rights to and compelling the authorities to do their mandatory duties, under the law or to refrain from doing them against law, or in setting aside the accomplished illegal acts, the judiciary only performs its duty.\(^e\) No one can deny that the executive, the legislative and the judiciary should function in harmony. But cordial relation between the different institutions is not an end in itself and can certainly not be used as a shield against accountability.

Recently in TADA case\(^f\), Supreme Court expressed its distress and concern over atrocities and brutalities by overzealous police officers. Court, observed, in their anxiety to collect evidence against the accused, police were using methods leading even to custodial deaths.

\(^a\) See Vina Sethi vs. State of Bihar 1982 (2) SCC 583.
\(^b\) See Kadra Pahadiya and Ors. vs. State of Bihar 1983 (2) SCC 104.
\(^c\) See Sunil Batra vs. Delhi Administration AIR 1980 SC 1579.
\(^d\) See Pratul Kumar Sinha vs. State of Bihar, 1994 SCC 100.
\(^e\) See H.R.Khanna, Judicial Activism : Courts as Trustees of the Constitution, Politics India, April 1996, p.11
\(^f\) See 'SC Verdict Blunts TADA' The Sunday Times of India. New Delhi, 13/03/1994 p.3.
Another area where the Indian judiciary has shown its wisdom in the protection of human rights is—"prison justice". The Indian judiciary, particularly the Supreme Court in the recent past has been vigilant against encroachments upon the human rights of the prisoners,[104] which is been dealt in the next chapter.

There is no doubt that the court has become a battle ground for interesting and even conflicting ideals and ideologies relating to human rights and their enforcement. In the process, the courts have become even more crowded than before. But that is no reason why Human Rights litigation should not get priority. The correct answer is to take steps for decongestion of courts. But in this arena of Human Rights jurisdiction, the most important single factor which stands out is the universal acceptance of human Rights and their being projected as a test for judging the philosophy and the very existence of any civilised society in any nation, irrespective of past history or its current ideology[105].