CHAPTER – V

INSTITUTIONS FOR THE PROTECTION OF CUSTODIAL TORTURE IN INDIA

National Human rights institutions are a necessary corollary to the democratic machinery of Governments. They are a means of democratic empowerment for those who are less powerful and loss advantaged. Given that in democracy the majority rules, standard Government machinery and institution are not always sufficient to guarantee the protection of human rights. This becomes very much relevant for those sections of people who are in minority and for those without significant financial or intellectual resources, as well as for section of society that are not as legally empowered as other (i.e. children). The national human rights institution can complement existing democratic bodies within the Government.¹ In fact, national human rights institutions are fundamental mechanism in protecting people rights. The establishment and maintenance of national human rights institutions will depend on special settings. The most important factor in this regard is the degree of commitment that the Government has in setting up human rights institution. Strong political will must be exhibited from across the political spectrum, not only from those holding power at particular point of time. 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 actual help the government to govern. It is of utmost

important to stress the link between human rights and development of nation.²

India has shown keen interest in the past in establishing or strengthening a national institution for the promotion and protection of human rights before the Third Committee of the General Assembly. It introduced a draft resolution wherein it emphasized the importance of the integrity and independence of such national institutions. In the draft resolution it also requested the Secretary General of the United Nations to submit a report to the General Assembly in two years regarding the functioning of the various kinds of national institutions and their contribution towards implementing human rights instruments. Therefore in early 1990s India felt the need of establishing a commission as a positive response to the criticism of the foreign Governments in the context of political unrest and violence in the Punjab, Jammu & Kashmir, North-East and Andhra Pradesh. In addition to the pressure from the foreign countries, pressure was added from the domestic front as well. All this led the Government to decide to enact a law to establish a Human Rights Commission³. The setting up of a national institution is one of most effective mean to perform the various functions relating to the implementation of human rights. Such as awareness raises human rights awareness through education, training, research and conduct impartial investigation into alleged violations. It may also prove or secure effective redress either by negotiation with the Government concerned or may assist victims by providing relief through court of

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law. The domestic institution of human rights may also influence the legislature to prevent human rights in the widest sense of the term. It may also monitor government compliance with treaty commitments.4

Notwithstanding the serious international concern for human rights, according to the rough estimates of the U.N. Centre for Human Rights, at least half of the world’s people still suffer from some serious violation or deprivation of their basic economic, social cultural political and civil rights. These violation range from torture, execution, rape, arbitrary detention, violence and disappearance, to extreme poverty, slavery child, abuse, famine and under nourishment and lack of access to clean water, sanitation, and health care.5

Most suitable definition of Human Rights Commission can be given as under:-

Human Rights Commission deal with the protection of the citizen against discrimination as well as with the protection of other human rights. They are generally designed to hear and investigate individual charges of human rights violation or discriminatory act committed in violation of existing law. Most human rights violations or discriminatory act committed in violation of existing law. Most human rights commission are collegial bodies comprised of members who, most, cases are selected by the Executive. In many cases the commissions

enjoy statutory independence and are responsible for reporting on a regular basis to the legislative body.\textsuperscript{6}

In this connection it must be mentioned that the national governments play a particularly important role in the realization of human rights. As human rights involve relationship among individually and between individuals and the state, the practical task of protecting and promoting human rights in primarily a national one, for which each state must be responsible. At the national level, rights can be best protected through adequate legislation, an independent judiciary, the enactment of the individual safeguard and remedies and the establishment of democratic institutions,\textsuperscript{7} when states satisfy a human rights instrument, they either incorporate its provisions directly into their domestic legislation or undertake the comply in other ways with the obligations contained therein.

Therefore, universal human rights standards and norms today find their expression in the domestic laws of most countries. Often however, the fact that a law exists to protect certain rights is not enough if these laws do not provide for all the legal process and institutions necessary to ensure their effective realization. Human Rights commissions are concerned primarily with the protection of nationals against discrimination and with the protection of civil and other human rights. The Precise functions and powers of the


\textsuperscript{7} Gurjit Singh, Torture and Human Rights Institutions, Central India Law Quarterly, Vol. XII, 554(1999).
particular commission are often defined in the legislative or decree under which it is established.\textsuperscript{8}

The Human Rights Commissions both at the apex national level and state level inquiries suo moto and on a petition presented to it by a victim or any person on his behalf into a complaint of violation of human rights or abetment thereof or negligence in the prevention of such violation by a public servant. It can intervene in any proceeding invoking any allegation of violation of human rights pending before a court with the special approval of such court. It can visit under intimation to the state Government where persons are detained or lodged for the purpose of treatment, reformation or protection to study the living conditions of the inmates and make recommendation thereon. It can 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 protective implementation.

It reviews the factor that escalates or gives rise to terrorism that corrodes the fabric of human rights and recommends appropriate remedial measures. The spread of human rights literacy among the various section of society and promotion of awareness of the safeguards available for protection of these rights are also an important responsibility thrust on these institution which it does through its publications and also through media, seminars and other available means of communication. If encourages the efforts of non-governmental organization and institutions working in the field of

\textsuperscript{8} Id at 7.
human rights. It can take up such other functions deemed necessary for the promotion of human rights.9

In the light of the extraordinary range of functions assigned to the commission and scope of powers conferred on such commissions, it is evident that it must act and be seen to act at all times with transparency and autonomy. The transparency of the commission rests both on its statute and the regulations which the commission has framed to govern its procedure. The capacity to receive petitions, to provide petitioners with copies of its report and decisions and to place its reports before parliament and/or the state Legislature and the public are all essential for the openness and transparency with which the commission is functioning indeed it counts on the relationship that it will foster and maintain with non-governmental organization human right activists, the media and the public, to reinforce its message of transparency in the developing of a culture of human rights in the country.

The complexity and variety of human rights issues facing over nation has required another kind of discipline of the commission in its effort to maximize the impact of its activities. Amongst the many human rights issues that are of the highest concern is the question of prevention of torture as a violation of human rights.10 It is with such uppermost consideration in mind that the commission look at the National and State Level seek to take prompt action in case of receipt of any information of torture. It not only visit the scene of occurrence

10. Id at 486.
through its investigation staff but directs responsible public offices to intervene haste post haste so that no irreparable damage to the life and property be done in the meantime pending investigation in the matter. It has all the powers of a court to receive and call for evidence assess the evidentiary value of the testimonies of vital witness and come to concrete finding as to guilt or otherwise of the violators of human rights or perpetrators of torture, custodial deaths, rape, disappearance for custody, cruel and inhuman or degrading punishment and all shades and varieties of torture, gender relates violence, atrocities against vulnerable section of the society – women, children and disabled – often compounded when these vulnerable sections belong to scheduled caste. Scheduled tribes and cultural or religious minorities. It is for similar reasons that social evils like dowry deaths and bonded and child labour are receiving immediate attention of the commission and it always tries as to how best it can prevent breach or violation of human rights like torture and atrocities.¹¹

Hence it is felt that some independent machinery, falling outside the control of administration, for the protection of human rights of the people must be created. Human rights institutions may be the creation of national constitution or a specific statute. These are some advantages in establishing these institutions as a constitution body. For example, the constitution is a supreme law and any change in the fundamental structure of the institution would require the passing of constitutional amendment Act for which special procedure has to be followed. Thus the integrity of a institution will be protected and it can

¹¹. Ibid.

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work more effectively. The very fact that public servant can have to face a trial or serious departmental action in case the perpetrate torture by such a high ranking body like the Human Rights Commission where necessarily a retired Chief Justice presides and other retired judges and public servants comprises the team of adjudicatory tribunal, warrants a fear or hesitation in the mind of the possible violators like police and jail authorities or even Government hospital staff and doctors to take any arbitrary or wanton action.

There are certain more advantages of "National Human Rights Institution" over the "traditional" means of protecting human rights. For example, in courts there is prohibitive cost of litigation, frequent delay and lengthy hearing of cases. The courts can deal only with the specific issue raised in the case and can’t go beyond that. Sometimes there is difficulty in producing evidence. The complex procedure of courts keeps many deserving cases out of it. Thus, the courts play only a peripheral role and do not provide for a review in depth of the entire administrative field. The control by the administration over its own faults and lapses suffer from "Official bias" and it starts building up its own defence with department. Similarly, the legislature lack time to investigate complaints. It also lacks access to information. The Legislators are also unwilling to investigate politically restive issue.

Traditional organs in a democracy do not provide an adequate and effective control mechanism over the administration. Lack of such a

12. Supra note 2 at 233-234.
13. Supra note 9 at 486.
14. Supra note 1 at 354-355.
mechanism may negate democratic values. In this connection, the following warning administered by the Supreme Court of India in Sadanandan case\textsuperscript{15} must be kept in mind:

Continuous exercise of the very wide powers conferred by the rules on the several authorities is likely to the paramount requirement of the constitution that even during the emergency; the freedom of Indian Citizens can’t be taken away without the existence of the justifying necessity specified by the (Defence of India) Rules themselves. The tendency to treat these matters in a somewhat casual and cavalier manner which may conceivably result from the continuous use of such unfettered powers, may ultimately pose a serious threat to the basic values on which the democratic way of life in this country is founded.

In these circumstances, the quest for an effective control mechanism over the administration has led the people to the institution of Ombudsman in operation in the Scandinavian Countries.\textsuperscript{16} An Ombudsman in terms of utility means “watchdog of the administration” or “the protector of the little man”. It is an 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 binging renaissance and humanism in the working of the Government. It is difficult to define Ombudsman in precise term. According to Garner, he is “an officer of Parliament, having as his primary function, the

\textsuperscript{16.} Ibid.
duty of acting as an agent for parliament, for purpose of safeguarding citizens against abuse or miscues 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 of parliament and headed by an independent high level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, official and employees or who acts on his/her own motion, and who has the power to investigate, recommend corrective action and issue reports.17

Ombudsman redresses individual grievances arising out of bad administration. Ombudsman has direct access to departmental files. On a complaint on being made to him against the administration, the ombudsman satisfies himself by looking into the relevant papers whether there was any fault or lapse on the part of the administration. The Complainant is not required to lead any evidence, or to prove his case, before the ombudsman. It is for the ombudsman to find out whether complaint is justified or unjustified. No court fee are payable for filing a complaint with the ombudsman; no lawyer need be engaged because the ombudsman himself is the Complainant’s lawyer.18 Ombudsman takes cognizance of complaints made to him my individual or even suo motto except in England where complaints reach him not directly but through members of House of Commons.19

The main sanction behind the Ombudsman is the backing he receives in his work from the legislature. He enjoys power to report to the legislature on the results of his investigations into individual grievances. This is a power of consequence, for no department wants to get adverse publicity in the press or be discussed in parliament. Because of this, the recommendations made by him are invariably accepted by the department concerned and individual grievances redressed.

Ombudsman act as an external agency; outside the administrative hierarchy; to probe into administrative faults. In theory, Ombudsman is the projection of the legislative function of supervising the administration. He is an appointee of the legislature; he acts as its eye and reports to it. From this point of view, he cannot be regarded as anything foreign to or incompatible with parliamentary form of Government.20

5.1 Protection of Human Rights Act, 1993

In order to meet national as well as International demand for the constitution of National Human Right Commission. State Human Right Commission in State and Human Right Court for better protection of human right and for the eradication of the malpractice of torture.21 The Human Right Commission Bill was introduced in the Lok Sabha On May 14, 1993. The Bill was referred to the standing Committee of the parliament on Home Affairs. However, due to urgency of the Commission in view of the pressure from the foreign

20. Supra note 18 at 2430.
Countries and from the domestic front, the President of India on September 27, 1993 promulgated an Ordinance for the creation of a National Commission on Human Rights and the Commission at state level, i.e., “the protection of Human Right Ordinance, 1993, “On 28 September, 1993 under Article 123(1) of the Constitution.22 The Bill became an Act after it received the assent of the President on January 8, 1994 which is know as the Protection of Human Right Act.23 It extends to the whole of India. However, it shall apply the state of Jammu and Kashmir only on so far as it pertains to the matters relatable to any of the entries enumerated in list I or list III on the seventh schedule to the Constitution as applicable to that state.24

Section 2(d) of the Act defines the expression “human right” my stating human rights relating to life, liberty, equality and dignity of the individuals guaranteed by the Constitution or embodied in the International covenant and enforceable by court in India.25 The above definition limit the scope in the functioning of the N.H.R.C. India ratified the two covenants international covenant on civil and political Right and the covenant on Economic, social and culture rights but these covenants are not directly enforceable as law before Indian courts. These covenant adopted by the General Assembly of the United Nations on the 16th December, 1966. The Supreme Court ruled out that International Covenant can be enforced provided there

22. Article 123(1) of the Constitution provides, “If at any time except when both house of Parliament are in session, the President is satisfied that circumstances exists which renders it necessary for him to take immediate action, he may promulgate such ordinance as the circumstances appear to him to require”.
23. Act received the assent of the President on January 8, 1994 and published in the Gazette of India, Extra Part-II, Section 1, dated 10 Jan., 1994, pp. 1-16, St. No. 10.
is no fundamental Right against them and without being adopted as a law by our parliament. The protection of Human Rights, 1993 provides for the Constitution of a following three machinery for better protection of human rights and for matter connected therewith or incidental thereto:

5.1.1 National Human Right Commission
5.1.2 Human Right Commission in the states
5.1.3 Human Right Courts in the district

5.1.1 National Human Right Commission

Increasing concern over the growing violation of human rights and the international criticism it attracted, the government decided to set up the National Human Rights Commission (NHRC).26 The governmental introduced the Human Rights Commission Bill in May 1993. While the Parliamentary Standing Committee on Human Affairs was examining the Bill, the president Promulgated the Protection of Human Rights Ordinance on 28 September 1993 setting up five member. National Human Rights Commission headed by a retired Chief Justice of India and similar bodies at the state level along with human rights courts.27 Thus the ordinance is a welcome improvement over the Bill as the latter leaves to the state government to constitute state human rights commission to look into the violation of human rights under Clause 21 (1 and 2). But other lacunae of the Bill appear in the Ordinance, First there is no change in the composition of the

27. The NHRC headed by Justice R.N. Mishra, Former Chief Justice of India, the other members are Justice Meera Sahib Fatima Bibi, Justice Kochar Thomas, both former judges of the Supreme Court, Justice Sukhbir Singh Kang, Chief Justice of J&K High Court and Varinder Dayal former Chess of Cabinet to the U.N. Secretary General.
appointing committee under the ordinance. As under Clause 4(1) of the Bill it consists of the Prime Minister, the Home Minister, the Speaker, the Deputy Chairman of the Rajya Sabha and the leaders of the opposition in both the houses the exclusion of NGO representation in the appointing committee, would greatly prejudice the Commission's independence. Moreover NHRC is created by the ordinance. If it is constitutional body, instituted by constitutional amendment, its independence from the executive would be adequately guaranteed. The same constitutional amendment would also provide for the selection of members, independence of central or state governments. Second, like Clause 14 (1 and 2) of the Bill, the Ordinance also does not provide NHRC its own independent investigative machinery under its exclusive control and accountable to its. It would have to depend on the police and CBI. The main culprits of human rights violations, for carrying out investigation against themselves or their colleagues. This would render commission ineffective. Third, like clause 19 (1 and 2) the ordinance does not authorize commission to investigate into the violation of human rights committed by Military or paramilitary forces. These forces, facing the allegation of the worst forum of human rights violations in Kashmir, Punjab and north-east would remain outside the purview of the Commission. Fourth like clause 18 (1, 3 and 4) of the Bill, the functions of the Commission under the Ordinance are recommendatory. It has no power to punish the violators of human lights, nor to grant any compensation for any interim relief to the victims or the members of their family. It can merely make recommendations to the concerned governments for prosecution and
grant of interim relief if these recommendation are not accepted it become helpless.  

Accordingly, 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:  

i) A Chairperson who has been a Chief Justice of the Supreme Court;  

ii) One member who is; or has been’ a Judge of the Supreme Court;  

iii) One Member who is, or has been, the Chief Justice of a High Court;  

iv) Two members to be appointed from amongst persons having knowledge of, of practical experience in, matter relating to human rights.  

The Commission has, from its inception, been playing a pivotal role in developing a culture of HRS in the Country. It has built edifice of HRs accountability on the foundation of autonomy and transparency. The commission has been discharging its vast and varied functions entrusted to it under Section 21 of the Act in a quite methodological and systematic manner. The Commission has set the broad terms of its agenda as under:

(i) Protection of civil liberties.
(ii) Review of laws, implementation of treaties and other instrument of HRs.
(iii) Right of the vulnerable.
(iv) Promotion of HRs literacy and awareness.
(v) State Human Rights Commissions and District Human Rights Courts.
(vi) Interaction with external groups and organizations.
(vii) Inquiry into complaints.

Ever since its establishment the National Human Rights Commission in India has been seriously endeavoring to check the malpractices of torture and violence in police custody. A survey of the four Annual Reports of NHRC as well as other published materials enables one to argue that it has done a commendable job on this front. Commission has shown deep concern with the existence and continuous of the evil of torture in the country and has strongly pleaded for its abolition and avoidance from time to time it has either been taking cognizance of these violation on the basis of the complaints made to it by the private persons as well as on the basis of the report sent by the government officials.32

As regards the survey of the Annual Report on the present issue, the Annual Reports of the NHRC for the year 1994-95 contained the observations that violence, whether in police or judicial custody, was a “matter of great concern to all who believe in human rights and that it was “absolutely unacceptable to the Commission. According to this

report, "one of the first instruction of the BHRC, issued on 14 December 1993, required all state governments and Union Territory Administrations to ask that report be seat by the District Magistrates / superintendents of the police to the commission within twenty four hours of any occurrence of custodial death or rape\textsuperscript{33} and that the failure to send such reports could lead to a presumption by the committee – that an effort was being made to suppress knowledge of the incident. Pursuant to these instructions, the NHRC has been receiving reports of such occurrence from all parts of the country. During the year 1994-95, 65 deaths were reported in police custody and 34 in jail custody. In 1995, 105 such deaths were reported in police custody and 207 in jail custody. Between 1 January – 31 March 1996, a further 47 deaths were reported in police custody and 112 deaths in jail custody.\textsuperscript{34} Thus during the year 1995-96, 136 deaths were reported in police custody and 308 in jail custody. Similarly – during the year 1996-97, 188 deaths were reported in police custody and 700 deaths in judicial custody.\textsuperscript{35} According to the NHRC, the upswing in reported deaths in custody was the result of its repeated instructions that information regarding such tragic occurrences must not be suppressed but must be reported promptly, investigated and acted upon.\textsuperscript{36} Thus the NHRC is deeply in its efforts to bring to an end the egregious violation of human rights that result in custodial death, rape and torture. According to the NHRC, “Custodial Violence is a calculated assault on human dignity and “whenever human dignity is wounded, civilization takes a step 

\textsuperscript{33} Id at 17.
\textsuperscript{34} National Human Rights Annual Report, 1995-96, New Delhi, p. 12.
\textsuperscript{35} National Human Rights Annual Report, 1996-97, New Delhi, p. 15.
\textsuperscript{36} Ibid.
backward.” According to the commission and rightly so, the “flag of humanity on each occasion must fly half must.”

The Commission also drew attention to the Supreme Court of India’s views, notably in the case of Kishore Singh v. State of Rajasthan\textsuperscript{37} wherein the apex court had observed that “nothing is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts a deeper wound on our constitutional rights.

The NHRC further expressed that its concern in this matter was heightened by awareness that most of those who were victims of police brutalities and custodial deaths belonged to the economically poor or disadvantaged sections of society.\textsuperscript{38} In this connection, the following observations of the NHRC are worth quoting:\textsuperscript{39}

Our country is already required by the constitution, our laws and the Supreme Court to act to ways consistent with the convention against torture and that to acceded to the latter would thus be to signify to the world that we indeed intend to conduct ourselves in the matter that we have ourselves, determined to be in keeping with our most cherished values. Such a move would also signify that, as a nation, we intend to be in the forefront of the worldwide human right movement and not, timorously, in the rear. India’s efforts to promote and protect human rights in a country who’s demographic, linguistic and pluralistic complex present the most acute problems, incomparable anywhere else in the world for its sheer

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\textsuperscript{37} AIR 1982 SC 625.
\textsuperscript{38} National Human Rights Annual Report, 1995-96, New Delhi, pp. 13-14.
\textsuperscript{39} Supra note 7 at 561.
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staggering size, has been impressive. This great country does not need to crouch behind the high wall of national sovereignty on the great issue of Human Rights.

According to the commission, the country must signify to itself and to the world that it will not countenance brutality in custody.\(^{40}\) It was to this end that through a letter dated 9 December 1994, addressed to the then Prime Minister, the Chairperson of the N.H.R.C. recommended that in 125\(^{th}\) year of the Birth of Mahatma Gandhi, “the Republic could best pay tribute to the values he embodied by acceding to the 1984 convention against Torture and other forums of cruel, inhuman and Degrading Treatment of punishment.\(^{41}\) Thus N.H.R.C. has been strongly recommending that the government should announce its accession to the convention. Against Torture as according to the commission, such a stop, specially aimed at enhancing the dignity and worth of the human person.\(^{42}\) Further, the commission also impressed on the need for great care in the observance of the U.N. Body of Principals for the protection of all person Under any form of Detention and imprisonment and the UN Standard Minimum Rules for the treatment of Prisoners.\(^{43}\) There are number of other measures which have been recommended by N.H.R.C. one of such measure, to which the N.H.R.C has attached particular importance, relates to the implementation of decision of the Supreme Court in the case of Joginder Singh v. Uttar Pradesh,\(^{44}\) wherein it was held down that an arrested person being held in

\(^{42}\) Ibid.
\(^{44}\) AIR 1994(3) SC 423.
custody was entitled, if he so requested, to have a friend, relative or any other person who was known to him, or likely to take an interest in his welfare, to be informed that he had been arrested and told of where he had been detained.

In the Annual Report of 1997-1998 while addressing the issue of custodial torture, NHRC recommended:

(i) Early action need to be taken to implement the suggestion of Indian Law Commission in its 113th report to the effect that Section 114(B) should be inserted in the Indian Evidence Act of 1872 to introduce a rebuttable presumption that the injuries sustained by a person in the police custody may be presumed to have been caused by a police officer such provision would restrain the police from engaging in torture.

(ii) On the basis of recommendation of Indian Law Commission, Section 197 of the Criminal procedure needs to be amended to obviate the necessity for government sanctions for prosecution of a police officer, where a prima facie case has been established in an enquiry conducted by a session judge of the commission of custodial offence.

(iii) As suggested by the National Police Commission, there should be mandatory enquiry by a Session Judge in each case of custodial rape, death or grievous hurt.

The N.H.R.C. had the view in its continuing efforts to end custodial violence that the compensation to the next of kin of the person killed or injured should be the liability not just of state government, but of
the offending police officials themselves. According to N.H.R.C., it was gratified to note that in at least two instances of custodial death in the state of Rajasthan and Tamil Nadu. The state government concerned had accepted its recommendations in this regard, using its power.45

N.H.R.C. also visited many prisons and detention centers and made recommendations for improvement of jail conditions and felt that there is need to replace the century old Indian Prison Act, 1894 and to prepare a new All India Jail Manual, which would ensure more effective implementation of the rule of law. In the Fourth Annual Report of 1996-97, NHRC focused on the civil liberties at the sensitive border areas such as custodial death, rape and torture. NHRC drafted a bill to replace the Prison Act, recommended wide range of measures to rationalize the prison system. Using its power under section 12(c) of the protection of Human Rights Act, 1993, N.H.R.C. has conducted several surprise visits, under the intimation to the State Government, to any Jail or institutions under the control of state government, where person are detained or lodged for the purposes of treatment, reformation or protection, to study the living conditions of inmates and made recommendation thereon.46

5.1.1(a) Challenges, priorities and new role for National Human Rights Commission

The National Human Rights Commission (NHRC) established under the Human Rights Protection Act of 1993 has been mandated to address human rights violations including torture.

In this assessment, ACHR\textsuperscript{47} examines the role of the NHRC. Overall, the establishment of NHRC has been very positive. Before the establishment of the NHRC human rights activism was viewed as anti-national and part of Western propaganda to “put pressure on India”. The establishment of the NHRC provided legitimacy to human rights activism.

In its work on specific issues, the NHRC’s Directives of December 1993 on custodial deaths / rapes – wherein the District Magistrates are required to report cases of custodial deaths / rapes – have led to improved reporting. In these directives the NHRC also sent a clear message to the government with regard to its concern over the deliberate cover up of human rights violations by the authorities.

NHRC’s overall record is mixed. With regard to the eradication of torture ACHR has identified a number of very serious failings on the part of the NHRC. The first concern is what appears to be an institutional preference for the award of interim monetary relief despite powers to seek prosecution of the perpetrators of torture. ACHR will examine this preference in terms of international standards.

The second concern is perhaps more serious and relates to the NHRC dismissing cases of torture where a prima facie case exists; and in dismissing the case the NHRC has chosen to deny the complainants’ access to key evidence as well as denying the complainant a hearing. Under Section 13 of the Human Rights

Protection Act, NHRC has the powers of a civil court for investigation purposes. Hence, NHRC is equivalent to a tribunal and while adjudicating the cases, complainants have the statutory and constitutional right to receive a copy of all the documents made available to the NHRC. The complainant has the constitutional right to a hearing before the NHRC passes a final order. ACHR has documented numerous occasions where the NHRC has denied both rights.48

NHRC only awards compensation and has failed to recommend criminal prosecution even in prima facie cases of torture. ACHR's analysis suggests that the NHRC appears to have restricted its role to that of awarding immediate monetary compensation to relatives of victims of human rights violations.

In its Annual Report 2004-2005, NHRC states: "Since its establishment in October 1993, the Commission has directed to interim relief to the extent of Rs. 10,07,12,634/- to be paid in 617 cases. During the year 2004-05, the Commission recommended that interim relief amounting to Rs. 23,27,000/- be paid in 46 cases, including 12 cases of deaths in police / judicial custody.

ACHR has examined a number of orders of the NHRC awarding compensation with regard to the deaths in police custody from April 2003 to 31 March 2006. And in a great many cases examined by ACHR once immediate relief is paid, NHRC closes the complaint with

48. Section 13(5) of the protection of the Human Rights Act, 1993 provides that "Every proceedings before the Commission shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228, and for the purpose of Section 196, of the Indian Penal Code and the Commission shall be deemed to be a civil court for all purposes of Section 195 and Chapter XXVI of the Cr.P.C., 1973."
the observation: "Since 'immediate relief has been granted to the next of kin of the deceased, no further action by the Commission is called for. The file is closed." However the absence of recommendation for final compensation or indeed further prosecution is a notable concern.

ACHR's analysis suggests that the NHRC appears to have restricted its role to that of awarding immediate monetary relief to relatives of victims of human rights violations.

ACHR acknowledges that compensation is a vital part of the provision of redress to victims of human rights violations and their relatives. However, based on international standards, adequate and effective reparation for victims should in ACHR's view incorporate the following:

1. Steps should be taken to compensate for any economically assessable damage resulting from violations including physical or mental harm, emotional distress, lost educational opportunities, loss of earnings, legal and/or medical costs;

2. Steps should be taken to ensure medical and psychological care if necessary as well as legal and social services;

3. Steps should be taken to restore the victim to the situation they were in before the violation occurred, including restoration of their legal rights, social status, family life, place of residence, property and employment;

4. Steps should be taken to ensure cessation of continuing violations, public disclosure of truth behind violations, official declaration of responsibility and/or apologies, public acknowledgement of violations, as well as judicial or administrative sanctions, and preventive measures including human rights training.

The components of redress are outlined in Article 2 of the ICCPR as well as several other international standards. ACHR has particular concern with regard to the fourth requirement. It appears that the NHRC has closed cases where torture has taken place, and in numerous cases where in the process of reaching these conclusions the NHRC has denied the complainants access to the documents as well as failing to hear their complaint.

**5.1.1(b) Annual report of the Commission**

The Commission is required to submit an annual report to the Central Government and to the State Government concern. However, the Commission may submit special reports on matters which are of such urgency or importance that it should not be deferred till the submission of the annual report. The Central Government and the State Government concerned shall place the annual report and special reports of the commission before each House of Parliament or the State Legislature respectively alongwith the 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. Figures of custodial death reported to the NHRC from the year 2003 to 2008 is given below.  

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<thead>
<tr>
<th>State</th>
<th>2003-04</th>
<th>2004-05</th>
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<tr>
<td></td>
<td>Police Custody</td>
<td>Judicial Custody</td>
<td>Total</td>
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<tr>
<td>Andhra Pradesh</td>
<td>10</td>
<td>114</td>
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In view of above, it is submitted that talking 2000-2001 as the base year, custodial deaths have increased by 41.66% person under the UPA Government between 2004-05 and 2007-08. This includes 70.72% increase of death in prison custody and 12.60% increase death in police custody. The prevention of torture bill, 2008 was highly flawed and the Government has failed to indicate that its revised version (2010) addressed the flaws to fully comply with the obligation under the UNCAT.
5.1.1(c) NHRC as appropriate investigating body

The task of an investigator lies in identifying and gathering or collecting the data that brings home the entire sequence of events that constituted the offence under investigation in question and furthers the comprehensive and reliable as well as scientific method that is pursued to accomplish that task.

In all cases where involvement in torture by public officials is suspected, including possible orders for use of torture by persons in high political or administrative or other positions of authority or by their aides or by officers working with the knowledge of such positions, it seems natural that any normal investigating agency may not find it easy to get to the truth of the allegations and therefore it is necessary to have a Special Commission of enquiry or such other independent body which can fulfill those objectives of establishing the truth of the matter and for initiating steps necessary to enforce the rule of law. From that standard international viewpoint we can say that the establishment of the National Human Rights Commission does meet the expectations both from the point of view of the legal standards and also from the point of view of public credibility of such institutions. The fact that a person who is necessarily a retired Chief Justice of the Supreme Court heads the National Human Rights Commission makes the credibility aspect beyond doubt. The international Standards call for such a body particularly in cases:

1. Where the victim was last seen unharmed in police custody or detention;

2. Where the modus operandi is recognizably attributable to state sponsored torture;

3. Where investigation by regular investigating agencies is in question because of lack of expertise or lack of impartiality or for other reasons including:
   i) The importance of the matter, or
   ii) The apparent existence of a pattern of abuse or
   iii) Complaints from the person or the above inadequacies, or
   iv) Other substantial reasons.

4. Where persons in the State or associated with the State have attempted to obstruct or delay the investigation of the torture;

5. Where the public interest would be served by an independent body

The above, together with similar considerations should weigh when a state (country) decides to establish an independent commission (like the National Human Rights Commission - in so far as India is concerned) of inquiry. It is equally necessary to ensure that:52

52. Id at 105.
1. The investigators should receive the full scope of the state's resources and power.

2. The investigators should have the power to seek help from international community for experts in law and medicine.

3. Investigators functioning for the Commission should have the support of adequate technical and administrative personnel as well as access to the objective, impartial legal advice to ensure that the investigation will produce admissible evidence in, criminal proceedings.

4. The persons who are subjected to the enquiry are guaranteed the minimum procedural safeguards protected by international law (which is also reflected in the Constitution of India and other relevant procedural laws of the country) and at all stages of the investigation by the Commission.

There is also provision for inquiry into allegation of police torture by the National Human Rights Commission under the Protection of Human Rights Act, 1993 (Act No. 10 of 1994). The Commission is doing commendable work to prevent the abuse of human rights by the police, by clearly monitoring case of custodial torture, custodial death and rape, all over the country and asking the State Government to take corrective measures, including strict action against the non serious officers. States have urged to establish district level Committees for effective and speedy redressal of complaints of human right's violations.53

53. Supra note 30 at 330.
Sub sections 12(a) and 12(b) of the Protection of Human Rights Act require the Commission to:

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

(i) violation of human rights or abetment thereof; or

(ii) negligence in the prevention of such violation by a public servant.

(b) intervene in any proceeding involving any allegation of violation of human rights before a court with the approval of such Court.

The Commission has been discharging this responsibility since its inception in 1993. The Commission continues to receive an increasing number of complaints of human rights violation from all over the country. The nature of the cases include custodial deaths, rapes and torture, fake encounters, police harassment, human rights violations by security forces, violation of rights of women and children, dalits, schedule tribes, minorities, disables and others. Over a span of years since 1993, the Commission has made concerted efforts to safeguard civil liberties of the citizens.

5.1.2 Human Right Commission in the states

The Protection of Human Rights Act, 1993 envisages the setting up on State Human Rights Commission because being near to the people of the respective states they should be able to provide speedier and less expensive redressal of grievances. The National Human Rights Commission has, therefore, been urging the early
establishment of State Human Rights Commission in all states.\textsuperscript{54} However, a number of states are yet to set up Human Rights Commission. The NHRC in the meanwhile has been holding meeting with the Chairperson and members of the existing state Human Rights Commission with a view to developing healthy convention in the functioning of the various commissions and to ensure that, in their effort to promote and protect HRs in the country. The Presumption is that the redressal of grievances must be bright and inexpensive; the massage of HRs must reach the gross-root level in the language of the people of the country.\textsuperscript{55}

Section 21 of the Act accordingly provides for the constitution of State Human Rights Commission which may inquire into violation of HRs only in respect of the entries in the state list (List II) and concurrent list (List III) of the seventh schedule of the constitution. Provided that if any such matter is already being inquired into by the National Human Right Commission or any other commission duly constituted under any law for the time being in force, the state Commission shall not inquire into the said matter.\textsuperscript{56} There is a great defect in the provision of act thus it depends upon the discretion of the state to constitute a State Human Rights Commission. On 31\textsuperscript{st} March 2000, the position was as follows:

"State Human Rights Commissions had been established in Assam, Himachal Pradesh, Jammu & Kashmir, Kerala,
Manipur, Madhya Pradesh, Punjab, Rajasthan, Tamil Nadu and West Bengal.

The state of Bihar, Maharashtra and Orissa had issued notifications constituting State Human Rights Commissions. However these had not yet been established.\(^{57}\)

Section 36(1) of the Act\(^{58}\) provides that the Commission shall not enquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force. Besides this, Act provides that both the commission and state commission shall not enquire any matter after expiry of one year from the date on which the act constituting violation of human rights alleged to have been committed. Practical arrangements have thus been made to exchange information, twice a month between the NHRC and the State Commissions so that depending upon which the commission take cognizance of a case earlier, it could be decided as to where the matter should be pursued.

The Commission is required to submit its annual reports to the State Government and it may submit at any time 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.\(^{59}\) The State Government shall submit these report before each house of

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State Legislative with a memorandum of action taken or/and the reasons for non-acceptance of the recommendation, if any.\textsuperscript{60}

The NHRC in its 1998-99 report had recommended that the State Level Commission be established rapidly, where they do not yet exist. The Commission in its 1999-2000 report again emphasized the need for the early setting up of the State Commissions. It strongly recommended that those state governments at the earliest and that wherever such commissions have been constituted, they are provided with the backing that is essential for their proper functioning.\textsuperscript{61}

In India it is to be noted that some States have failed to constitute State Human Rights Commission even after 16 years of the enactment of the Act. Further, some of these commissions have already been either non-functional or ineffective where they exist. Therefore, all the complaints of human rights violation are being referred to the National Human Rights Commissions. Thus, its work-load has increased beyond proportion.\textsuperscript{62}

Therefore, it is the need of the hour that every state must constitute its own human rights commission so as to provide speedy justice to the people and protect them from the violation of their human rights.

\textsuperscript{60} Section 28 of National Human Rights Protection Act, 1993.
\textsuperscript{61} The Commission took the initiative to have annual interaction with all the SHRC’s. The first such annual meeting was held January 30, 2004 where the Agenda included coordinating and sharing of the information petition SHRC’s and the Commission training, awareness building and substantive Human Rights issue; talking forward, the second meeting was convened on May 13, 2005.
\textsuperscript{62} Ibid.
5.1.3 Human Right Courts in the District

Section 30 of the Protection of Human Rights Act, 1993, envisages the notification of Human Rights Courts for the purpose of providing speedy trials of offences arising out of violation of HRs. While a number of states have notified the constitution of Human Rights Courts, an ambiguity remains as to the precise nature of the offences that should be tried in such courts and other details regarding conduct of their business. For every Human Rights Court, the State Government in accordance with section 31 of the Act shall appoint a Public Prosecutor or an advocate who has been in Practice as an advocate for not less than seven years for the purpose of conducting cases in the Human Rights Courts. Such a person shall be called a special Public Prosecutor. For the purpose of providing for 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. However, this shall not apply in two conditions i.e. (i) if a Court of Session is already specified as special court (ii) if a special court is already constituted. Thus, we find that it is not mandatory but discretionary to specify any court of session to be Human Right Courts for trying the offences dealing with human rights violations. The provision in section 30 is very weak, for it uses the word “may” that is to say, it is not mandatory for the State Government to establish Human Rights Courts, in each District. That is why, only a few states, namely

64. Section 2-C read with Section 30 of the Protection Human Rights Act, 1993.
Andhra Pradesh, Assam, Sikkim and Tamil Nadu have notified such courts and only two states, namely Tamil Nadu and Assam have established such court in Madras and Guwahati respectively. Other States, have not so far, taken any action in this connection.  

Section 30 which provides for the establishment of District Human Rights Court does not lay down the jurisdiction of such courts. It also does not lay down as to what procedure shall be followed by such courts. Will these courts decide the cases involving human rights violations which are referred to Supreme Court under Article 32 or the High Courts under Article 226 of the Constitution? The ambiguity exists as to precise nature of the offences that should be tried in such courts and other details regarding the conduct of their business in view of the fact that section 30 of the Protection of Human Rights Act of 1993 does not lay down the jurisdiction and procedure to be followed by such courts. The National Human Rights Commission has drawn attention to the ambiguity. It recognized that substantive amendments to section 30 of the Act are necessary to enable the courts to fulfill the expectation that they would provide speedy trial of offences arising out of violations of human rights. However, the government has not taken any step on the amendment and therefore these courts have not been able to adequately discharge the purposes for which they are designed. Hence, these court can’t serve any fruitful purpose until a comprehensive legislation is passed. 

65. Supra note 2 at 236.
5.2 Role of Indian Judiciary

In human treatment, custodial violence, handcuffing of prisoners, third degree methods which are more often than not used and practiced by police official during the course of their official duties are against the norms of the civilized nations and are barbarous activities violative of the principal of rule of law and human dignity. However, Protective custody is the name given to the custody in certain places like police stations, correctional institutions, hospitals and hostels among others. In all these institutions, the relationship is fiduciary and it is unfortunate that there is abuse of these relations, subjecting the inmates to torture and custodial violence.

Deniel Webster always used to recall the story of a swallow and its young kitten. A swallow used to have a nest in the precincts of a place of protective custody, it used to keep its kitten in the nest and fly out to fetch food for its younger one. On day when it cam back with food for the younger ones, it found one of the younger one eaten my serpent. The mother swallow was crying in pain and then the elder swallows tried to console it by saying “you are not the first swallow to have lost the younger ones to a serpent nor are you going to be the last, it is the curse of nature that we should lose our younger ones to serpents” then the mother swallow said: yes, I know it is the law of nature, but I am crying only because this happened in the precincts of a place meant for protective custody, if there is no protection here where shall we go for protection? The concern of the swallow symbolically represents the concerns of all of us when places of Protective custody become places of violence and torture.
Therefore the question arise how for the Government is liable for the police atrocities violating the constitutional and legal norms and to what extent the judiciary has controlled and curbed the irresponsible and illegal action of the police officials, which are perpetrated by them during the course of the performance of their duties. This can be discussed under the following heads:-

5.2.1 The Plea of Sovereign Immunity

5.2.2 Judicial Activism

5.2.3 Concept of Public Interest Litigation

5.2.4 The Law Commission Report

5.2.5 Justice Malimath Committee Report

5.2.6 National Commission to Review the Working of the Constitution

5.2.1 The Plea of Sovereign Immunity

The Supreme Court of India like a live sentinel on the qui vive has been judiciously and admirably responding to the situation by giving a decent burial to the doctrine of Absolute Sovereign Immunity. The absolute eighteenth Century doctrine of ‘the king can do no wrong’ has been interpreted as ‘the king shall do no wrong’ and in a catener of decisions the Supreme Court of India with its majesty has been providing succour to the needy and has been providing balms to the wounded. The Supreme Court of India elaborately discussed the meaning and the concept of sovereignty in N. Nangendarao & Co. v.
State of A.P.\textsuperscript{68} while dealing with power of the Government under section 6-A and 6-A(2) of the Essential Commodities Act, 1955, and the Supreme Court declared that after the commencement of the Constitution of India, 1950 or prior to it the distinction between the sovereign and non sovereign power is not relevant. The Court observed that the concept of sovereignty underwent a drastic change and sovereign immunity has no relevance today. Further, in the opinion of the Supreme Court, the doctrine of sovereignty as pronounced by the theorists in the medieval period underwent radical changes and which doctrine in earlier days was outcome of old thoughts based on social set-up then prevailed and at which time the monarch was omnipotent. In later days the concept of sovereignty underwent gradual changes and nowadays sovereignty vests in the people. Justice Douglas in his book "Marshall to Mukherji" observes that India and United States both recognize the people are the basis of all sovereignty. Thus, the old and archaic concept of sovereignty does not survive in this traditional four corners and now people are real sovereign in a set-up where the legislation, executives and judiciary have been entrusted with their respective functions to serve the people.\textsuperscript{69}

The doctrine of sovereign immunity is not only anathematic to the republican polity in India but it also incompatible with the principles of human rights jurisprudence. The doctrine of sovereign immunity completely negates the fundamental human right. The Supreme Court nowadays does not take cognizance of the doctrine of

\textsuperscript{68} AIR 1994 SC 2663.
\textsuperscript{69} AIR 1997 Journal Section, pp. 170-171.
sovereign immunity while deciding cases involving violation of any fundamental rights, it has awarded compensation in number of cases to the aggrieved persons whose fundamental rights have been violated, as for example, in *Rudal Sah v. State of Bihar* 70 in *Bhim Singh v. State of J&K* 71 in *Saheli and others v. Commissioner of Police, Delhi* 72 and *Nilabati Behara v. State of Orissa*. 73 In the case of *Nilabati Behera v. State of Orissa*, the Supreme Court made this point clear when it observed; it may be mentioned straightway that award of compensation in a proceeding under Article 32 by this court or by the High Court under Article 226 of the Constitution is a remedy available in public lens based on strict liability of contravention of fundamental rights to which the sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort. According to this doctrine liability of the state for violation of human rights is absolute and admits of no exception such as sovereign immunity. In this case the court awarded Rs.1,50,000/- to the mother of youth as compensation for the custodial death.

### 5.2.2 Judicial Activism

Judicial activism has not only protected the human right of the people, but it also led to the granting of exemplary compensation to the victims of police atrocities which resulted in human rights violation. In this connection the United Nations Convention against torture provides for redress and compensation to the tortured victim. Article 14 of the convention categorically emphasis that every state

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70. AIR 1983 SC 1086.
71. AIR 1986 SC 494.
72. AIR 1990 SC 513.
party to the convention must ensure that the tortured victim is provided redressal, fair and adequate compensation, rehabilitation also. If the death results in the event of the torture the victim's family must provided compensation. The compensation shall be for any damage which may be physical, mental or material, any opportunities lost along with loss of earnings, harm to reputation and cost for legal or expert assistance.74 There are more than one hundred treaties signed and satisfied by many countries. But the sad part of this aspect is that even after such welcoming of the respect for Human Rights, they are still being violated like the ordinary laws of the land.75

Though Article 9 Para 5 of the convention on civil and political Rights ensures an enforceable rights to compensation in case of unlawful arrest or detention, India ratification of the convenient with reservation and the absence of any express right in the Indian Constitution to compensation for the violation of fundamental rights, have made compensation for the violation of fundamental right, have made accountability of state in case of unlawful arrest or detention or custodial violence difficult. Initially the judiciary was also lukewarm in its response when for the first time the question of state accountability for the infringement of fundamental rights under Article 21 was raised before the Supreme Court in Khatri V State of Bihar,76 and in Veena Sethi v. State of Bihar.77 The judiciary was inimical to the payment of compensation for breach of fundamental rights, Under Art. 21. But continuous and unabated violation of human rights by the

75. Ibid.
76. AIR 1981 SC 928.
77. AIR 1983 SC 339.
men in Uniform has awakened the judiciary and brought into focus the need for a right to compensation against state. Rudual Shah v. State of Bihar\textsuperscript{78} is a path breaking decision in this regard. Rudual Shah was found to have been illegally detained without any statutory justification for a period of fourteen years after his acquittal of criminal charges at a session’s trial, the court felt rights under Article 21. As the state has depicted the man of fourteen invaluable years of life, the court awarded a compensation of Rs. 35,000/- to Rudul Shah. The genial seeds of compensatory jurisprudence have been laid and the citadel has been broken. The court observed:

Art. 21 which guaranteed the right to life and liberty will be demanded of its significance if the power of these courts were listed to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with mandate of Article 21 secured is to inflict its violators to pay monetary compensation.\textsuperscript{79}

It was the historical judgement in the field of human rights jurisprudence which opened the gates of the Supreme Court and the High Court for claiming the monetary compensation through writs. Many other cases involving custodial torture came before the Supreme Court in which the highest court awarded monetary compensation is a welcome step. But the question is how for such judicial activism can bring relief the victims when thousands of ‘Rudal

\textsuperscript{78} AIR 1983 SC 1086.
Shahs’ are going under the administrative laxity and red tapism. There have been several instances when the state government did not care to comply with the judicial order.\textsuperscript{80}

Payments of compensation to the victims of crime for any injury caused to him has not been institutionalized under the Indian Penal laws. Nor any legal right to be compensated has been created in favour of the victim. Whereas in case of irreversible injury monetary compensation is the sole effective remedy. In India there is neither a comprehensive legislation nor a statutory scheme providing for compensation by state or offender to victims of crime. The legislative vacuum of a legal right to monetary compensation for violation of human rights has been supplemented by the higher judiciary by providing parallel constitutional remedy.\textsuperscript{81} Likewise in Bhim Singh v. Jammu & Kashmir,\textsuperscript{82} the Supreme Court directed the state to pay compensation to the appellant for the breach of fundamental rights under Article 21 and Article 22(2) respectively. In this case Chinnappa Reddy, J., speaking on behalf of the court observed:

“If personal liberty of a member of a Legislative Assembly is to be played with in this fashion, one can only wonder what may happen to lesser mortals. Police officers who are the custodians of law and order should have the greatest respect for the personal liberty of citizens and should not float the law by stooping to such bizarre acts of lawlessness. Custodians of law and order should not

\textsuperscript{80} Supra note 28 at 187.
\textsuperscript{82} AIR 1956 SC 494.
become depredators of civil liberties. Their duty is to protect and not abduct.”

In *M.C. Mehta v. Union of India*, 83 the Supreme Court emphasized that its jurisdiction under Article 32 is both preventive and remedial and that the remedial relief may include the power to award compensation in appropriate case is one where the infringement of fundamental right must be gross, patent, incontrovertible, ex-facie glaring and its magnitude must be such as to shock the conscience of the court.

In *Neelabati Behara v. State of Orissa*, 84 the Supreme Court observed:

“It is an obligation of the State to ensure that there is no infringement of indefeasible rights of a citizen to life, except precious right guaranteed by Article 21 of the constitution of India cannot be denied to convicts, under trial or other prisoners in custodial except according to procedure established by law. There is great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of strict and admits of no exception. The wrongdoer is accountable and the state is responsible if the person in custody of the

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83. AIR 1997 SC 1086.
police is deprived of his life except according to the protector established by law."\(^85\)

The high watermark in the custodial jurisprudence was reached when the Supreme Court established some norms followed during arrest and detention in the case of \textit{D.K. Basu v. State of West Bengal}.\(^86\)

Torture has not been defined in the constitution or any other penal laws torture of human being by another human being is essentially, an instrument to impose the will of the "strong over the weak" by suffering. The Word ‘Torture’ today has become synonymous with the darker side of human civilization ... Anel, custodial violence including torture and death in the loc-up strikes a below at the rule of law.

Similarly, the court’s concern towards police atrocities and handcuffing has also been expressed in various cases.\(^87\) The Apex Court has always shown its exasperation on public abuse, torture, inefficiency, or human rights. The Supreme Court has not only scrutinized the police atrocities but has galvanized the police department also by expressing displeasure with the inaction of the police.\(^88\)

While turning new leaf of jurisprudence in accountability aspect for custodial violence, the Supreme Court cautioned that care must be taken to separate non-genuine claim claims. In \textit{Shakila Abdul Gafar}


\(^{86}\) 1997 Cr.LJ, 743.


\(^{88}\) \textit{Navkiran Singh v. State of Punjab, 1995(7) SC 477.}
Khan v. Vasant Raghunath Dhoble,89 and Munshi Singh Gautam v. State of M.P.90 the court observed:

But at the same time there seems to a disturbing trend or increase in cases where false accusations of custodial torture and made, trying to take advantage of the serious concern shown and western attitude reflected by the courts while dealing with custodial violence. It seeds to be carefully examined whether the allegations of custodial violence are genuine or are same attempts to gain undeserved benefit masquerading as victims of custodial violence.

In Sube Singh v. State of Haryana91 the Supreme Court suggested that custodial violence requires to be tackled from two ends, that is, my taking measures that are remedial and preventive. Award of compensation is one of the remedial measures after the even effort should be made to remove the very cause, which lead to custodial violence, so as to prevent such occurrence.

5.2.3 Concept of Public Interest Litigation

Since early 1980s the Supreme Court of India has developed a procedure which enables any public spirited citizen or social activist to mobilise favourable judicial concern on behalf of the oppressed classes. The medium through which the access to judice has been democratized is called ‘Public Interest Litigation’ (PIL). Indian PIL is home grown and in the product of direct social, historical and political

91. AIR 2006 SC 1117.
forces and has nothing in common with American Public Interest Litigation, Professor Upendra Baxi, one of India’s foremost legal scholars, preferred to describe the new legal phenomenon as ‘Social Action Litigation which was desired to be used only as an instrument of Social change genuinely on behalf of the victimized and oppressed class. The concept of Public interest litigation is a public redress system unique to India. It cuts through the usual lengthy and costly legal formalities by allowing the protest victims of human rights abuses to approach the Supreme Court directly, or if the victim can not do so himself or herself, through a bonafide organisation or person. The Supreme Court has even acted on a simple letter or postcard written by a prisoner. The Supreme Court’s judgement in the Sheela Barse case resulted from a letter of journalist who had written to the court complaining of custodial violence to which women were subjected in the Bombay Police station.

Traditionally, only a person whose own right was in jeopardy was entitled to seek a remedy. However, the Supreme Court through its rulings in the People’s Union for Democratic Rights and other v. Union of India has considerably relaxed this traditional rule. The Court permits PIL or Social interest litigation at the instance of “Public spirited citizen” for the enforcement of constitutional and legal rights of any person or group of persons who because of their socially or economically disadvantage position are unable to approach court for relief. In the Sunil Batra case. The Supreme Court accepted a

94. AIR 1982 SC 1473
letter of one prisoner as writ petition, complaining of a brutal assault by a Head Warden on another co-prisoner. The Court held: “Technicalities and legal niceties are no impediment to the court entertaining even an informal communication as proceeding for Habeas Corpus if the Basic facts are found”.

In People Union Case,96 the Court laid down the scope and nature of PIL Justice Bhagwati observed thus:

PIL which a strategic arm of legal movement and which is intended to bring justice within the reach of poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between litigating parties. PIL is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation’s, but is intended to promote and virehicate PIL which demands justice to large number of people who are poor and ignorant.

The first reported case of PIL in 1979 focused on the inhuman conditions of prisons and under trial prisoners. In Hussainara Khatoon v. Home Secretary, State of Bihar,97 the PIL was filed by an advocate on the basis of a news report highlighting the plight of thousand of Under trial prisoners languishing in various jails in Bihar. This litigation exposed the failure of the criminal justice system and led to chain of proceeding resulting in the release of over 40,000

96. AIR 1982 SC 1473.
under trial prisoners. Right to speedy justice emerged as basic fundamental right which had been denied to these prisoners. This litigation also generated public debate on prison reform.

In 1981 the case of Anil Yadav v. State of Bihar98 exposed horrific police Brutalities. A news report revealed that about 33 suspected criminals were blinded by police in Bihar by putting acid into their eyes. In response to a PIL, the Supreme Court deputed its Registrar to visit Bhagalpur and investigate the truth. Through interim orders the court quashed the trial of blinded persons condemned the police for their cruel act and directed the state government to bring the blinded men to Delhi for medical treatment. It also ordered speedy prosecution of the guilty policemen. The Court read right to free legal aid as a fundamental right of very accused. Session judges throughout the country were directed to inform each accused about his fundamental right to legal aid.

The response of the courts in handling cases of police excesses has been mixed one. Immediately after assassination of Prime Minister Indira Gandhi in 1984 a communal riot occurred in Delhi and other parts of the country in which many members of the Sikh community lost their lives. A civil liberties group approached the Delhi High Court for appointment of a Commission of inquiry and a direction to the CBI to conduct an investigation into the role of police. Rejecting there prayers, the High Court held that in PIL there could be no Precedents and direction in PIL could be given only if they were effective.

According to the court, there was no need to distrust the police and politicians as they were equally concerned with human rights.99

In striking contract to the above approach of judicial reluctance to make police their adversaries, the Supreme Court became very critical about the ‘Police Raj’ in the country while hearing a PIL alleging Police Brutalities on a judicial officer in Gujarat. In this case telegram was sent by an association of Delhi judicial officer to the Supreme Court alleging assault, handcuffing and brutal torture of the Chief Judicial Magistrate, Nadiad, in the streets by certain police officers. The Supreme Court condemned the police Brutalities in strong term and ordered their punishment in the exercise of its contempt power.100

A Civil liberties group through PIL drew the Supreme Court attention to the police atrocities committed against poor people who were forcibly taken to a police station in Delhi to work their without wages. One person died of police beating. The court awarded Rs.50,000 as interim compensation to the next of kin of deceased and ordered the recovery of the amount from the policemen.101 A nine-year old child was beated to death by the police. In response to a PIL the mother of the child got Rs. 95,000/- as interim compensation.102 Illegal detention of a youth aged 21 years was reported to Delhi police commissioner who paid no heed to complaint. The Court ordered an inquiry which revealed 51 injuries on the person of the youth as a

101. PUDR v. Commissioner of Police, Delhi, (1989), Scale 114.
result of which he died. The High Court of Delhi awarded Rs.5,50,000/- as compensation to the next kin of the deceased.\textsuperscript{103}

PIL has undoubtedly produced astonishing results which were unthinkable two decades ago. Tortured under trials humiliated inmates of protective women’s home, blinded prisoners, exploited children and many other have liberated through judicial intervention. What happened to them after liberation is, however not known. The great contribution of PIL has been to enhance the accountability of governments towards human rights of the poor. Unfortunately there are two disturbing features of PIL ones is that PIL is initiated and controlled by elites and is governed by their own choices and priorities. Different Social action groups have different agendas and ideologies. Most of these groups lack sustained commitment to any specific victimized group. Another disturbing feature is some PIL matters are pending for many years. Inordinate delays in the disposal of PIL cases may render many leading judgments merely of academic value.

5.2.4 The Law Commission Report

The Law Commission in its report in 1996 has stated that, ‘The principles of victimology have foundation in India Constitutional jurisprudence. The provisions of fundamental right (Part-III) and directive principles of state policy (Part IV) of the Indian Constitution from the bulwark for a new social order in which social and economic justice blossom in the national life of the country. Article 41

\textsuperscript{103} Geeta v. Lt. Governor, Delhi, 1998, Delhi Law Times, 822.
mandates, inter alia, that the state shall make effective disablement in other cases of undeserved want.\textsuperscript{104}

The Report has said further that, the principles of compensation to crime victims need to be reviewed and expanded to cover all cases. The compensation should not only be limited to fines, penalties and forfeiture realized. The state should accept the principles of providing assistance to victims out of its own funds (i) in cases of acquittals, or (ii) where the offence is not traceable, but the victim is identified, or (iii) and also in cases when the offence is proved.” In view of the lacunae in the existing provision for compensation to crime victims under the criminal law, the Law Commission of India has stated that it is necessary to incorporate a new section 357 A in the code of Criminal Procedure to provide for a comprehensive scheme of payment of compensation for all victims fairly and adequately by the Court.

5.2.5 Justice Malimath Committee Report

Despite the protest of the lawyer community on many aspect of the recommendations of Malimath Committee this committee has made recommendations of far reaching significance to improve the position of victims of crime in the criminal justice system and to proved justice to the victims, yet victims have not been any substantial rights, not even to participate in the criminal proceedings. Therefore, the committee focused on justice to victims and has made many recommendations, including the victims and has made many recommendations including the victim’s right to participate in cases

\textsuperscript{104.} Supra note 79 at 452.
involving serious crime to adequate compensation. Some of the significant recommendation includes:

(i) The victims and if he is dead, his legal representative shall have the right to be impleaded as a party in every criminal proceeding.

(ii) In select cases notified by the appropriate government with the permission of the court, an approved voluntary organization shall also have the right to implead in court proceedings.

(iii) The victim has a right to be represented by an advocate of his choice; provided that an advocate shall be provided at the cost of the state if the victim is not in a position to afford lawyer.

(iv) The victim’s right to participate in criminal trial shall, inter alia, include:

   (a) To produce evidence, oral or documentary, with leave of the court and/or to seek directions for production of such evidence.

   (b) To be heard in respect of the grant or cancellation of bail.

   (c) To be heard whenever prosecution seeks to withdraw and to offer to continue the prosecution.

   (d) To adverse arguments after the prosecutor has submitted arguments.

(v) The victims shall have a right to prefer an appeal against any adverse order passed by the court acquitting the accused, convicting for a lesser offence, imposing inadequate sentence, or granting inadequate compensation. Such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court.

(vi) Victim compensation is a state obligation in all serious crimes, whether the offender is apprehended or not, convicted or acquitted. This is to be organized in a separate legislation by parliament. The draft bill on the subject submitted to Government in 1995 by Indian Society of Victimology provides a tentative framework for consideration.

(vii) The victim compensation law will provide for the creation of a Victim Compensation fund to be administered possibly by the Legal Service Authority. The law should provide for the scale of compensation in different offences for the guidance of the court. It may specify offences in which compensation may not be granted and conditions under which it may be awarded or withdrawn.

The Report, while proposing ways to augment the state's resources for compensation fund, emphasized that dispensing justice to victims of crime cannot be ignored any longer on grounds of scarcity if resources.
5.2.6 National Commission to Review the Working of the Constitution

The Commission to review the working of the constitution (Government of India, 2002) has advocated a victim – orientation to criminal justice administration. In views of the commission, ‘Victim Orientation includes greater respect and consideration towards victims and their rights in the investigative and prosecution processes, provision for greater choices to victims in trial and disposition of the accused, and a scheme of reparation/compensation particularly for victims of violent crimes. According to the Commission, the case for a viable, social justice – Oriented and effective scheme for compensation to victims is now widely felt. The commission recommended to the union and state governments that under the directive principles of state policy and under international human right obligations, it should legislate on the subject with an effective scheme of compensation for victims of crime without further delay. The commission felt that if the compensation scheme were to be introduced even in a modest scale, the criminal justice system might receive tremendous support from the people as it will ensure social justice, therefore, there is a strong justification for the state to find resources to float the scheme immediately.\footnote{106. Supra note 79 at 454.}

5.3 Role of NGO's in Protection and Promotion of Human Rights

The Economic ad social council of the United Nations by adopting a resolution [288 (X)] on February 27, 1950 defined the non-
governmental organizations as private associations and they denote significant resources to the promotion and protection of human rights. They are independent of both government and all political groups which seek direct political power. Human Right NOG's are different from NOG’s involved in other fields in the sense that the former seek to protect the right of all members of the society and not a particular group or constituents. 107

N.G.O’s, whether their activities are spread worldwide or confined to one country, contribute substantially in different ways in the promotion and protection of human rights. They perform different functions depending upon the purpose for which they are established. NOG’s can have a dialogue with government to respect international standards for human rights. They can pressurize the government to keep a check on the growing problem of torture and inhuman treatment of police and jail authorities; and can also extend pressure on international bodies to adopt a convention against torture and other cruel inhuman, or Degrading Treatment or Punishment. NGO's may work directly with victims and assist in solving their problems. Thus, they may perform the task of service providers; they may take initiative in bringing those cases before the courts of law where a right has been violated but no action has been taken by the victims to secure the redress either because of the lack of resources or because of the ignorance; NOG’s may file writ petitions before the courts by way of public interest litigation for the purpose of providing access to justice; NOG’s may perform the task of processing of

107. Supra note 3 at 213.
information, i.e. educating people about the extent of their rights and disseminating information about rights violation.\textsuperscript{108}

Independent human rights groups operate throughout India in investigating abuses and publishing their findings which are often the basis for reports by international human right groups. However, the police have targeted human rights monitors for arrest and harassment. Some domestic NGO’s and human rights organizations faced intimidation and harassment by local authorities. The Government appointed National Human Rights Commission (NHRC) in October 1993 and is directed to contribute for the establishment, growth and functioning of non-governmental human rights organizations. Human rights groups alleged that state human rights commissions are more likely than the NHRC to be inflamed by local politics and less likely to often fair judgments.\textsuperscript{109}

The exceptional role of non-governmental organizations (NGOs) in furthering human rights is given appropriate and special recognition in the Act. Section 12(1) expressly charges the commissions to encourage the efforts of non-governmental organizations and institutions working in the field of human rights”. This is a responsibility which the commission readily assumes for the cause has much to gain both from the practical help and from the constructive criticism that NGO’s and the commission can bring to bear in their mutual interaction and growing relationship. There are three areas in which NGOs can be of particular assistance to the commission. Firstly, because of their gross-root contacts, they can

\textsuperscript{108}. Id at 216.
\textsuperscript{109}. N.S. Sreenavasulu, Human Rights many sides to a coin, 240-41(2008).
most effectively identify human rights violations, articulate them and seek redress. The commission sees a most positive role for NGOs in bringing complaints to its notice. Secondly, given the report that they have established with public at large, the assistance and cooperation of the NGO’s can be of great value in the investigation of the more serious cases that come to be looked into by the commission through its investigative staff – group that will be put together with great care as to their sensitivity to HRs considerations. There may be instances when the Commission, in accordance with its Regulation No.18, in addition to using its investigative staff, may choose to associate NGO’s actively in investigation work. Thirdly, the high level of expertise of individual NGO’s in specific areas of HRs work can be a source of great benefit to the commission as its studies and makes recommendations on specific issues and problems. There would thus be a role for NGO’s in the research and studies programme of the commission as this develops.\textsuperscript{110}

The Commission has already had the benefit of interacting with a large number of NGO’s both Indian and foreign. Certain of them have already brought complaints that are under consideration by the commission. Yet others have already helped the commission by their reports and publications and by their vigilance in the defiance of HRs. the commission is particularly grateful of NGO’s for coming forwarded with complaints regarding violation of HRs. Analysis of the complaints regarding violation of HRs. Analysis of the complaints received by the commission indicates that over 200 NGO’s were involved in the submission of such complaints and that these complaints were

\textsuperscript{110} Supra note 9 at 488.
received from all parts of the country. This speaks for itself concerning the range of NGOs in the country and to their interest.\textsuperscript{111} The commission is seeking to prepare an appropriate National Register of NGOs working in the field of human rights, both in order to develop practical links with task, the Commission is seeking advice from prominent human rights activists and NGOs that have already established a repute for probity and commitment.

To the cause of human rights we can evaluate the role of some Non-Governmental Organizations (NGO’s) Civil Rights Group and their vital role in disclosing the various incidents of police atrocities and violence. These organizations emanated at a time when the state of human rights was fairly dismal and they have played a crucial role in monitoring and spreading awareness among peoples of their rights and exposing the violent nature of the state. The most prominent of these groups are the Peoples Union for Democratic Rights (PUDR) and the People Union for Civil Liberties (PUCL) formed after the split in the first and only national human rights organizations, the People Union for Civil Liberties and Democratic Rights (PUCLDR). The PUCL and the PUDR have widely contributed to the civil rights movement. Other civil rights groups had emerged earlier in the sixties in the wake of state oppression and repression in West – Bengal, Andhra Pradesh and Punjab. They are the Association for the Protection of Democratic Rights (ADPR) in West Bengal, the Andhra Pradesh Civil Liberties Committee (APCLC) and the Association for Democratic Rights (AFDR) in Punjab. Some International Civil Rights Group – Amnesty International (AI), the

\textsuperscript{111} Supra note 30 at 324.
Human Rights watch Asia (HRWA) and the International Commission of Jurists (ICJ) have also actively engaged in monitoring violations. Amnesty’s contribution lies in its examination of specific issue of human rights concern, such as detentions without trial, systematic use of torture, disappearances and extra judicial execution of political activities in the Punjab, Jammu and Kashmir and West Bengal. Most of these civil and democratic rights movement national and international have made notable contributions to the safeguarding of human rights. Emerging for the first time in the late sixties and early seventies, at a time when state repression against the Naxals in Bengal had reached its Peak, when many were imprisoned, maimed and executed, these groups have played a vital role in disclosing the various incidents of police atrocities and violence.

Thus, Non Governmental human rights groups have contributed their mite to the cause of human rights. Through independent and non-biased investigation into the allegations of violence and injustices. These groups have exposed the involvement of the State and its institutional enforcement agencies in the abuse of people’s rights and freedom. They have also organized conferences and published reports that address human rights issues and their widespread successive infringement. In this way they have aroused awareness for human rights.

5.4 Role of International Human Rights Group Active in India

5.4.1 Amnesty International

A number of international organizations have begun focusing their attention on the question of torture in recent years. Apart from
international organization some non-governmental organization having their network throughout the world have been very active on the problem of torture. They include the Amnesty International, the International Commission of Jurists, the International Catholic Movement for Intellectual and Cultural Affairs etc. one of the basic objectives of the Amnesty is:

Opposing by all appropriate means the imposition and inflection of death penalties and torture or other cruel, inhuman and degrading treatment or punishment of prisoners or other detained or restricted persons whether or not they have used or advocated violence.¹¹²

Right from the Beginning, it has been guided by the principle, “that every man, woman, and child is of value, that none should be made to suffer for holding or expressing his own opinions.”¹¹³ In its opinion torture must be recognized an evil “and the public mobilized and international and domestic machinery set up to bring it to an end. In 1972, the Amnesty broadened its organizational objectives so as to include within it a campaign for the abolition of torture.¹¹⁴

The Indian Section of the Amnesty International was founded in Delhi in September, 1968 at the initiative of Shri Jai Prakash Narain and Mrifula Sarabhai, Mrs. Matti Singh, was the founder president of the Indian Section of the Amnesty International. In January, 1972 the Amnesty International focused on the custodial violence in India and mentioned that country wide campaign be launched in India from

¹¹². Clause 1 of Amnesty Statutes setting out its objectives.
¹¹⁴. Ibid.
March – June, 1992. Amnesty International decided to launch the movement to dispel the Indian impression that the organization was western based and to prove that there was regional insert in the movement. Amnesty also wants to gain access to the country to conduct research mission inside India. The Amnesty International focused its attention on India for 1992 with Publication of its book entitled ‘India – Torture Rape and Death in Custody’ and also declared 1992 as the year of India. They also utilized their network of 1.5 million members worldwide to disseminate information over the alleged poor record of India on the question of HRs.\textsuperscript{115}

5.4.2 South Asian Forum for Human Rights (SAFHR): Insec P.O. Box 2726 Kathmandu Nepal

It is a regional HRs Organization – a Conglomerate of 36 NGO’s from SAARC Countries – which was established at Kathmandu in 1993. The aims and objects of the organization are:

a) To work for the realization, promotion and promotion of HR’s in the SAARC region;

b) To work for the implementation of all national, regional and international human rights instruments, standard, norms and declarations and of international humanitarian law;

c) to engage in studies and research in the field of human rights and to educate the public to support the cause of human rights through talks, seminars, training, publications, uses of mass media and similar activities;

d) to hold a people's SAARC at the time of the annual SAARC summit meeting in order to project the viewpoint of the general public on selected human rights issues;

e) to seek affiliation with ECOSOC for making representations to various UN committees;

f) to investigate violation of human rights especially those of a class nature, and;

g) to receive donation in cash or kind, operate bank account and invest money and pursue the other activity which is necessary, incidental or conducive to fulfilling the aims and object of the society;

5.4.3 Kashmir - American Mission (KAM)

Kashmir-American Mission (KAM) is an organisation of Kashmiris based in the USA, supporting pro-independence militant movement in the valley. It has issued a pamphlet, which appeared in 1991-93 in Indian/International media, indicting Indian security forces for violation of human rights in Kashmir.

5.4.4 India Alert

'India Alert,' a US-based human rights group, had come to notice for contacting civil rights groups in India to mobilize opinion against State terrorism and human rights violation. It has published three pamphlets on India:

(i) Extra-judicial executions in Kashmir - dealing with the death of Dr. Abdul Ahmed Guru and H.N. Wanchoo - human rights
Activist in the valley and Hamida Matto, a 35 year, old woman allegedly killed by security forces in Baramulla on March 3, 1993.

(ii) Death in Police custody in Alleppey Distt. In Kerala deals with the death of Vidhyadharam, the Congress dissident who allegedly died in police custody on Feb. 18, 1993.

5.4.5 Asia Watch (USA)

Asia Watch and other committees, namely Africa Watch, Helsinki Watch and Middle-East Watch are linked, coordinated and supported by "Human Rights Watch". Asia Watch claims that it advises the US 'Congress' and 'Administration' on abuses of the human rights in Asian countries. It has been urging the Indian Govt. to investigate police atrocities and the role of security forces in Kashmir. Recently, the organisation expressed its concern regarding the alleged bias and prejudice of the police and security forces in handling the riots at Mumbai.

5.4.6 Physician for Human Rights

Physician for Human Rights (PHR) is an organisation of physician and health professionals that brings the knowledge and skills of medical sciences to the investigation and prevention of violation of international human rights and humanitarian law. Since its founding in 1986, it has conducted over forty missions concerning over twenty-five countries.
5.4.7 Commonwealth Human Rights Initiative (CHRI)

Commonwealth Human Rights Initiative is a non-government organisation and was formed in 1987 by a group of Commonwealth NGO's, viz. the Commonwealth Journalists, Medical, Law and Legal Education Association and the Commonwealth Trade Union Council, under a Board of Trustees in London. The initiative is registered as a charity under the laws of England and has the potential to establish itself as a charitable institution in other Commonwealth countries, under their laws. The institution H.O. will rotate around Commonwealth countries at 5 yearly intervals. The purposes and objects of the CHRI are mainly:

a) promote awareness of the UN Declaration and other internationally recognized human rights instruments;

b) to gather, evaluate and disseminate information in this regard;

c) to advocate approaches and measures which may prevent human rights abuses, and to secure redress;

d) to advise national and international authorities on human rights issues;

e) to promote national legislation to conform to international human rights standards.

Conclusion

All these initiatives of the Supreme Court, NHRC, NGOs (National and International) reveals the firm determination of all these to eliminate the custodial violence and these efforts will go a long way in
protection the innocent and helpless people of the country from the violation of their basic Human Rights, viz., the right to life. And time has come when the people of the country have identified the higher judiciary and the NHRC as the last resort for ventilating their grievance against the State constabulary. In view of above, it is humbly submitted that the eliminate custodial torture, the Judges, Administrators, Police, Media, NGOs (National and International) and Medicos should join hands and discourage torture. The ethical value expected of policeman should be revealed through his functional attitude, where he gives utmost importance to the protection and promotion of Human Rights, so that a social order emerges where the custodial torture becomes a thing of the past.