The majority of countries in the world have made a formal commitment to the eradication of torture. The Convention against Torture currently obliges 136 State parties to prevent, repress, punish and compensate acts of torture committed within their jurisdiction. Many other international instruments and the national laws of a majority of nations have the provisions relating to prohibition against torture. The International Law prohibition against torture is expressly non derogable even in times of public emergency.

Despite these prohibitions, the published reports of bodies such as the UN Committee against Torture, the UN Special Rapporteur on Torture, the European Committee for the Prevention of Torture, the Inter-American Commission on Human Rights, the International Committee of the Red Cross, Amnesty International and Human Rights Watch amply confirm that torture remains a reality in all parts of the world.

This study has sought to answer some important questions. The first question is in what ways there has existed a gap between law on torture – particularly the international norms relating to prohibition-and State practice regarding torture. The second issue addressed is the liability of State to protect the victims of torture and the role played by various Government instruments viz. Judiciary, NHRC and Non-Government Organizations (NGOs) etc.

The Vedas, the material religious works of the ancient Hindus, that offer guidance, *inter alia*, on religious and social obligations constituted the base on which the Hindu law was built.

The philosophy of human rights in the world over has today proved to be dynamic and in continuum transformation. The challenge is to achieve the appropriate balance between, the need to maintain the integrity on the one hand and credibility of the human rights tradition, on the other hand.

According to Justice V.N. Venkatachaliah, the ‘Human Rights’ philosophy is the ‘quest for translating the International standards of human rights from phrase to action’. The incorporation of a bill of rights in written Constitution is to incorporate the Human Rights regime into the municipal law and make them justifiable and enforceable. If it is so incorporated in the Constitution, Human Rights transforms themselves into enforceable
rights. India has made sincere efforts for the protection and promotion of Human Rights and is the greatest champion of the Human Rights.

Police is one of the means by which State seeks to meet its obligations to protect ‘Fundamental Human Rights’ i.e. right to life, liberty and security of persons, right to fair trial and equal protection of law. The term ‘police’ is defined as the civil force of a State, responsible for maintaining public order. The Willink Commission on Police Reforms constituted by the Government of United Kingdom described the term police as, ‘the police in this country are the instrument for enforcing the rule of law, they are the means by which civilized society maintains orders, which people may live safely in their homes and go freely about their lawful business. Basically, their task is the maintenance of the Queen’s Peace – that is the preservation of law and order. Without this, there would be anarchy.’ Sutherland is of the opinion that police refers primarily to agents of State whose function is the maintenance of law and order and especially the enforcement of regular Criminal Code.

The Police Act of 1861 was the first endeavor to introduce a law enforcing agency with a uniform structure in the greater part of India. The police system created by the Act of 1861 has been retained in the independent India.

Unlawful policing only results in suppression of ‘Human Rights’. It is often witnessed as paradox that human rights are protected by law and are often at risk at the hands of enforcers of law. Police atrocities are a common feature of Indian scenario. Some of the common features of violations of human rights are the torture of arrested persons, the disappearances of suspects who ought to have been in regular police custody, deaths in false encounters and at police stations and undertrials detained in jails for years without trials. Custodial Violence is common in the spheres of crime investigation to extract information/confession about crime and to recover property. It also occurs in maintenance of law and order situations particularly while dealing with political violence like terrorism, extremism etc.

Torture is generally defined as an instrument to impose the will of strong over the weak by suffering. As described by 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”.
In India, where the majority people are illiterate, ignorant and poor, they are likely to be more prone to inhuman treatment and exploitations. Many factors can be attributed to the courses of the human rights violations in police custody such as, familial, social, economic traditions, political etc. Inadequate and improper training of police personnel, corruption, lack of human rights awareness, non-use and non-availability of scientific means of investigation and interrogation, absence of effective system of collection of evidence, lack of necessary infrastructure in police stations, work load of police personnel, understaffing in the police stations, insufficient judicial vigilance and other supervisory mechanism, delay in criminal justice system etc. have also contributed to the infliction of torture by the police on persons in their custody. Torture may result in the following forms; giving electric shocks, brutal use of lathis/pattas, burning of fingers, limbs with flames, threshing private organs, denying food, water for days, raping or assaulting the accused, ignoring medical aid.

Torture is banned as a matter of customary international law and this prohibition is enshrined in a number of international legal instruments and by a variety of international and regional Courts and institutions. The prohibition of torture is also considered to carry a special status in general international law, that of *jus cogens*, which is a ‘peremptory norm’ of general international law. General International law is binding on all States, even if they have not ratified a particular treaty. Rules of *jus cogens* cannot be contradicted by treaty law or by other rules of international law.

The prohibition of torture is found in Article 5 of the Universal Declaration of Human Rights (1948) and a number of international and regional human rights treaties. These include, the International Covenant on Civil and Political Rights (1966), the European Convention on Human Rights (1950) the American Convention of Human Rights (1978) and the African Charter on Human and People’s Rights (1981). The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (1987) and the Inter American Convention to Prevent and Punish Torture (1985) have drawn up specifically to combat torture.

The absolute prohibition of torture is underlined by its non-derogable status in human rights law. There are no circumstances in which States can set aside or restrict this obligation, even in times of war or other emergency threatening the life of the nation, which may justify the suspension of limitation of some other rights.
An order from a superior officer or a public authority may not be invoked as a justification for torture. States are also required to ensure that all acts of torture are offences under their Criminal Law, establish criminal justification over such acts, investigate all such acts and hold those responsible for committing them to account.

Torture is also considered to be a crime against humanity when the acts are perpetrated as part of a widespread or systematic attack against civilian population, whether or not they are committed in the course of an armed conflict. As provided by Article 3 of the Geneva Convention and various provisions of the Geneva Conventions and the Additional Protocols of 1977 banned torture in humanitarian law. Article 7 of the Rome Statute of the International Criminal Court included torture and rape within the Court’s jurisdiction.

The Convention against Torture prohibited the forcible return or extradition of a person to another country where he or she is at risk of torture. Statements made as a result of torture may not be invoked in evidence except the alleged torture. Victims of torture have a right to redress and adequate compensation. At the international level, a significant effort has been made to combat the practice of torture in all its forms.

Much before India signed and ratified the international instruments and became party to various UN Declarations, the concept of prohibition of torture, especially when committed by the law enforcement officers, had been in India as early as 1860 when the Indian Penal Code was enacted. Sections 330 and 331 of this Code expressly prohibited acts of torture, cruel, inhuman or degrading treatment by the police or other law enforcement officers as an offence punishable with the imposition of penalties. Section 163 of Code of Criminal Procedure, 1973 and Police Act of 1861 prescribed various tasks to be fulfilled by the law enforcement agencies, which can be used as tools to prevent custodial violence. Indian Evidence Act of 1872 also prohibited custodial violence or torture under Sections 24, 25 and 26.

Custodial torture causing physical or mental harm, to the accused person or suspect directly affects his fundamental right of freedom and is also a gross violation of Article 21 of the Indian Constitution. The Supreme Court through a number of landmark decisions, upheld protection of life and personal liberty, protections against inhumane treatment, prison torture and police atrocities. But in spite of all these efforts to combat torture, custodial torture still constitutes a chronic reality.

When the inmates in the custody happen to be women, they are subjected to torture and ill treatment. The provisions under the Indian legal system relating to arrest
and detention of women are in routine violated by police personnel. Article 15 (3) of the Indian Constitution permitted the State to make special provision for women, in order to safeguard them and to protect their interest. The Criminal Procedure Code, 1973 provided for a number of checks to curb the police atrocities on women. Indian Penal Code, 1860 was amended to provide deterrent punishment in such cases. But the practice is always otherwise. The policemen did not spare even minor girls from torture as is evident by the Mathura Rape case. The Government set up a National Expert Committee on Women Prisoners in 1986 under the chairmanship of Justice V.R. Krishna Iyer. The Committee reported various methods of torture met out to the women in which women police also participated.

On 26 April 2010, the Prevention of Torture Bill, 2010 was introduced in the Lok Sabha to allow India to ratify the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. The Bill contains only three operative paragraphs relating to (i) Definition of torture, (ii) Punishment for torture, (iii) Limitation for cognizance of offence. It excludes many of the key provisions of the United Nations Convention against Torture. Under the proposed torture bill there is no separate provision relating to torture of women and children under custody. Section 3 of the Bill defines torture as: whoever being a public servant or being abetted by a public servant or with the consent or acquiescence of a public servant, intentionally does any act for the purpose to obtain from him or a third person such information or confession which causes:

(i) grievous hurt to any person or

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

is said to inflict torture.

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

The US Senate ratified the Convention against Torture in 1994, but applied a number of reservations, declarations and understandings to the Convention. US firstly attached declaration that the Convention is not self-executing; it means domestic legislation to be implemented. The justification given by the US authorities was that the US had already sufficient legislation to prohibit torture. The Committee against Torture stated that US domestic legislation is not effective in implementing Convention against Torture. In 2002, the Bush Administration narrowly interpreted the definition of torture mentioned in Convention against Torture, so that, only those acts that were equivalent to
intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death would count as torture—a far more restrictive, standard that what the Committee against Torture has set up in its own interpretations. Additionally, by defining torture so strictly and limiting the scope of inhuman and degrading treatment under Article 16 to only the protections offered by the US Constitution, the US narrowed the scope of where and to whom the Convention against Torture prohibition applied. For example, it is a contested issue to whether Convention against Torture applies outside US territorial jurisdiction to military bases and other such sites.

The International Covenant on Civil and Political Rights has been ratified by the United Kingdom but not incorporated into English Law. The European Convention has been incorporated into United Kingdom Law by the Human Rights Act 1998 and the provisions of the Convention against Torture have been incorporated by Section 134 of Criminal Justice Act, 1988. Section 134 of Criminal Justice Act of 1988 criminalized acts of torture and conferred exceptional extraterritorial jurisdiction on United Kingdom courts to hear such cases. However this provision, by itself, is not sufficient to guarantee successful prosecutions. Competent and properly resource mechanisms for the investigation and prosecution of international crimes is crucial. The United Kingdom introduced a scheme of Criminal Injuries Compensation. Under this scheme applications may be made to the Criminal Injuries Compensation Board for an *ex gratia* payment of compensation where the applicant sustained personal injuries. Compensation is assessed on the basis of Common Law damages but loss of earnings is limited to twice the average of industrial earnings and there is no element of exemplary or punitive damages.

In Canada, foreigners and the refugees enjoy an extensive protection of their rights. The Supreme Court of Canada ruled that the Canadian Charter applies to everyone and Canada expanded the refugee definition to protect those facing threats of torture. In Canada Compensation program was first initiated in Ontario in 1967 under the Law Enforcement Compensation Act. It was re-enacted in 1971 and further amended in 1973. Ontario program granted compensation both for injuries and death resulting from crimes of violence.

The Judiciary, Human Rights Commissions and NGOs have played a significant role to protect the victims of torture. The Bhagalpur Blindings episode, the Mathura Rape episode, the Indefinite Prisonization of undertrials episode and many other such incidents exposed the seamy side of our criminal justice system. All these episodes involved abuse
by custodial power. A study of the landmark decision of the Supreme Court and various High Courts reveals that Indian Judiciary has made a tremendous achievement in protecting custodial human rights and in facilitating effective reliefs to the victims of custodial violence and their relatives. On the other hand, Indian Criminal Justice system comprising of police very often violates the custodial rights, the judiciary tries to protect and promote human rights. It means our criminal justice system has a double face, one hurts and the other tries to heal.

Considering the increasing violence and to protect the victims the parliament has passed Human Rights Act of 1993. This Act empowers the Central Government to constitute National Human Rights Commission, State Human Rights Commissions and Human Rights Courts.

In the efforts to protect the victims of custodial torture, one of the first instructions issued by NHRC on 14 December 1993, required all State Governments and Union territory administrations to ask that reports be sent by the District Magistrates and Superintendents of Police to the Commission within twenty four hours of any occurrence of custodial death or rape and the failure to send such reports could lead to presumption by the Commission that an effort was being made to suppress the facts. It was due to the efforts of NHRC, that Government had included a statement in its Common Minimum Program that ‘the United Nations Conventions against Torture will be adopted.’ According to NHRC whenever human dignity is wounded, ‘flag of humanity on each occasion must fly half-mast.’

NHRC itself on the other hand felt that the provisions of the Act are not adequate for the better protection of human rights. The major factor about the ineffectiveness of the Commission is that it has no power to enforce its own decision. Where after the inquiry the Commission finds the violation of human rights by public servant, it can only recommend to the concerned Government or authority to prosecute such servant or it has to approach the Supreme Court or the High Court concerned for such directions, orders or writs.

The Protection of Human Rights Act, 1993 required the NHRC to encourage the efforts of NGOs working in the field of Human Rights. In the rehabilitation of the torture victims the NGOs has an important role to play as not only medical/clinical treatment is seemed enough there should be psychological stabilization of the victims, which has to be brought in through a gradual process by way of creating a confidence by remitting fear and guilt which often encompasses a poor victim of torture.
With the realization of the fact, that people throughout the world suffer harm as a result of crime and the abuse of power, the UN General Assembly adopted two resolutions dealing with the rights of victims. First, the Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 and second, the Basic Principles and Guidelines on the Rights to Remedy and Reparation for Victims of International Humanitarian Law, 2005. The UN Declaration recognized four major components of the rights of the victims of crime-access to justice and fair treatment, restitution, compensation and assistance.

In India immunity of the Government for the tortuous acts of its servants, even after the enactment of the Constitution which constitutes India into a socialist society and also contains an equality clause is still based on the principle of ‘sovereign’ and ‘non-sovereign’ functions as laid down by the Calcutta Supreme Court in 1861 and no sincere efforts has been made either by the Government or the Judiciary to eliminate this feudal and vague doctrine of governmental liability in tort. Article 300 of the Constitution determined the extent of immunity of the State for the torts of its employees in India.

There is no express provision in the Constitution to grant compensation in case of violation of human rights while ratifying International Convention on Civil and Political Rights, India made a specific reservation to the Article 9(5) which provides to grant compensation in case of unlawful arrest or detention by the State. The court used Article 21 of the Constitution to enforce rights guaranteed to the people and began to grant compensation in case of violation of human rights and it’s also clarified in number of cases that the sovereign immunity is not a defence in case of public law remedy.

It is now a well established proposition, that monetary or pecuniary jurisdiction, is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established violation of human rights. The purpose is to apply balm to the wounds and not to punish the offender, as awarding punishment for the offence be left to the criminal courts.

Despite a plethora of reports and declarations issued by non-governmental and inter governmental organizations, human rights and humanitarian instruments, conventions, regulations, recommendations, rules, declared and adopted both universally and regionally by inter governmental and decisions and judgments by regional and international bodies, torture and other forms of ill-treatment, however, continue to occur in more than half of all countries in the world. The following suggestions could be taken...
to ensure effective domestic compliance with international law and thus bridge the gap between the law on torture and practice:

- The Government of India signed the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 14 October 1997 but did not ratified it. The Convention against torture requires the State parties to prevent not only the acts of torture; it is to be modified incorporating the requirement to prevent the attempt, preparation, complicity and abetment to commit an act of torture.

- The right of not to be tortured should be explicitly enshrined within the Fundamental Rights chapter of the Constitution. In addition, torture should be prohibited as a distinct penal offence in the Indian Law.

- It is suggested that the First Optional Protocol to the International Covenant on Civil and Political Rights should be ratified by the Government of India which enables the individuals to file a complaint to Human Rights Committee for effective remedies against police atrocities, when all the domestic remedies are exhausted. The Government should take steps to take away the reservations it made while acceding to the International Covenant on Civil and Political Rights, so as to enable the Indian citizens the right to claim compensation in case of wrongful arrest or detention.

- India should ratify the Optional Protocol to the UN Convention on the Elimination of All forms of Discrimination against Women to enable the individuals to bring complaints to the committee about the violation of their rights under the Women’s Convention once they have exhausted national remedies.

- Arrests should only be made strictly in accordance with legal procedures and any lapse should attract penal punishment. There should be a single and comprehensive custody record for each detained person. Such custody record should contain the details of the arrest, the subsequent action taken, legal consultation, his physical health, mental condition, the details of those who visited him in custody, the kind of food offered to him, etc. The custody record should also contain all the whereabouts of the interrogation such as who interrogated him, duration of the interrogation, the presence of others, if any. Failure to keep proper records should be made an offence. Detainees should only be held in officially recognized places of detention. Where unrecorded detentions have been proven,
those responsible should be disciplined and prosecuted for unlawful imprisonment and the victim should be granted compensation for illegal detention.

- Under the Indian criminal justice administration, after taking a person in custody the investigating officers are usually trying to get confession by torture. It should be clear that use of torture and ill-treatment as a means of extracting confessions from the accused or testimony from witnesses is unlawful. In the process of investigation, arrest and detention must be the final step after knowing the whereabouts of the suspects and collection of evidence by lawful means.

- Political influence over police is resulting in misuse and abuse of police power. Often the politicians use the police as weapon against the opposite party. The non-compliance of the politicians’ instructions is likely to result in transfer of the police officers. There should be no interference in the functioning of the police system. As the Royal Commission of the Police in Great Britain observed, “The Police should hold allegiance to the law and judiciary and there should be no interference by any authority in the performance of their legal duties.”

In Japan, to ensure the complete insulation of the police against political pressure, all promotions are determined by the Prefecture Police Organization or the National Public Safety Commission itself and these are all subject to the approval by the Prefectural/National Public Safety Commission. Neither bureaucrats nor elected politicians can become members of either the National or Prefectural Safety Commission. Government of India should also implement the similar system to isolate the day to day working of police from political influence.

- Steps should be taken for recruiting highly qualified and competent personnel having sensitivity to human rights, considering the rising educational standard and financial standard of the society. During the police training the main focus is on physical training. But, there should be modification, instead of ‘muscle police’ we require a police having ‘brain’ and ‘heart’ since they have to deal with their own fellow human beings and not with their enemies.

In all police training institutions in the country there should be constant emphasis on the fact that no explanation or expediency can justify the use of torture. Police personnel should be provided with periodical training in the field of human rights. Regular gender sensitization and orientation programs should be conducted for police personnel of all levels.
There should be greater emphasis on the scientific techniques of interrogation and investigation. In the present system, a policeman does not know how to make a criminal talk except through the use of third degree. The police personnel are getting only 30% of their time on investigation duties. Due to the shortage of time they resort to the short-cut method of torture. As recommended by 14th Law Commission investigating staff should be separated from law and order staff. The investigating officer should be given sufficient time for investigation.

As per the provisions of the Police Act, 1861, the police officers are to be considered to be always on duty and they are not allowed to have regional or national holidays. Due to the continuous work without rest the police personnel tend to become mentally and physically unfit and they become highly insensitive to human rights. They should be given special allowances for the duty. Man power should be increased in the police stations. Better living and service conditions should be provided to curb the corruption in police system.

- There should be prompt independent investigations, into all the allegations of torture or ill-treatment. Police officials suspected of involvement in torture or ill-treatment should not be allowed to be associated with the investigation into the allegation of torture and should be removed from any position of influence over alleged victim or witnesses for the duration of the investigation and any trial proceedings. The police officer should not be present during postmortems or the medical examination of detainees. The victim’s relatives should have the right to request any registered doctor of their own choice to be physically present while a post-mortem is actually being conducted.

Complainants, witnesses and others at risk should be protected from intimidation and reprisals. A witness protection programme should be established in every State. Methods and findings of investigation should be made public and the victim or the victim’s family must be allowed access to the complete records of the enquiry.

Case of human right abuses should be put on different footing and they must be acted on quickly and promptly. The National Police Commission in its first Report in February, 1979 recommended mandatory judicial enquiry in case of an alleged rape, death or grievous hurt in police custody. Judicial enquiry should
be held by an Additional Sessions Judge nominated for the purpose that could be designated as the District Inquiry Authority.

- As recommended by the Law Commission in 113th Report, it should be provided in the Indian Evidence Act to provide for raising a presumption against the police officers or public servant in case of any injury caused to a person in custody or resulting in his death.

- The requirement of sanction of prosecution under Section 197 of Criminal Procedure Code of police personnel in all cases of torture should be dispensed with.

- Judicial Officers play a crucial role in ensuring that legal procedures have been followed in arrest and detention and that abuses have not been occurred. They should therefore be encouraged to play an active role in detecting and remedying torture. Magistrates should question detainees brought before them to ascertain that they have not been tortured or ill-treated, have not made involuntary confessions.

- A Judicial Magistrate vested with all powers to grant bail, record confession, issue judicial processes should be available round the clock to attend the judicial needs of the arrestees. This system may be called as ‘Mobile Judicial Unit’.

- The majority of victims of police atrocities belong to economically backward classes. They are not in a position to approach the Superior Courts for initiating contempt proceedings against the errant police officers. So, it is suggested that even the lower courts should be empowered to hear the grievances and to grant compensation to the aggrieved persons. At least, the Sessions Judge should be empowered to award compensation to the victim of torture.

- The Protection of Human Rights Act, 1993 empowered the Commission to investigate allegations of human rights violations which took place over one year previously; should be amended to extend this time duration to three years. It should also be given the power to visit custodial institutions without having previous notification to State officials. Section 19 of the Act should be amended to empower the Commission to investigate allegations of human rights violations by members of armed and paramilitary forces. Commission’s recommendations should be promptly complied with. It should be given explicitly powers to refer cases in which it has found sufficient evidence to merit prosecution for a human
rights violation directly to the prosecuting authority so that appropriate action can be taken against individuals concerned. District level Human Rights cells should also be constituted in all the district head quarters similar to the State level Human Rights Commission.

Justice V.R. Krishna Iyer said, “Custodial Torture was worse than terrorism because the authority of State was behind it. Laws like POTA and TADA were ‘perilously too closed’ to State sponsored torture.

Although these suggestions can help yet will is the basic requirement to eliminate torture under custody.