LAW COMMISSION OF INDIA

ONE HUNDRED AND FIFTY SECOND

REPORT

ON

CUSTODIAL CRIMES

1994

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(FORMER CHIEF JUSTICE OF INDIA)

CHAIRMAN
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GOVERNMENT OF INDIA
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Dear Prime Minister,

I am glad to forward herewith Law Commission's 152nd Report on "**Custodial Crimes**" (9th Report of the 13th Law Commission).

Complaints of abuse of power and torture of suspects in custody by the police and other law enforcing agencies have been the concern of the society. Custodial crimes and torture of persons in police custody are heinous and revolting as they reflect betrayal of custodial trust by a public authority against the defenceless citizen, such practices violate fundamental rights and human rights. There is a pressing need to control this malady. The victims of custodial crimes, torture, injury or death, mostly belong to the weaker section of our society, the Law Commission considered it necessary to take up this matter *sou motu* for an in-depth, study.

The commission circulated a working paper on the subject to elicit public opinion. It also organised a Seminar wherein the problem of custodial crimes was discussed at length. The Commission has, after an indepth analysis of the Constitutional and legal provisions, prepared this report which contains recommendations for amendment of substantive and procedural laws, including amendment of some of the provisions of Indian Penal Code, 1860, Criminal Procedure Code, 1973 and Indian Evidence Act, 1872. The recommendations have been made with a view to contain the possibility of abuse of power and to provide for payment of compensation to the victims.

We hope the recommendations made by the Commission in this Report will be implemented as that will greatly benefit the poor and ignorant victims of custodial crimes and it will further be a progressive step towards the protection of human rights of our citizens.

With regards,

Yours sincerely,

(K. N. SINGH)

Hon'ble Shri P. V. Narsimha Rao,
Prime Minister &
Minister for Law, Justice & Company Affairs,
New Delhi.

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CHAPTER 1

INTRODUCTION

1.1 There is a deep concern at the growing incidence of custodial crimes occurring in different parts of our country. Complaints of abuse of power, and torture of suspects in custody by the police and other law enforcing agencies having power to detain a person for interrogation in connection with investigation of an offence are, on rise. Of late, such complaints have assumed a larming dimensions projecting the incidence of torture, assault, injury, extortion, sexual exploitation and death in custody. Compared with other crimes, custodial crimes are particularly heinous and revolting as they reflect betrayal of custodial trust by a public servant against the defenceless citizen. Custodial crimes violate law; human dignity and human rights.

1.2 Despite constitutional and statutory provisions safeguarding the liberty and the life of an individual, the growing incidence of custodial torture and death have become a disturbing factor in the society. It is distressing to find the gory tales of dehumanising torture, assault and death in the custody of police almost in every morning newspaper. The alarming rise in custodial crimes has picked the conscience of every section of society and it has evoked public outcry against the law enforcing agencies, especially the police and the Directorate of Revenue Intelligence and Enforcement Directorate. The Supreme Court has expressed its deep concern on the recurrence of custodial crimes on more than one occasion. While dismissing the appeal of an Assistant Sub-Inspector of Police, who was sentenced to life imprisonment by the coutrs below, for torturing a person to death, in the police custody in connection with the interrogation of an offence of theft committed in a police officer's house, the Court expressed its distress and anguish in these words : "We are deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of law gore human rights to death.... Police lock-ups, if reports in newspapers have a streak of credence, are becoming awsome cells. This development is disastorous to our human right awareness and humanist constitutional order."[1]

1.3 No reliable or authentic statistics are available regarding the custodial crimes as most of the incidents of torture are not recorded. Incidents of torure and injury in urban areas is brought to public notice by the media, while large number of such incidents occurring in rural areas of our vast country, remain unnoticed. In this state of affaits, it is difficult to pinpoint the exact number of incidents of torture and death in custody. According to the Amnesty International's Report for the year 1993, 415 persons died in custody throughout India during the period 1985 to 1993. According to the National Crime Records Bureau, 289 rapes and 274 deaths in police custody were reported from all over the country during 1990 to 1993[2]. A report published in a leading newspaper indicates that 265 incidents of custodial deaths occured during 1990—1993[3]. There is no guarantee as to the correctness of these figures, but this is quite evident that the incidents of torture and death in custody have assumed alarming proportions which is affecting the credibility of our system of criminal justice and bringing the State to disrepute.

1.4 The problem of custodial crimes has been the subject matter of debate in the Media and various fora in our country and even in international fora. National as well as international agencies have indicated our system for the violation of human rights in the wake of reports of custodial torture and deaths. In September, 1992 the Central Governemnt convened a Chief Ministers' Conference to discuss the violations of human rights, and it is reported that the question of custodial crimes was discussed therein. The decisions taken at the Conference are not available although after the Conference, the Central Government constituted the National Human Rights Commission to deal with the violations of human rights.

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1. *Raghubir Singh* v. *State of Haryana* (1980) 3 SCC 17 : AIR 1980 SC 1087.
2. Letter No. 205/1/94-STAT/NCRB dated 15-6-1994 of National Crime Records Bureau, Ministry of Home Affairs. Government of India.
3. B. P. Saha "Towards Better Police—Public Repport", *The Hindu* May 17, 1994 at p. 17.

1.5 Generally, the victums of custodial crimes, torture, injury or death belong to weaker sections of society. The poor, the dewntrodden and the ignorant with little, or no political or financial power, are unable to protect their interests. The affluent members of the society are generally not subjected to torture as the Police is afraid of their resources as such resourceful persons immediately approach higher authorities and courts to regain their freedom. Members of the weaker or poorer sections of society, are arrested informally and kept in police custody for days together without any entry of such arrests in the police records. During the informal detention they are subjected to torture, which at times results in death. In the event of death in custody, the body of the deceased is disposed of stealthily or thrown to a public place making out a case of suicide or accident. Records are manipulated to shield the police personnel. The relatives or friends of the victim are unable to seek protection of law on account of their poverty, ignorance and illiteracy. But even if some voluntary organisations take up thier case or public interest litigation is intiated against the erring public officers, no effective or speedy remedy is available to them, as a result of which erring public officers go scot-free. This situation gives rise to a belief that the laws' protection is meant for the rich and not for the poor. If the incidents of custodial crimes are not controlled or eliminated, the Constitution, the law, and the State would have no meaning to the people which may ultimately lead to anarchy de-stabilising the society. Justice Brande is of U.S. Supreme Court looked upon Government "as the potent and omnipresent teacher (that) teaches the whole people by its example". If the Government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself". Such a situation cannot be permitted to exist in a civilsed society.

1.6 Maintenance of law and order is of prime importance to any Government. Investigation of crime and apprehension of an offender is extremely necessary, to ensure peace and order. For the implementation of laws and maintenance of law and order, police and other law enforcing agencies are necessary, but no civilised country can permit the use of torture and third degree methods during interrogation and investigation of an offence. The police and other Governmental agencies, while enforcing the law, are required to respect the constitutional commitment to the indiviaual's fundamental rights. The statutory laws including the Criminal Procedure Code and the Indian Evidence Act provide procedure to safeguard the interest of a suspect or an accused, but, in actual practice, those provisions are violated. The existing law is inadequate and ineffective in dealing with the custodial crimes and in many cases the erring officers go scot-free on account of the complainants inability to prove the case against them. The Supreme Court has adversely commented upon the inadequate statutory provisions dealing with the custodial crimes in India and it has made several suggestions for reforms in the existing laws.

1.7 As observed earlier generally the victims of custodial crimes belong to the weaker sections of society. In the event of death of the earning member of a poor family in custody, the family members of the deceased are left to lead a pathetic life in penury. Various enquiry commissions appointed by the Government to enquire into costodial deaths have recommended the amendment of the law, providing for relief and rehabilitation to the family members of the deceased[1]. The Supreme Court and other courts have also directed the State to pay damages to the affected family members. The State functionaries including the Chief Ministers and Home Ministers have been granting ex-gratia payment to the affected family members of the victims of custodial crimes, but the existing law does not adequately provide for the grant of compensation or damages to the affected family members, nor there is provision for granting interim relief. No doubt relief for damages may be claimed in tort through a civil suit but the legal position in this respect is unclear and the process of civil suit is too cumbersome, making it illusory.

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1. Report of the Commission of Inquiry into the death of Sri U. Narasimha in the Police Custody at Sanjeeva Reddy Nagar Police Station, Hyderabad on 10-7-1986, 28 Government of Andhra Pradesh (1986).

   Report of the Commission of Inquiry on the death of Sri T. Murlidharan at V Town Police Station, Vijayawada, on 17-9-1986 (Government of Andhra Pradesh, 1987).

   Report of the Inquiry Commission on the death of Dadugula Sankuriah in the Outpost of Yelleswaram on 26-8-1985, (Government of Andhra Padesh, 1986).

   Report of the Commission of Inquiry into the death of Sri Machela Anjiah while in the police custody at Thungathurthi on 6-9-1986, (Government of Andhra Pradesh).

1.8 The Law Commission is entrusted with the task of examining the laws which affect the poor and suggesting such measures as may be necessary to harness law and the legal process in the service of the poor, keeping under review, the system of judicial administration to ensure that the system of judicial administration is responsive to the demands of the society in the light of Directive Principles of State Policy. Though the Government has made no reference to the Law Commission on the subject under study, the Commission has taken up the matter *sou motu* for an in-depth study, with a view to providing relief to the victims of Custodial Crimes, which mostly belong to weaker sections of our society. There have been demands in public to amend laws, both substantive and procedural to minimise the occurrence of the custodial crimes and to provide for the relief to the victims and their dependents, hence this study. The Commission is conscious that abuse of power by the law enforcing agencies cannot successfully be prevented altogether as the obedience to the laws depends upon the social consciousness of the law enforcing agencies, consiousness of their commitment to the human rights and to the individual's freedom and liberty. The law should be made stringent to eliminate chances of torture in custody and even if it is not possible to eliminate it altogether, efforts should be made at least to minimise it to maximum possible extent. The Commission has undertaken this task with the aforesaid object in view.

1.9 In order to elicit public opinion on the subject, the Commission circulated a Working paper on Custodial Crimes, setting out various aspects of the subject under study. In the Working Paper[1] the Law Commission formulated ten issues on various aspects of the problem of custodial crimes and invited opinion on the provisional proposals for the amendment of substantive and procedural laws. The working Paper was sent to all State Governments, Director Generals of all State Police and para-military forces and also to the Home Ministry and Central Bureau of Investigation, and to Supreme Court, and High Court Judges, Bar Associations, academicians Law Professors, Human Rights agencies, Advocates and other persons. Comments received on the Working Paper are summarised in Appendix-II. The Commission has also organised an all India Seminar on "Administration of Criminal Justice, its problems and perspectives" at New Delhi. In the seminar Judges, Jurists, Advocates, Law Professors, Magistrates, and Police Officers expressed their views on various aspects of the administration of criminal justice. 'Custodial crimes' was one of the topics for discussion, which generated a lively debate. The Commission has, while formulating this report, taken into consideration the views expressed at the seminar.

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1. See Appendix—I.

CHAPTER 2

CIRCUMSTANCES LEADING TO CRIME IN CUSTODY

2.1 Arrest and its significance.

Arrest of a person leads to custody, which provides possible opportunity for commission of crime against the person in custody. Commission of a crime by a public servant against the arrested or detained person while in custody amounts to custodial crime. The custodial crime is preceded by arrest or detention. In generals "custody" commences on a person being arrested, the arrest may be legal or illegal: it may be formal or informal; it may be by word or action.[1-6] Whatever be the origin or category of the act of arrest, it has one very important consequence; it deprives the person arrested of his personal liberty. From that moment onwards, he is totally under the control of the person arresting him. His movements, his freedom, his actions, even his thinking, come under the exclusive control and mastery of another person. His personality becomes subordinate to that of the person in whose custody he is placed. Every arrest amounts to custody. Arrest and custody are not synonymous terms. Custody may amount to arrest in certain circumstances but not in all circum, stances.[7] Arrest is a formal mode of taking a person in custody, but a person may be in the custody in other ways also. Ordinarily, the term "custody" in relation to detention of a person implies restraint upon the movement of the person concerned denying him freedom to move about according to his volition. Thus a person after arrest, formally or informally is in custody of the authority concerned.

2.2 Situation of mastery and abuse of authorty.

It is this situation of mastery, domination and total control that is generative of a possibility of abuse. If "power tends to corrupt" in the political area, it is equally true to say that a situation of authority tends to abuse of authority. Such abuse may take a variety of forms. It may lead to physical torture, mental cruelty, silent psychic domination or any other form of abuse. The varieties of custodial torture and crime, can be as infinite as are the varieties of human perversity.

The situation is indeed peculiar. One person comes under the total domination of another person. And that other person (so placed in domination) is not (in general) subject to the concrete and immediate supervison or overview of a third person.

2.1 Role of the Law.

Of course, such supervision and overview can be supplied by the law. And, indeed, it is one of the essential functions of the law to create and maitain an apparatus that will function as the retraining a element against oppression, malpractice, abuse and corruption, particularly in situations of sensitivity, Where the situation is one of temptation, the law will act as a brake on the vice of greed. Where the situation is one of passion, the law, by its sanctions, tries to control the surge of passion. Where the situation is one of exploitation or oppression, the law must try to construct a barrier to stop the on slaught of the evil mind. It is in this respect that the invisible, but omnipresent influence of the law has a role to play. And it is for this reason that the law should try to supply the deficiency that the peculiarity of the situation may give rise to.

This is not to say that passing a good law is, in itself, enough to cure all evils. Good legislation is only the beginning, but is a good beginning. In the context of arrest (with which this paragraph is concerned), the legal framework should be such

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1. 113th Report of Law Commission of India on Injuries in Police Custody :
2. *Uttam Chand v. Mahmud Jewa*, AIR 1936 Nagpur 200.
3. *Chottey Lal v. State of Uttar Pradesh*, AIR 1954 Allahabad, 687.
4. *Muthiah Chettiar v. Ganesan*, AIR 1960 Madras 91.
5. *Paramhamsa Jadab* v. *State of Orissa*, AIR 1964 Orissa 144.
6. *Jodha Khoda Rabari* v. *State of Gujarat* 1992 Cri. LR 3298.
7. *Directorate of Enforcement* v. *Deepak Mahajan* & Anr JT 1994 (1) SC 299, 306.

as to supply the restraining influence which is needed because of the weakness of human nature. This means (apart from other things) that the law of arrest should itself be kept under constant review. In the "law of arrest", one has, of course, to include (i) the statutory provisions that give power to arrest, (ii) the kind of persons empowerd to arrest, (iii) the safeguards provided in law in relation to arrest and detention, and (iv) connected matters, including, in particular, the subjective and objective factors that must exist before the power of arrest can be exercised. All these need consideration and we would discuss them at the appropriate place.

2.4 Officers other than the police.

At this stage, we may like to make it clear that the power of arrest is not given only to police officers. In our statutory framework, this power is conferred on many other officers as well. Whatever be the technical view, they are also, in subastance, persons in authority, like police officers. It is possible that in the ensuing paragraphs of this eport, for brevity and convenience, the expression used is "police officer" or "the polce." But (unless the context otherwise demands) the discussion would apply *mutatis mutandis* to officers other than the police officers, who are entrusted with the duty of law enforcement and who have poer of arrest and of keeping persons in custody.

2.5 Initiating the criminal process

If unfortunately, an incident of torture or other crime in custody occurs, it obviously becomes necessary to invoke the criminal process. Ordinarily, the initiation of the criminal process in India takes the shape of lodging information with the police or of making a complaint to the competent Magistrate. Lodging information with the police is the more frequently adopted course. However, where the personal leged to have committed an offence is himself an officer concerned with the enforcement of the law, this may not always prove to be very effective. It is this element of the situation which, in a negative way, counts as a factor that facilitates malpractices.

2.6 Medical Examination.

Allegations about the perpetration of violence by an officer having custody have to be proved by concrete evidence. Eye witness testimony in such cases would very rarely be available. But, in general, medical evidence would furnish a very satisfactory material in this regard, provided it is available. To ensure that such evidence is available, medical examination of the alleged victim of custodial violence could be the best device. This postulates, *inter alia*, that such examination is adequately provided for in the law, which is not the case at present. This aspect will therefore receive attention at the appropriate place.

2.7 Inquest, investigation and inquiry.

Where custodial violence results in death of the victim, obviously the substantive law has failed. But procedural law must 'take over' in order that the factum of death, the cause of death, the mode of death and other relevant facts are ascertained. As far as possible, the ascertainment of such facts must be—

(a) quick in its timing,

(b) adequate in its coverage,

(c) thorough in its methodology, and

(d) impartial in its approach.

The desideratum that we have mentioned last in the above enumeration is, of course, of the highest importance. It is in regrd to this very desideratum that the present situation is not satisfactory. No doubt, the statutory law, particularly, the Code of Criminal Procedure, does contain a few provisions on the subject, but experience seems to indicate that there are three major defects in this regard. In the first place, though inquest by the Executive Magistrate is, at resent, mandatory, cases are not known where police officers are associated with the inquiry, thus defeating the very object of the provision for Magisterial inquiry. Secondly, without casting any reflections of the police or Executive Magistrates, one must take note of the fact that these inquests have not always inspired public confidence. This is evident from the persistent demands for the appointment of Commissions of Inquiry that are made

whenever there is custodial torture, rape or death. Finally, assuming that inquest by an Executive Magistrate is, from the practical point of view, the best that can be thought of, the difficulty is that such inquests do not always result in the initiation of appropriate criminal proceedings against those who may be guilty.

2.8 Deficiencies in regard to evidence : difficulty of proof.

We may now turn to certain practical problems arising in the sphere of evidence. By its very nature, a crime that takes place while the victim is in custody is extremely difficult to prove. In the first place (as elaborated above), the situation is such that the victim is totally subservient to the alleged perpetrator of the crime. Hence the victim would be afraid to speak out. Secondly, the situation is such that no third person may ordinarily be present who can give oral testimony. Even where there is a probability that custodial violence had been committed, it is difficult to link up the episode with the custodian and to establish to the satisfaction of the court that (i) the offence in question had been committed, and (ii) the offence was committed by the the *custodian*.

2.9 Using force to compel statements leading to discovery.

Apart from the question posed in the preceding paragraph, there is another point pertaining to the law of evidence, which, we believe, is of still greater practical importance. The root of this problem lies in a highly anomalous provision contained in the Evidence Act, namely, section 27. In the scheme of the Act, a confession made by a person in police custody is not admissible. By way of a proviso, section 27 lays down that if a person in the custody of a police officer makes a statement leading to the discovery of a fact, the same is admissible. whether or not it amounts to a confession. Different grammatical problems and linguistic vagueness have been generated by the placing and inept language of the section. Our present concern is with more substantial matters. The fact that a statement can be rendered admissible, if it is represented to the trial court as a "discovery statement" and presented at the trial in the form of a confession marked as a discovery statement, a fact will known to every police officer, acts as a lever to the police officer to use unfair means to procure such a statement. The police knows that thi is an easy method of circumventing the prohibitions based on practical wisdom, experience, of generations, and deep thinking. It is an unpleasant thing to say, but it must be said, that secton 27 of the Evidence Act has been productive of great mischief, in the sense that it generates an itch for extorting a confession which, in its turn, leads to resort to subtle, disguised action in regard to the section. For the present, let us say that the section does need drastic surgery. if the cause of honest law enforcement is to be promoted.

2.10 Organisation of the police.

While on the theme of honest and efficient law enforcement, we must also make a mention of an important aspect relating to the organisation of the police. By and large, the police in India is so organised that no strict dividing line is drawn between the function of investigation and the function of maintenance of law and order. The former requires patience, skill, long range efforts and expertise of a high order. The latter envisages very quick action on the spot, facutly of immediate response, firmness of the mind and a decisive approach. The officer engaged in investigation has to collect facts, explore the reality, reconstruct the past and analyse the entire gamut of materials. The officer charged with duties connected with law and order, security and the like must, on the other hand, capture reality in a fleeting moment and exhibit an immediate and effective response. If a police officer is shunted off from time to time to emergency duties, he cannot be expected to adopt 'the text book line of invesigation and may be teoted to switch over to less desirable methods. This is very likely to result in an urge to resort to coercion. There are many other factors arising out of the Police Organisation which cotribute to adoption of coercive methods. We will discuss those in a little detail in a later chapter of this report.

CHAPTER 3

CONSTITUTIONAL AND STATUTORY PROVISIONS

3.1 Introduction

The legal framework in India, both constitutional and statutory contain provisions relating to custodial torture and other crimes in custody. The substantive law Indian Penal Code) provides for punishment of a person causing injury, torture or death on the body of a person in custody. The procedural law (Criminal Procedure Code and Evidence Act) contains several provisions safeguarding the fundamental rights and interest of a person in custody. The constitutional and the relevant statutory provisions on the subject have been supplemented by the significant judicial pronouncements.

3.2 Constitutional provisions : Article. 20

The prohibitions imposed by Article 20 of the Constitution are directly relevant to the criminal process. Article 20(1) prohibits retrospetive operation of penal legislation. Article 20(2) guards against double jeopardy for the same offence. Article 20(3) provides that no persons accused of any effence shall be compelled to be a witness against himself. These three clauses may appear to be dealing with three different topics or facets. But there is a common thread running through all of them namely, the anxiety to ensure that the various facets of the criminal justice system—substative, procedural and evidentiary shall not be used to oppress the accused person. To put the matter in different words, the common theme is that the administration of the criminal justice system should not be so designed or implemented as to destroy the deeper and moral values of justice itself.

Of course, article 20(3) is most directly relevant. The Constitution and the law protect against testimonial compulsion on the premise that such compulsion may act as a subtle form of coercion on the accused.[1] This is a value which has been given the status of a fundamental right but is also the underlying theme of several statutory provisions—particularly sections 24 to 26, Evidence Act (as aspect which is often overlooked). Article 20(3) comes into operation as soon as a formal accusation is made, whether before the commencement of a prosecution or during its currency.[2]

3.3. Article. 21

Article 21 of the Constituton provides that no persion shall be deprived of life or personal liberty except according to procedure established by law. Because of the expansive interpretation placed on the words "procedure established by law", this article has been held to cover a variety of Governmental acts which have an impact on personal liberty. The case law on the article is so vast that none can grasp the total coverage of this article without very deep study and no one can do full justice to it without a lengthy discussion. But our task at present is confined to drawing attention to the relevance of Article 21 (as judicially interpreted) to custodial crime Though Article 21 does not contain any express provision against torture or custodial crimes, the expression "Life or personal liberty" occurring in the Article has been interpreted to include Constitutional guarantee against torture, assault or injury against a person under arrest or under custody. Following are some illustrative decisions :—

(i) Punishment which has an element of torture is unconstitutional.[3]

(ii) Prison restrictions amounting to torture, pressure or infliction and going beyond what the court order authorises, are unconstitutional.[4]

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1. Lord Mustills Judgement in *Smith* v. *Director, Serious Fraud Office*, (1992) 3 All E.R. 456, 463.

2. Dastagir v. State of Madras, AIR 1960 SC 759. 1978 SC 1025. para 30: *Balkishan* v. *State*, AIR 1981 SC 279.

4. *Inderjeet* v. *State of Uttar Pradesh*, AIR 1975 SC 1867.

3. *Sheela Barse* v. *State of Maharashtra*. AIR 1983 SC 378; *Javed* v. *State of Maharashtra*, AIR 1985 SC 231.

(iii) An under-trial or convicted prisoner cannot be subjected to physical or mental restraint :

(a) which is not warranted by the punishment awarded by the court, or

(b) which is in excess of the requirement of prisoner's discipline, or

(c) which amounts to human degradation.[5]

3.4. Article 22

Article 22(1) and 22(2) of the Constitution are also relevant for the present purpose, because one of their objects is to ensure that certain checks exist in the law to prevent abuse of the power of arrest and detention. Article 22(1)provides that no person who is arrested shall be detained in custody without being informed as soon as may be, of the ground for such arrest, nor shall he be, of the grounds for such arrest, nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice.

Article 22(2) provides that every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest, excluding the time necessary for the journey from the place of arrest to court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate.

Both the provisions referred to above, have a vital importance to the theme of the present Report. The right to consult a lawyer is intended to enable the detained person, *inter-alia.*

(a) to secure release, if the arrest is totally illegal.

(b) to apply for bail, if the circumstances so warrant,

(c) to prepare for his defence, and

(d) to ensure that while he is in custody, no illegality is perpetrated upon him

The right to be produced before a Magistrate under article 22(2) is intended, *inter-alia,* to ensure that :

(i) there will be an independent scrutiny of the legality of the detention,

(ii) there will be an adequate and deffective opportunity for seeking release on bail, and

(iii) there will be available an avenue where the person detained can ventilate his grievance that he might have against the treatment meted out to him in custody.

Realising the essential connection between the provisions of article 22(1) and article 22(2), the courts have held that the provisions of clause (1) and (2) of article 22 are mandatory.[6]

3.5 The Indian Penal Code : General Scheme

As an enactment containing the general criminal law of the country, the Indian Penal Code does not omit to take notice of the need to create criminal sanctions against conduct that harms another persons through an act which ought to be punishable. It needs to be emphasised that the Code takes as much notice of intangible harm as of tangible harm. The definition in section 44 of the Code which defines the expression "injury" as covering harm to body, mind, reputation or property.

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5. *Sunil Batra* v. *Delhi Administration,* AIR 1968 SC 1675; *Sita Ram* v. *State of Uttar Pradesh* AIR 1979 SC 745 ; *Sunil Batra* v. *Delhi Administration,* AIR 1988 SC 1579, para 31, 42; *Javed* v. *State of Maharashtra,* AIR 1985 SC 231, para 4; *Sher Singh* v. *State of Punjab,* AIR 1983 SC 465, para 11.

6. *Gopalan* v. *State of Madras,* 1950 SCR 88; *Hansmukh* v. *State of Gujarat,* AIR 1981 SC 28; *Statement of Madhya Pradesh* v. *Shobhram,* AIR 1968 SC 1910, 1917.

The provisions of the Code that are relevant for the present purpose fall into two categories—

(*i*) provisions applicable as protecting all categories of persons against specified types of harms, such provisions being expressed in language wide enough to cover persons in custody (though not confined to them, and

(*ii*) provisions specifically focused upon the protection of persons in custody.

Thus, most of the provisions contained in Chapter 16 of the Penal Code (offence: against the human body) cover persons in custody as well as others. In contrast, section 330 of the Penal Code is specifically addressed to the causing of hurt to extort a confession (though it covers certain other acts also).

3.6 Sections 166 and 167

Section 166 of the Penal Code reads as under :—

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

It may be reiterated that the expression "injury" (see section 44) covers harm illegally caused to body, mind, reputation or property.

Section 167 provides for punishment of a public servant framing an incorrect document with intent to cause injury etc.

3.7 Section 220

Section 220 of the Code provides punishment to a person (with legal authority to confine persons etc.) who corruptly or maliciously confines any person, knowing that in doing so he is acting contrary to law.

3.8 Sections 330, 331

Chapter 16 of the Indian Penal Code (offences affecting the human body) is the second longest Chapter of the Code. It provides punishment for almost every kind of restraint, interference with or harm to body, ranging from the lowest degree of physical attack (assault) to the highest category of physical harm, namely, the extinction of human life. However, for the present purpose, it is sufficient to confine the discussion to certain specific sections which are of direct relevance to custodial crimes. Under section 330, a person who voluntarily causes hurt to extort "any confession *or any information which may lead to the detection of an offence or misconduct*" or for compelling restoration of any property etc. becomes punishable with imprisonment upto 7 years and with fine. Illustrations (a) and (b) are of particular relevance and read as under :—

"(*a*) A, a police officer tortures Z in order to induce Z to confess that he committed a crime. A is guilty of an offence under this section".

"(*b*) A, a police officer tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section."

Section 331 punishes a person who causes grievous hurt to extort confession or to compel restoration of property. The offence is punishable with imprisonment upto 10 years and with fine.

3.9 Sections 340 to 348

Sections 340 to 348 of the Indian Penal Code constitute a group of sections dealing with wrongful restraint, and wrongful confinement and their aggravations. Of course, they envisage that the confinement itself is illegal—an ingredient prominently brought out by the adjective "wrongful". But we must refer to section 348 which provides for punishment to a person who wrongfully confines any person for extorting any confession etc. The section also punishes extortion committed to extract *information leading to the detection of offence or misconduct.*

3.10 Section 376(2)

The next provision in the Indian Penal Code which deserves to be noted is section 376(2) ,which deals with an aggravated form of rape committed by police officers and other public servants—persons in charge of hospitals and women's institutions etc.

3.11 Sections 376B to 376D

Custodial sexual offences are specially taken care of. by sections 376B to 376D of the Indian Penal Code, dealing with—

(*a*) intercourse by a public servant with woman in custody.

(*b*) intercourse by Superintendent of Jail, remand home etc.,

(*c*) intercourse by member of the management or staff of hospital with an inmate of the hospital.

3.12 Sections 503 and 506

Criminal intimidation is punished by section 503 read with section 506 of the Indian Penal Code.

3.13 Code of Criminal Procedure, 1973 : General observations

The relevance of the Code of Criminal Procedure, 1973 to the theme of the present Report is two-fold. In the first place, the Code itself contains provisions intended to operate as a safeguard against custodial torture. These represent, what may be called, the positive side. Secondly, those provisions of the Code which confer various powers on law enforcement agencies need to be kept in mind, in so far as they create possibilities of abuse of authority. This may be regarded as the negative side. Besides these two categories of provisions, we are concerned with the question how far the provisions of the Code need to be supplemented, with reference to custodial crimes, so that the investigation, trial, punishment and remedial measures in respect of such crimes are taken care of in an adequate manner in the scheme of the Code.

As a matter of convenience, we shall deal with the provisions of the Code sectionwise, at the same time keeping the above considerations in view.

3.14 Code of Criminal Procedure, 1973 : Section 41 : Arrest

The power of arrest is conferred on any police officer by section 41 of the Code of Criminal Procedure 1973. For the present purpose, Section 41(a) is the most important provision, as under this provision a police officer may, without an order from the Magistrate and without a warrant arrest any person—

> "(*a*) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concernce."

3.15 Section 49 : Restraints

Section 49 of the Code provides that the person arrested shall not be subjected to more restraint than is necessary to prevent his escape. The emphasis is on the prevention of his escape which may supply the need for restraint. However, at the same time, the quantum of restraint is very carefully defined by the word "necessary". It is noteworthy that the entire provision begins with a categorical prohibition, because the command of the law is that the arrested person shall not be subjected to unnecessary restraint. Any excessive restraint would definitely give rise to a cause of action o for damages, because, in such a case the immunity from civil action conferred by the doctrine of lawful authority would not be applicable. Presumably, appropriate criminal sections would also be available, with reference to sections 340 to 348 of the Indian Penal Code, as also sections 349 to 358 of the same Code which are concerned with assault and the use of criminal force. If lawful authority is exceeded, the protection otherwise available under sections 76 to 79 of the Penal Code cannot be claimed with the result that penal action will be maintainable against the erring public servant.

3.16 Section 50 : Grounds of arrest

The section reads as under :—

"50. *Person arrested to be informed of grounds of arrest and of right to bail*

(1) Every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.

(2) Where a police officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf."

Section 50 has been regarded as mandatory, particularly in the light of article 22(1) of the Constitution, so that non-compliance with the section renders the arrest and detention illegal.[1]

3.17 Section 53 : Medical Examination of the accused

In certain circumstances, medical examination of the accused may become necessary and this is taken care of by section 53 of the Code. As the law stands at present., it is lawful for a registered medical practitioner at the request of a police officer not below the rank of sub-inspector, to make a medical examination of the accused, if there are reasonable grounds for believing that the examination of the person will afford evidence as to the commission of an offence. Such force as is reasonably necessary for this purpose can be used. In the case of women, section 53(2) provides that the examination "shall be made only by, or under the supervision of, a female registered medical practitioner", a provision obviously intended to guard against sexual malpractices at the time of such examination.

It appears that in the recent Bill to amend the Code, Bill No. 35 of 1994 of the Rajya Sabha (9th May, 1994), it is sought to be clarified that "examination" shall include the examination of blood, swabs in case of sexual assault, sputum and sweat, hair sample and finger nail clippings and such other tests which the registered medical practitioner thinks necessary in a particular case. This Explanation seems to have been considered desirable in view of the fact that the subject of pathological tests has been the point at issue before certain High Courts (although the Notes on Clauses to the Bill do not mention this aspect).

3.18 Section 54 : Medical examination at the request of the arrested person

Section 54 of the Code gives to an arrested person the right to get his body examined if the allegation is that such examination will afford evidence which will disprove the commission by him of any offence against anybody. In this context, it has been held that it is the duty of the Magistrate to inform the arrested person that he has such a right of medical examination if he has a complaint of torture, maltreatment etc[2]

It may be mentioned that in the recent Bill to amend the Code (Rajya Sabha Bill No. 35, 9th May, 1994), the following subsection is proposed to be added to section 54 :—

"(2) Where an examination is made under sub-section (1), a copy of the report of such examination shall, on a request being made by the arrested person or by any person nominated by him in this behalf, be furnished by the registered medical practitioner to the arrested person or the person so nominated."

The proposal seems to have been suggested by the fact that in Uttar Pradesh by the U.P. Act No. 1 of 1984, section 54 has been amended by inserting the following sentence at the end :—

"The registered medical practitioner shall forthwith furnish to the arrested person a copy of the report of such examination free of cost".

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[1]. *Ashok* v. *The State*, 1987 Cri. LJ 1750.

[2]. *Sheela Barse* v. *State of Maharashtra*, AIR 1983 SC 378 : 1983 Cri. LJ 642.

3.19 Sections 56, 57 and 58 : Action after arrest

Section 56 of the Code provides that a police officer making an arrest without warrant shall, without unnecessary delay and subject to provisions as to bail, send the person arrested before a Magistrate having jurisdiction in the case or before the officer in charge of a police station. By section 57, no police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the court of the Magistrate. Provisions of section 57 are mandatory.[1]

Section 58 provides that officers in charge of police stations shall report to the District Magistrate (or, if he so directs, to the Sub-Divisional Magistrate) the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

The object of these sections, is to ensure that prolonged detention is not resorted to by the Police and that the person detained has an opportunity of making known to the Magistrate any problems that he might have faced after arrest.

3.20 Sections 75 and 76 : Arrest under warrant

Where the arrest of a person under the Code of Criminal Procedure, 1973 is under a warrant, sections 70 to 81 of the Code become applicable, of which sections 75 and 76 are relevant for the present purpose. They read as under :—

> "75. *Notification of substance of warrant.*—The police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant.
>
> 76. *Person arrested to be brought before Court without delay.*—The police officer or other person executing a warrant of arrest shall (subject to the provisions of section 71 as to surety) without unnecessary delay, bring the person arrested before the Court before which he is required by law to produce such person :
>
> Provided that such delay shall not, in any case, exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's, Court."

3.21 Section 154 : Information in cognizable cases

In order that the criminal process may be invoked in respect of any offence, two principal modes of approach are available under the Code of Criminal Procedure, 1973. A person may report the matter to police if the offence is a cognizable one. In the alternative, he may make a complaint before the Magistrate, whether or not the offence is a cognizable one. Section 154 of the Code deals with information given to the police in a cognizable case. The relevance of this section to the present Report is a general one, the section being applicable to all cognizable offences would include offences concerned with wrongful arrest or torture etc. by the police. The scheme of section 154 may be analysed, for convenience, as under :—

(*a*) The information given to an officer in charge of a police station shall be reduced in writing;

(*b*) It shall be signed by the person giving it and its substance shall be entered in the prescribed book;

(*c*) A copy of the recorded information shall be given forthwith, free of cost, to the informant;

(*d*) If there is a refusal by the police to record the information, the person aggrieved may send the substance of the information by post to the Superintendent of Police concerned. If the latter is satisfied that the information discloses the commission of a cognizable offence, he must either investigate the offence himself or direct a subordinate officer to do so.

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[1]. *Khatri v. State of Bihar*, AIR 1981 SC 928: 1981 Cri. LJ 470.

It has been held that before the police starts investigation, there must be a reasonable suspicion of the commission of cognizable offence.[1]

3.22 Section 160 : Attendance of witnesses

An important provision in the area of police powers is contained in section 160(1) of the Code, reading as under :—

> "160. *Police officer's power to require attendance of witnesses.*—(1) Any police officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the facts and circumstances of the case; and such person shall attend as required ;
>
> Provided that no male person under the age of fifteen years or woman shall be required to attend at any place other than the place in which such male person or woman resides."

This section is of particular importance, in view of the express prohibition, contained in the proviso, against summoning of women of any age and males under fifteen years at a place other than their place of residence. The legislative seems to have taken note of the possibility of abuse of authority if the section is not complied with.

3.23 Section 163 : Prohibition of Inducements

Taking note of the fact that a person in custody may be subjected to subtle influences to make a confession, section 163(1) of the Code expressly provides that no police officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise, as is mentioned in section 24 of the Indian Evidence Act, 1872. For convenience, we quote section 24 of the Evidence Act below :—

> "24. *Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding*—A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing thar by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

3.24 Section 164 : Confession before Magistrate

The Code, in section 164, contains provisions of great importance to the criminal process and vital for the preservation of integrity in the process. The full significance of this section cannot be appreciated unless, one keeps in mind certain important provisions of the Indian Evidence Act and of the Code of Criminal Procedure. In the Indian Evidence Act, by section 25, a confession made to a police officer cannot be proved as against the person who has made the confession. Under section 26, a confession made by a person while he is in the custody of a police officer cannot be proved as against such person, unless it is made in the immediate presence of a Magistrate. By section 26, of the Evidence Act a confession made to a Police Officer becomes irrelevent besides this the legislature has enacted in section 164 of the code, a procedure whereunder the competent Magistrate may record a confession made to him in the course of an investigation or at any stage afterwards before the commencement of the inquiry or trial. In practice, when it is the case of the police that an accused person in custody wishes to confess, the accused person is taken before the competent Magistrate who, after complying with the elaborate formalities prescirbed in section 164, records the confession. Those formalities are intended primarily to ensure (i) satisfaction of the Magistrate that the confession is voluntary, and (ii) proper record of the statutory warnings which are intended to achieve the above object.

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[1]. *Rita Wilson* v. *State of Himachal Pradesh*, 1992 Cri. LJ 2400 (HP); *Nina Nargis Devaud* v. *Farida G. Devecha*, 1991 Cri. LJ 2694 (Karn.).

There is another aspect relevant for the present purpose. While under section 161 of the code, the investigating police officer can examine orally any person supposed to be acquainted with the facts of the case and reduce into writing the statement made by such person, section 162 of the Code provides that the statement shall not be signed by the witness and further, that the statement shall not be used for any purpose (save as provided in law) at any inquiry or trial in respect of an offence under investigation at the time when such statement was made. It is at this stage that section 164 of the Code becomes useful. Under that section, the competent Magistrate may record, on oath, any statement made to him in the course of an investigation or at any time afterwards before the commencement of the tiral.

3.25 Section 313 : Examination of the accused in Court

Under section 313 of the Code, the criminal court is required to examine the accused after the prosecution case is over, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him. But section 313(2) prohibits the administration of oath to the accused.

3.26 Section 315 : Accused as witness

Section 315 of the Code makes the accused a competent witness for the defence in which case he may give evidence on oath in disproof of the charges, but this can be only on his own written request, thus fortifying the constitutional privilege against testimonial compulsion. Section 315(1), proviso (*b*) further provides that the failure by the accused to give any evidence shall not be made the subject of any comment by the parties or by the court, nor shall it give rise to any presumption against him or against the co-accused.

3.27 Section 357 : Compensation

Section 357 of the Code of Criminal Procedure, 1973 empowers the criminal court to award compensation to victims of an offence when the court passes a judgment.

The order may be passed not only when the court imposes a sentence of fine,— but also when it does not impose fine. The compensation can be ordered in favour of the person who has suffered loss or injury caused by the offence. In that part of the section which applies where fine is imposed, it is specifically stated that the loss or injury must be such that in a civil suit compensation would be recoverable. Where fine is not imposed, this requirement is not expressly stated. But the word "injury" itself suggests that it must be actionable harm. (See section 2(h) of the Code of Criminal Procedure, 1972 read with section 43, Indian Penal Code). In short, section 357 of the Code empowers the criminal court to function also as a civil court, within the limits laid down in the section.

3.28 Indian Evidence Act : General observations

The Evidence Act deals with the following principal topics :—

(*a*) the facts about which evidence can be given;

(*b*) the kind of evidence that can be given about such facts;

(c) the buden of proof and the presumptions that can be drawn;

(d) the mode of examination of witnesses and the permissible limits about the substance and form of questions to put to them; and

(*e*) the role of the judge in regard to all these matters.

In the present report, we are concerned in the main, with certain matters falling under category (a) and category (d) above. Under category (a), it will be necessary to deal with confessions, while under category (d), it will be necessary to deal with the privilege against self-incrimination.

3.29 Section 24 to 27 Evidence Act

The subject of confessions is of vital relevance to the theme of custodial crimes, because it is often found that the urge to procure a confession tempts the law enforcement officers to resort to unfair means. The provisions of the Evidence Act relating

to confessions cannot be fully appreciated unless one keeps before the mental eye the setting in which they appear in the Act. The scheme of the Act in this regard can be analysed as under :—

(*a*) A statement made by a party to a proceeding is an 'admission' (section 17) and is admissible in evidence.

(*b*) An admission is the genus; confession is a species thereof, and is therefore admissible.

(*c*) However, since a confession (as distinct from an ordinary admission) may result in the imposition of punishment, the law has enacted certain special provisions restricting their admissibility. One such restriction relates to voluntariness. A confession is not admissible if it is not voluntary (section 24).

(*d*) In certain special situations, the law even goes to the length of assuming that the confession may not be voluntary, having regard to the pressures of the situation; and it therefore enacts special "exclusionary" provisions, totally shutting them out from evidence. One such provision is contained in section 25, which provides that no confession made to a police officer shall be proved as against a person accused of any offence. Such a confession can never be used as substantive evidence to convict the accused.[1]

Another exclusionary provision is contaned in section 26, Evidence Act, under which no confession made by any person while he is in the custody of a police officer shall be proved against such person unless it be made in the immediate presence of a Magistrate. Reference has already been made to section 164 of the Code of Criminal Procedure, 1973 under which a Magistrate can record a confession.

(*e*) Finally, section 27 of the Evidence Act (which curiously begins with the words "Provided that") lays down that when any fact is deposed to as discovered in consequence of "information" received from an accused person in the custody of a police officer, then so much of such information as distinctly relates to the fact so discovered, is relevant whether or not it amounts to a confession, whether this section overrides section 26 only, or any other section or sections preceding it is a question. We need not go into that question. What matters for practical purposes is that if "information" is given and it leads to the "discovery" of any fact, (it should be a relevant fact, though the section does not expressly say so) then the information can be admitted in evidence—

(*i*) even though the person is in police custody, and

(*ii*) notwithstanding the fact that it amounts to a confession.

In so far as section 27 overrides the exclusionary rules relating to confessions made by a person in custody, it puts a powerful weapon in the hands of the police. The vast mass of case law on the section is sufficient to show that the weapon has been extensively used by the police to extract confessions by use of force and coercion. And if one can read between the lines, the case law also projects an apprehension that there is a tendency on the part of the police to use means not totally legitimate, to procure "information" that satisfies the formal requirements of section 27, even though the giving off such information may not be an exercise of the voliation of the accused. It is for this reason that we shall have to revert to this section when we make our recommendations.[2]

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1. *Paulose* v. *State of Kerala*, 1990 Cri. LJ 100 (Ker.).

2. See Para 11.6 of Chapter 11 of the Report.

CHAPTER 4

INTERNATIONAL COVENANTS

4.1 Right to life

The right to life is safeguarded by most of the international instruments relating to human rights. The general clause for the protection of the right to life in these instruments declares every human being's inherent entitlement to life, which right Governments undertake to protect by law. [1—4]

4.2 Positive and negative aspects

So far as the international covenants are concerned, they seem to impose both a positive and a negative responsibility on the State. In their positive aspect, those covenants require the State and its agencies not to violate the right to life. This is implicit in the obligation to respect such right. In their negative aspect, the State must take at least such reasonable steps as are necessary to ensure protection of the right conferred by the Covenant. In regard to the International Covenant on Civil and Political Rights, the Human Rights Committee established under the Covenant seems to have taken the view that the obligations of the particular States under the Covenant encompass both positive and negative dimensions.[5]

4.3 U.N. Declaration

The General Assembly of the United Nations adopted the Declaration for protection of persons from being subjected to torture and other crime of inhuman or degrading treatment or punishment on December 9, 1975. Article 5 of the Declaration requires comprehensive training of law enforcement officers against torture. Article 7 contemplates a system of review of the interrogation, methods and practices as well as custodial arrangements. Article 9 obligates the States to ensure that the acts of torture are made offences under national criminal law. The Declaration also provides that victims shall be afforded redress and compensation.

4.4 Code of Conduct

In December 1979, a Code of Conduct for Law Enforcement Officials was adopted by the United Nations General Assembly. Article 5 of the Code prohibits law enforcement officials from inflicting, instigating or tolerating any act of torture. The United Nations Voluntary Fund for Victims of Torture, 1981 was set up pursuant to General Assembly Resolution 36/151 of 16 December, 1981 to receive voluntary contributions for distribution, through established channels of assistance, as humanitarian, legal and financial aid to persons who may have been tortured and to member of their families.

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1. Article 6 ; of International Convenant on Civil and Political Rights (United Nations, 1966). Text in Ian Brownlie (ed.), Basic Documents on Human Rights (OUP, 1985), page 128.

2. Article 2(1) of the European Convention on Human Rights and Fundamental Freedom (Council of Europe, 1950). Text in Ian Brownlie (ed.), Basic Documents on Human Rights (OUP, 1985), page 242.

3. Article 4 (1) of the American Convention on Human Rights (Organisation of American States 1969). Text in Ian Brownlie (ed.), Basic Documents on Human Rights (OUP, 1985), page 391.

4. Article 4 of the African Charter on Human and Peoples' Rights (Organisation of African Unity, 1981). Text in K. Ginther and W. Benedek (eds.), New Perspectives and Conceptions of International Law : An Afro-European Dialogue (Springer-Ver-lag, Vienna), page 247.

5. See *Dadiel Monguya Mbengo* v. *Zaire*, Communication No. 16/1977, in Reports of the Human Rights Committee to the General Assembly, U. N. Doc. A/38/40 (1983), p. 134. Pedro Pablo Connargogv. Colombia, communication No. R. 11/45, in Reports of the Human Rights Committee to the General Assembly, U. N. Doc. A/37/40 (1982), p. 137. Also see *Olive Farrell* v. *United Kingdom*, Application No. 9013/80, in Vol. 25 Yr. Bk. of the European Convention on Human Rights. p. 124.

4.5 U.N. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

The U.N. Convention against torture and other cruel, inhuman or degrading treatment or punishment of 1984, came into force on 26th June, 1987. The Convention comprises 33 articles divided into three parts. Part I of the Convention defines torture, prohibits acts of torture and allied concepts and obliges State parties to the Convention to ensure that all acts of torture are punished. Part II provides for the machinery for the enforcement of the above prohibition. Part III relates to formal matters.

4.6 Torture defined

The Convention against torture (1984) defines the term 'torture' as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from his or a third person *information or a confession* punishing him for an act (which) he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person, or for any act based on discrimination of any kind, when such pain or suffering is inflicted by, or at the instigation or with consent or acquiescence of, a public official or other person acting in an official capacity but does not include pain or suffering arising only from action inherent in or incidental to lawful sanctionsn (Article 1).

4.7 Measures

Article 2 of the U.N. Convention against Torture (1984) obligates the State parties to the Convention to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. No exceptional circumstances whatsoever, whether a state of war or a threat of war, international political instability or any other public emergency, may be invoked as a justification of torture. An order from a superior officer or a public authority may not be invoked as a justification for torture. Article 4 reads as under :—

> "*Article* 4.1—Each State party shall ensure that all acts of torture are offence under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. Each State party make these offences punishable by appropriate penalties which take into account their grave nature."

4.8 Education etc.

The Convention, in article 10, also requires each State party to ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may ne involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

4.9 Review of rules

Article 11 of the U.N. Convention (1984) provides that each State Party shall keep, under systematic review of rules, instructions methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any case of torture.

4.10 Other acts of cruelty

Article 16 of the UN Convention (1984) provides that each State Party shall undertake to prevent, in any territory under its jurisdiction, other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture, as defined in Article 1, when such acts are the result of acquiescence of a pufilic official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply, with the substitution (for reference to torture); of references to other forms of cruel, inhuman or degrading treatment or punishment.

4.11 Victims

On 29th November, 1985, the United Nations adopted a Resolution to ensure justice for the victims of crime and abuse of power. The General Assembly of the United Nations adopted the Caracas Resolution 'Declaration on Basic Principles of Justice for Victims of Crime and abuse of Power'. This Declaration defines 'victims of crime' and requires the mem ber States to establish judicial and administrative mechanisms to enable the victims to obtain redress, formal or informal, in procedures that are expedient, fair, inexpensive and accessible. The Declaration further obligates the member States to make laws providing for restitution and payment of compensation to the victims of crime and abuse of power. Article 12 of the Doclaration of 1985 obligates the member States to provide financial compensation to victims of crime. Article 19 requires the States to incorporate, into the national laws, norms prescribing the abuse of power and providing remedies to victims of such abuse. Such remedies should include restitution and compensation and necessary material, medical, psychological and social assistance in support.

4.12 India's obligation

India is a party to the aforesaid Declarations. Hence, it is under an obligation to take effective steps to implement them. In the deliberations before the United Nations, the representative of Indian made "a committment by the Government on behalf of its citizens and a guarantee for these citizens which they could claim whenever their rights were threatened."[1]

4.13 In India, the people's resolve to foster respect for international law and treaties and obligations is reflected in Article 51 of the Constitution. In fact, Parliament has enacted laws to give effect to the international obligation as contained in various Declarations and Conventions. In addition, the courts have also, by their judicial innovation, ensured the effective implementation of thosea norms. Where the State or its agencies failed to implement the international norms, and the State has ratified or adopted those norms, the Supreme Court of India has intervened to issue directions for the effective enforcement of those norms through laws. Further, the Court has interpreted domestic law in a manner so as to give effect to the implementation of the internationl norms. We do not consider it necessary to refer to all the decisions on the subject, but it would be worthwhile to refer to only some of the landmark decisions.

4.14 Case law

In *Francis Coralle Mullin* v. *Administrator, U.T. of Delhi,*[2] the Supreme Court gave due recognition to the international norms while interpreting Article 21 of the Constitution, when it observed :

> ".....any form of torture or Cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibite by Article 21 unless it is in accordance with the procedure prescribed by law, but no law which authorises and no procedure presecibed by law, which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness it would plainly be unconstitutional and void as being violative of Articles 14 and 21. It would thus be seen that there is implicit in Article 21 the right to protection against torture or cruel, inhman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the International Covenant on Civil and Political Rights."

The Supreme Court, while interpreting Articles, 21, 48-A and 51(g) of the Constitution in *Charan Lal Sahu* v. *Union of India.*[3] observed as under :—

"In the context of our national dimensions of human rights, right to life, liberty, pollution-free air and water is guaranteed by the Constitution under Articles 21, 48-A and 51(g). It is the duty of the State to take effective steps to protect

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1. Nigel Rodley, Treatment of Prisoners under International Law (UNESCO Paris Clarendon Press Oxford, 1987), page 59.
2. *Francis Coralle Mullin* v. *Administrator, Union Territory of Delhi*, (1981) 1 SCC 608, 619.
3. *Charan Lal Sahu* v. *Union of Inda*, (1990) 1 SCC 613, 713.

the guaranteed constitutional rights. These rights must be integrated and illumined by the evolving international dimensions and standards, having regard to our sovereignty, as highlighted by clauses 7 and 13 of the Code of Conduct on Transnational Corporations. The evolving standards of international obligations need to be respected. Maintaining dignity and sovereignty of our people, the State must take effective steps to safeguard the constitutional rights of citizens by enacting laws."

In *Kartar Singh* v. *State of Punjab*, the Supreme Court, while dealing with Article 21 on human rights observed as under :

"We are undoubtedly committed to uphold human rights even as a part of long standing heritage and as enshrned in our constitutional law. We feel that this perspective needs to be kept in view by every law enforcing authority because the recognition of the inherent dignity and of the equal and inalienable rights of the citizens is the foundation of freedom, justice and peace in the world. If the human rights are outraged, then the Court should set its face against such violation of human rights by exercising its majestic judicial authority."

These illustrative cases are cited here simply to show the importance of keeping in mind International Conventions while dealing with questions of national law.

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CHAPTER 5

ARREST

5.1 Introduction

The law of arrest which, at one time, was regarded as a very simple subject, has proved to be a difficult and thorny one for a variety of reasons. Political events of the last half a century throughout the world have lent an added emphasis to the need to observe certain principles in formulating the law of arrest and in administering the law. International covenants on the subject and developments in the sphere of human rights no longer permit one to sit quiet and take the view the everything is well with the law of arrest. Added to this, is the apprehension, often expressed froms various quarters, that, on some occasions arrests are made without reasonable cause, or are being made in a manner contrary to the intendment of the law. In India, (as in other countries), the constitutional mandate against the deprivation of a person's personal liberty except according to procedure established by law, naturally increases the theoretical and practical importance of a discussion of the subject. Moreover, the vital and essential connection of the concept and procedure of arrest with the cherished personal liberty of the citizen must obviously make it a matter of perennial anxiety and concern for the wise law-giver as well as for the judge.

5.2 Concept of arrest

In common paralance, one understands, by the word "arrest," the deprivation of personal liberty and we take it that a person is arrested when his freedom of movement is circumscribed at the will of the person arresting him. Origin of the word "arrest" is interesting. The Latin verb *restare* meant "stand back, remain behind" or "stop" (it is the source of English *rest* in the sense "remainder"). The compound verb *arrestare*, formed in post-classifical times from the prefix *ad* and *restare*, had a causative function : "cause to remain behind or stop," hence "capture, seize". These meanings were carried over, via Old French *arester* into English. (Bloomsbury, *Didctionary of Word origins* 1992, page 38.)

5.3 Legal provisions as to arrest

The power to arrest a person is conferred by statute in a variety of situations. For the present purpose, the most relevant provision is contained in section 41(1) of the Code of Criminal Procedure, 1973, which provides that a police officer may arrest a person "who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists of having been so concerned." The first part of the section is totally objective, because, if a person has been concerned in any cognizable offence, then the police officer may arrest him. What matters in the first part is the fact of having been concerned in a cognizable offence. The police officer's view of the matter is of no consequence, But, in regard to the remaining portions of section 41(1), one finds a combination of objective facts coupled with a certain amount of subjective evaluation. The objective element in this part of section 41(1) is highlighted by its repeated use of adjectives, such as "reasonable" or "credible." But it is not necessary to establish objectively that the person proposed to be arrested has been concerned in a cognizable offence. Reasonableness of the complaint, or credibility of the information or reasonableness of the suspicion, would suffice, although these elements themselves could be the subject matter of debate in concrete cases.

5.4 Formal and informal arrest

There has been considerable amount of discussion as to when an arrest takes place, a discussion which seems to have become necessary because of the practice adopted by police officers of "detaining, for inquiries" or "stopping and frisking" and the like. In an appeal from malaysia,[1] Lord Devlin stated the position thus :

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1. *Shabban Bin Hussain* v. *Chong Fook Kam.*, (1969) 3 All E. R. 1626 (P.C.)

"An arrest occurs when a police officer states in terms that he is arresting or when he uses force to restrain the individual concerned. It occurs also when by words or conduct, he makes it clear that he will, if necessary, use force to prevent the individual from going where he may want to go. It does not occur when he stops an individual to make inquiries."

In another case (in the House of Lords,[1] Lord Diplock expressed himself as under :—

"Arrest is a continuing act; it starts with the arrest or taking a person into custody (by action or words restraining him from moving anywhere beyond the arrestor's control), and it continues until the person so restrained is either released from custody, or having been brought before a Magistrate, is remanded into custody by the Magistrate's judicial act."

5.5 Requirements of section 41 Cr. P.C.

It will be noticed that section 41(1)(a) of the Code of Criminal Procedure, 1973 operates in three alternative situations (apart from the totally objective situation of the person to be arrested having been concerned in any cognizable offence :—

(i) reasonable complaint has been made, of having been so concerned;

(ii) credible information having been received, of having been so concerned;

(iii) reasonable suspicion existing, of having been so concerned.

In practice, most arrests by police officers fall under the third category. In this connection, it may be pertinent to point out that reasonable suspicion has been described as the minimum requirement. According to a Full Bench decision of the Madhya Pradesh Hight Court,[2] reasonable suspicion is the minimum requirement. We shall refer later to a recent Supreme Court Judgment[3] where several aspects of the power of arrest have been elucidated and certain guidelines laid down. It is obvious that the objective "reasonable" introduces an objective element and that reasonable suspicion must exist before a person is arrested. Since arrest is a serious inroad on the liberty of a person, the law has enjoined a police officer to exercise the power of arrest only after the objective element of reasonable suspicion is made out. However, in actual practice this salutory mandate of the law has not been followed, as indiscriminate arrests are being made by police on mere suspicion.

5.6 Discretion regarding arrest

In England, by section 2(4) of the Criminal Law Act, 1967, the constable's power of arrest has been laid down in these words :—

where a constable with reasonable cause suspects that an arrestable offence has been committed, he may arrest without warrant anyone whom he, with reasonable cause, suspects to be guilty of the offence."

The question arose in England some time ago, as to whether, on such reasonable suspicion being entertained by he constable, arrest is mandatory. Dealing with this question, the House of Lords held[4] that even when the police has a reasonable suspicion that a person has committed an arrestable offence, it does not follow that he must be arrested. The discretion has to be reasonably exercised and its exercise can be questioned in a court of law on the principles which have come to be known as *Wednesbury principles*.[5] According to these principles, a person on whom discretion is conferred by statute;

(a) must exercise it in good faith, for furtherance of the object of the statute;

(b) must not proceed upon a misconstruction of the statute;

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1. *Holgate Mohd.* v. *Duke*, (1984) 1 All E.R. 1054, 1056 (H. L.).
2. *Gulabchand Kannoolal* v. *State of M. P.*, (1982) M. P. L. J. 7, 17 (F. B.).
3. *Joginder Singh*, para 5.7, *infra*.
4. *Holgate Mohd.* v. *Duke*, (1984) 1 All E.R. 1054, 1059, 1060 (H. L.).
5. *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*, (1947) 2 All E.R. 680 (C.A.)

(c) must take into account matters relevant for exercise of the discretion; and

(d) must not be influenced by irrelevant matter.

5.7 Judgment of the Supreme Court :

Joginder Singh's case

The subject of discretion to arrest came up before the Supreme Court of India, in Joginder Singh's case which is of great practical importance for the present purpose.[1] In that case, the Supreme Court first noted that the law of arrest is one of balancing individual rights, liberties and privileges on the one hand and individual duties etc. on the other hand. One has to balance protection for the individual, against the social need that crime shall be suppressed. After elaborating on this point, and after noticing the views expressed by the National Police Commission in its Third Report (pages 31 and 32) and by the Royal Commission on Criminal Procedure, the Supreme Court of India took care to suggest certain guidelines regarding arrest by the police. The court also referred to the following suggestion of the Royal Commission on Criminal Procedure :

> "To help to reduce the use of arrest we would also propose the introduction here of a scheme that is used in Ontario enabling a police officer to issue what is called an appearance notice. That procedure can be used to obtain attendance at the police station without resorting to arrest provided a power to arrest exists, for example to be fingerprinted or to participate in an identification parade. It could also be extended to attendance for interview at a time convenient to both to the suspect and to the police officer investigating the case....."

The Supreme court also referred to section 56(1) of the Police and Criminal Evidence Act, 1984 (U.K.) which reads as under :—

> "where a person has been arrested and is being held in custody in a police station or other premises, he shall be entitled, if he so requests, to have one friend or relative or other person who is known to him or who is likely to take an interest in his welfare told, as soon as is practicable except to the extent that delay is permitted by this section, that he has been arrested and is being detained there."

5.8 Guidelines suggested by the Supreme Court

In the case of *Joginder Kumar* v. *State of U.P.* (1994) 3 J.T. (S.C.) 423, 430, which we have referred to in the preceding paragraph, the court (paragraph 24 of the judgment) took pains to point out that an arrest cannot be made, merely because it is lawful for the police officer to do so. The existence of the power is one thing, while the exercise of the power quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention may cause incalculable harm to the reputation and self esteem of a person. The court made the following observations in this behalf :

> "No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a Police Officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave Station without permission would do."

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[1]. *Joginder Kumar* v. *State of Uttar Pradesh*, (1994) 3 J.T. (SC) 423.

In paragraph 26 of its judgment, the Supreme Court set out the requirements as under :—

"These rights are inherent in articles 21 and 22(1) of the Constitution and require to be recognised and scrupulously protected. For effective enforcement of these fundamental rights, we issue the following requirements :

1. An arrested person being held in custody is entitled, if he so requests, to have one friend, relative or other person who is known to him or likely to take an interest in his welfare told, as far as is practicable that he has been arrested and where he is being detained.

2. The police officer shall inform the arrested person when he is brought to the police station of this right.

3. An entry shall be required to be made in the Diary as to who was informed of the arrest. These protections from power must be held to flow from articles 21 and 22(1) and enforced strictly."

5.9 Duty of Magistrate

In the same Judgment (*Joginder Kumar*), in paragraph 27, the Supreme Court directed that it shall be the duty of the Magistrate before whom the arrested person is produced, to satisfy himself that the requirements set out in the preceding paragraph have been complied with. As per paragraph 28 of the judgment, the above requirements must be followed till legal provision's are made in this behalf and it was further clarified that these requirements are in addition to the rights of arrested persons found in, various police manuals.

5.10 Reasons for arrest

In *Joginder Singh's case,* paragraph 29, the Supreme Court, while clarifying that these requirements are not exhaustive, directed the Directors Generals of Police of all the States in India to issue necessary instructions requiring due observance of requirements. "In addition, departmental instructions have also to be issued that a police officer making an arrest must also record in the case diary the reasons for making the arrest."

5.11 Judgment in Sheela Barses case

At this stage, we may also make a reference to an earlier Supreme Court judgment in Sheela Barse's case wherein certain guidelines were laid down, both regarding arrest generally and regarding the arrest of women. The relevant guidelines are as under :

"(1) Four or five police lock ups should be selected in the reasonably good localities where only female suspects should be kept and they should be guarded by female constables.

(2) Female suspects should not be kept in a police lock up in which male suspects are detained.

(3) Integrrogation of female suspects should be carried out only in the presence of female police officers/constables.

(4) Whenever a suspect is arrested by the police and taken to the police lock up, the police will immediately give intimation of the fact to the nearest legal aid committee.

(5) Surprise visits to the police lockups in the city should periodically be made with a view to providing arrested person an opportunity to hear their grievances and ascertain the conditions of police lock up.

(6) As soon as a person is arrested, the police must immediately obtain from him/her the name of any relative or friend who he/she would like to be informed about his/her arrest and the police should get in touch with such relative or friend and inform him about the arrest.

(7) The Magistrate before whom an arrested person is produced shall enquire from the arrested person whether he has any complaint of torture or maltreatment in police custody."

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8. *Sheela Barse* v. *State of Maharashtra,* AIR 1983 SC 378.

9. *Nandini Satpathy* v. *State of Bihar,* 1978 Cri. LJ 968.

5.12 Presence of counsel

The topic of presence of counsel at the time of interrogation of an accused by the police has received attention to many countries, particularly from the constitutional angle. The point was touched in the well known case of **Nandini Satpathy**[9] where an emphasis was laid on the presence of counsel in the light of article 20(3) of the Constitution (testimonial compulsion) and article 22(1) of the Constitution (right to consult and to be defended by a lawyer of one's choice). The relevant observations are as under :—

> "Lawyer's presence is a constitutional claim in some circumstances in our country also, and, in the context of article 20(3), is an assurance of awareness and observance of the right to silence.....we think that article 20(3) and article 22(1) may, in a way, be telescoped by making it prudent for the police to permit the advocate of the accused, if there be one, to be present at the time he is examined.....We do not lay down that the police must secure the services of a lawyer's system, an abuse which breeds other vices. But all that we mean is that if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied, without being exposed to the serious reproof that involuntary self-crimination secured in secrecy and by coercing the will was the project....."

It would appear that at least three articles of the Constitution articles 20, 21 and 22 have relevance if one were to examine the constitutional aspect in great detail. Even if the non-constitutonal aspect is taken into accqunt, it would seem that if serious effort is made to check the malpractices of torture and allied practices during interrogation, there should be a provision, at least entitling the arrested person to demand that the interrogation should be carried out in the presence of his counsel or a family friend of his choice. Requirement of State appointed counsel being present at that stage need not be inserted, but what we have stated in the preceding sentence, needs to be incorporated into the law. We should mention that in response to our questionnaire (Issue No. 2) some replies have favoured the presence of counsel though a fairly large number have opposed it. (Issue No. 2).

5.13 Law Commisson Report No. 115

We would like to specifically mention at this place that the Law Commission of India, in its 135th Report on *Women in Custody* (1989) recommended detailed provisions to avoid harassment to women in custody and to protect them to the extent possible. The Commission, for this purpose, recommended the insertion of a specific and separate Chapter in the Code of Criminal Procedure, so that the concerned officers, as well as women's organisations and women in custody and their relatives, can, without much effort, discover and inform themselves of the rights of such women and the obligations of various officers. A draft of the proposed separte Chapter relating to arrest, interrogaion and custody of women etc. was attached to the Report. At the present stage, it may be sufficient to mention only those recommendations which are related to arrest and interrogation. These are as under :—

(1) In the event of a woman being required to be arrested, the police officer concerned shall not actually touch the person of the woman and may presume her submission to custody. This recommendation is being made in order that the dignity of the concerned woman is maintained.

(2) Ordinarily, no woman shall be arrested after sunset and before sunrise. In exceptional cases calling for arrest during these hours,—

(i) prior permission of the immediate superior officer shall be obtained, or (ii) if the case is of extreme urgency, then, after arrest, a report with reasons shall be made to the immediate superior officer and to the Magistrate.

(3) Wherever a woman is medically examined, the examination shall be conducted only under the supervision of a female medical practitoner, with strict regard to decency.

(4) The concerned woman shall be informed about her right to be medically examined, "in order to bring on record any facts which may show that an offence against her has been committed after her arrest."

(5) A copy of the report of the medical examination shall be furnished to the woman.

(6) A woman shall not, under section 160 of the Criminal Procedure Code, be required to attend for interrogation at any place other than her dwelling house, and section 160 of the Code should be amended for the purpose.

(7) When the statement of a woman is recorded during investigation, a relative or friend of the woman or an authorised representative of an organisation interested in the welfare of women shall be allowed to remain present.

5.14 Judicial officers

It would be proper to mention at this stage the Supreme Courts another judgment in which certain guidelines have been suggested to be followed by police officers or judicial officers.[1] The guidelines are as under :—

(a) If a judicial officer is to be arrested for some offence, it should be done under intimation to the District Judge or the High Court, as the case may be.

(b) If facts and circumstances necessitate the immediate arrest of a judicial officer of the subordinate judiciary, a tecnical or formal arrest may be effected.

(c) The fact of such arrest should be immediately communicated to the District and Sessions Judge of the concerned District and the Chief Justice of the High Court.

(d) The judicial officer so arrested shall not be taken to a police station, without the prior order or directions of the District and Sessions Judge of the concerned district, if available.

(g) There should be no handcuffing of a judicial officer. If, however, violent resistance to arrest is offered or there is imminent need to effect physical arrest in order to avert danger to life and limb, the person resisting arrest may be overpowered and handcuffed. In such case, immediate report shall be made to the District and Sessions Judge concerned and also to the Chief Justice of the High Court. But the burden would be on the police to establish the necessity for effecting physical arrest and handcuffing the judicial officer, and if it be established that the physical arrest and handcuffing of the judicial officer was unjustified, the police officers causing or responsible for such arrest and handcuffing would be guilty of misconduct and would also be personally liable for compensation and/or damages as may be summarily determined by the High Court.

5.15 Member of Parliament

We may also like to take note of the fact that the question of arrest of Members of Parliament (and of Members of Legislatures of States) is of some importance. The current convention is that the police officer arresting such member on a criminal charge shall forthwith inform the presiding officer of the legislature through telegram and also by post. This practice should continue. In *Joginder Singh's* case,[2] the Supreme Court emphasized the need to observe strictly the following norm :—

"Under Rule 229 of the Rules for Procedure and Conduct of Business in Lok Sabha, when a Member is arrested on a criminal charge or is detained under an executive authority or order of the Magistrate, the executive authority must inform without delay such fact to the Speaker. As soon as any arrest, detention, conviction or release is effected, intimation should invariably be sent to the Government concerned concurrently with the intimation sent to the Speaker/Lok Sabha/Rajya Sabha. This should be sent through telegrams and also by post and the intimation should not be delayed on the ground of holiday."

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1. *Delhi Judicial Service Association* v. *State of Gujarat*, (1991) 4 SCC 406.

2. *Joginder Singh* v. *State of Punjab*, (1994) 3 JT (SC) 423, 430, 431.

5.16 Course to be adopted—Amending the Law

We have tried to collect together in this Chapter the important materials relating to arrest, with a view to focussing attention upon the various mesures that should be adopted, particularly in order to check malpractices. We are conscious that it may not be feasible to put everything in legislation. A possible device of dealing with the various propositions mentioned in this Chapter would be to insert a numer of sections—like, 50A, 50B 50C and so on—in the Code of Criminal Procedure, 1973 to incorporate all those propositions that can be overwhelmingly codified. It is necessary that the important propositions, having direct relevance to the prevention of torture in custody should be given legislative form. With this end in view, we would recommend that a new section or sections (as may be convenient) should be inserted after section 50 of the Code of Criminal Procedure, 1973 to incorporate the following propositions in substance :—

(1) Whenever a person is arrested by a police officer, intimation of the arrest shall be immediately sent by the police officer (along with intimation about the place of detention) to the following persons :—
(a) a relative or friend or other person known to the arrested person, as may be nominated by the arrested person;

(b) failing (a) above, the local legal aid committee.

(2) Such intimation shall be sent by telegram or telephone,[1] as may be convenient, and the fact that such intimation has been sent shall be recorded by the police officer under the signature of the arrested person.

(3) The police officer shall prepare a custody memo and body receipt of the person arrested, duly signed by him and by two witnesses of the locality where the arrest has been made, and deliver the same to a relative of the person arrested, if he is present at the time of arrest or, in his absence, send the same along with the intimation of arrest to the person mentioned in (1)(a) above.

(4) The custody memo referred to in(3) above shall contain the following particulars :—

(i) name of the person arrested and father's or husband's name,

(ii) address of the person arrested;

(iii) date, time and place of arrest;

(iv) offence for which, the arrest has been made;

(v) property, if any, recovered from the person arrested and taken into charge at the time of the arrest; and

(vi) any bodily injury which may be apparent at the time of arrest.

(5) During the interrogation of an arrested person, his legal practitioner shall be allowed to remain present.

(6) The police officer shall inform the person arrested, as soon as he is brought to the police station, of the contents of this section and shall make an entry in the police diary about the following facts :

(a) the person who was informed of the arrest;

(b) the fact that the person arrested has been informed of the contents of this section; and

(c) the fact that a custody memo has been prepared, as required by this section.

5.17 Arrest of women : Recommendations

Of the various recommendations made in the 135th Report of the Law Commission of India (Women in Custody) referred to above,[2] recommendations No. 1 and 2 are of direct relevance to arrest and we recommend that the same

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[1]. At present there is some obscurity in this regard. See report about beliefs of Delhi Police The Statesman, 13th April, 1994, page 9.

[2]. Para 5.13, *supra*.

should be incorporated into the Codes of Criminal Procedure, 1973 at an appropriate place.

5.18 Power of arrest : Recommendations

We now come to the major question as to the direction in which the power of arrest conferred on the police, in regard to cognizable offences needs to be amended in order to reduce the possibility of misuses of the power. Section 41(1) (a) of the Code of Criminal Procedure 1973 which contains the material reads as under :—

> "41(1) Any police officer may, without an order from the Magistrate and from the Magistrate and without a warrant, arrest any person—
>
> (a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned.

A misconception seems to prevail that if there is a power to arrest, then that power must be exercised. The judicial decisions to which we have referred in the relevant paragraphs of this Chapter[1] take pains to point out that this is not the legal position. The power is subject to the ordinary principles of administrative law. Justification for its exercise must be shown to exist in each case. What the law requires, is not merely the requisite quality of complaint, information or suspicion about the commission of a cognizable offence, but also the satisfaction of a further condition, that shows the complicity of the person to be arrested, in the suspected offence. All these propositions are implicit in the scheme of section 41, particularly when the section is viewed against the background of the general law, including administrative law and rules of statutory interpretation. Thus, the fact that there is a discretion and not a duty, is sufficiently indicated by the word "may". The fact that complicity of the particular person is to be established, is also sufficiently indicated by the words "against whom" and by the words "of his having been so concerned" which occur in section 41(1)(a).

5.19 Need for Amendment

Notwithstanding clear words, and amendment is needed, because the essential requirements are many times overlooked either deliberately or through oversight. The rush of work may also prevent full and proper attention from being given to the need to satisfy all these requirements, though that cannot be an excuse for non-compliance. In this situation, we are faced with a dilemma when considering the question whether an amendment to highlight these essential features is needed. On the one hand, a provision which is vitally concerned with liberty should be as precise as possible and it can be argued that even at he cost of making the provision appear cumbersome, one can with some justification, take the liberty of putting more emphatically into the section all those requirements which are unfortunately overlooked sometimes. As against this, there is the consideration that a matter which is already explicit (if the section is read carefully) cannot be added and that such addition goes against the normal practice of legislative drafting. We have ultimately come to the conclusion that on balance it will be preferable to recommended 'an amendment'. The situation prevailing is one where brevity must yield to clarity; principle and detail must be made to reside together; elegance of form of will have to yield to structural complexity; and profusion of language will have to be regarded as excusable, in order to achieve objectives whose importance transcends the ordinary canons of drafting.

5.20 Amendments of Sec 41 Recommended

Accordingly, we recommend that in section 41 of the Code of Criminal Procedure Code, 1973 after sub-section (1), the following new sub-section (1A) should be inserted :—

> "41 (1A) A police officer arresting a person under clause (a) of sub-section must be reasonably satisfied and must record such satisfaction, relating to the following matters :—
>
> (a) the complaint information or suspicion referred to in that clause, is not only in respect of a cognizable offence having been commited, but also in respect of the complicity of the person to be arrested, in that offence;

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1. Para 5.7, 5.8., *supra.*

(b) arrest is necessary in order to bring the movements of the person to be arrested under restraint, so as to inspire a sense of security in the public or to prevent the person to be arrested from evading the process of the law or to prevent him from committing similar offences of from indulging in violent behaviour in general."

We should mention at this stage that about unrestricted power of arrest, some of the replies to our Questionnaire favour some restriction (Issue No. 8). In fact a senior police officer expressed this view at the Seminar.

In *Joginder Singh's* case,[1] a very helpful suggestion has been made about the possibility of substituting a notice of appearance in place of arrest by the police. This is really in the nature of a summons, but it is new idea inasmuch as, under the present law in India, while a summons to an accused person may be issued by the court, the police does not issue a summons to an accused person. There are several factors justifying the insertion of such a provision. The great factor is, of course, the protection of personal liberty which, in certain cases, can be achieved without sacrificing considerations of public welfare. Substitution of this device will automatically eliminate, or at least reduce, the possibility of custodial crimes. We should, therefore, recommend that in the Code of Criminal Procedure, 1973, a new Section should be *inserted* on the following lines :—

"41A. *Notice of appearance*—Where the case falls under clause (a) of sub-section (1) of section 41, the police officer may, instead of arresting the person concerned, issued to him a notice of appearance requiring hom to appear before the police officer issuing the notice or at such other place as may be specified in the notice and to co-operate with the police officer in the investigation of the offence referred to, in clause (a) of sub-section (1) of section 41.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of that notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that the ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice, it shall be lawful for the police officer to arrest him for the offence mentioned in the notice, subject to such orders as may have been passed in this behalf by a competent court."

5.21 Duty of Magistrate : Recommendation

In order that the various safeguards set out in this Chapter are complied with it is desirable that there ought to be a kind of supervision of overseeing of the police by an independent agency. In the present set up, it may not be possible to provide for a separate agency in this regard, but it should be possible to utilise the existing machinery for the purpose. Both under constituional requirements as laid down in Article 22 of the Constitution and under section 56 of the Code of Criminal Procedure, 1973, the person to be arrested has to be produced before a Magistrate, By virture of the combined operation of section 56 and 57 of the Code, production of the accused before a Magistrate must take place within 24 hours of the arrest.[2] But in cases where informal arrests are made, the accused is not produced before the Magistrate within 24 hours, instead he is kept in police custody for interrogation and his arrest is shown only after he is coerced to confession or to state facts leading to discovery of weapon or goods. To prevent this malpractice, the Magistrate before whom the accused is presented should enquire from the accused the time and date of his arrest and record the same. Our recommendation is that a new section 57A may be inserted in the Code of Criminal Procedure on the following lines :—

[16]57A. *Duty of Magistrate to verify certain facts*—When a person arrested without warrent is produced before the Magistrate, the Magistrate shall, by inquiries to be made from the arrested person 'satisfy himself that the provisions of sections, 57 and 57, have been complied with (sections relating to

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1. *Joginder Singh* v. *State of UP.*, JT (1994) 3 SC 423, 430, 431.
2. *Khatri* v. *State of Bihar*, AIR 1981 SC 928 : 1981 Cri. LJ 470 (SC).

safeguards in connection with arrest, rights on arrest, intimation etc. to be entered) and shall also enquire and record the time and dare of arrest."

5.22 Other matters

The recommendations that we have made in some of the paragraphs immediately preceding this paragraph seek to take care of important matters on which a legislative prosition is urgenlty desired. For the present, we are not making recommendations regarding some matters touched upon in this Chapter, because they may not lend themselves easily to legislative formulation. However the need to codify them in the Police Manual is very urgent. We arer eferring here to such specialised topics as relate to the arrest of judicial officers and the arrest of Members of Parliament. The fact that in this report, we are not suggesting legislative amendment on these points, does not mean that they are not of vital importance. If such problems recur, it may been be necessary to attend to them by recommending statutory provisions.

As regards matters dealt with in the Law Commission of India's 135th Reports (Women in Custody), we have already made a recommendation in this Chapter[1] on points directly relevant to the theme of arrest in the context of the present Report. But the remaining recommendations made in that Report also need to be implemented. We note that in the Bill recently introduced to amend the Code (9th May, 1994), one or two of the points dealt with in the 135th Report have been implemented. But many other recommendations of that Report have been left out even though they relate to provisions of the Code of Criminal Procedure, 1973. We have not been able to locate in the Notes on Clauses to the Bill any reasons for this non-implementation. We are of the view that the remaining recommendations should also be implemented as that would safeguard the interest of women.

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1. Para 5.17., *supra*.

CHAPTER 6

CALLING TO THE POLICE STATION

6.1 Introduction

We propose to deal in this Chapter with one situation forming part of the investigation by the police into cognizable offences, namely, calling a person (witness) to the police station. This particular act by the police may appear to be just a preliminary step and insignificant from the overall point of view of the machinery of criminal procedure, but, for the purpose of the subject matter of this report, it is of cruical importance.

6.2 The present law

To begin with, we may refer in brief to the present law on the subject. Chapter 12 of the Code of Criminal Procedure, 1973 which is titled "Information to the police and their power to investigate", confers by section 156, power on an officer in charge of the police station, without the order of the Magistrate, to investigate any cognizable case. The procedure for investigation begins with section 157, under which, *inter alia*, the investigating officer is expected ito proceed to the spot to investigate the facts and circumstances of the case and, if necessary, to take measures for the discovery and arrest of the offender. Under section 158, the Magistrate himself may direct an investigation or hold a preliminary inquiry. In the majority of cases, the police officer calls the witnesses to the police station under section 160 (to be examined in detail presently) and it may be noted that under section 161, the investigating officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

Section 160 of the Code, reads as under —

"160. *Police officer's power to require attendance of witnesses.*—(1) Any police officer making an investigation under this Chapter may, be order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the facts and circumstances of the case; and such person shall attend as so required;
Provided that no male person under the age of fifteen years or woman shall be required to attend at any place other than the place in which such male person or woman resides.

(2) The State Government may, by rules in this behalf, provide for the payment by the police officer of the reasonable expenses of every person, attending under sub-section (1) at any place other than his residence.

6.3 Section 160 Cr. P.C. Recommendation

Section 160 of the Code of Cirminal Procedure, 1973 which we have quoted in the preceding paragraph is not a minor provision of routine character; instead it confers very wide power on a police officer investigating a case to summon any person to the police station for interrogation. The enacting section grants legislative sanction to the age-old convention of the police officers to bring persons to police station for purposes of interrogation. By and large, this power is misused by the police. Though the law requires the investigating officer to summon any person for interrogation *by an order in writing*. Yet, in actual practice, this is rarely followed. Generally, the investigating officer or a constable of the police station calls the witness to the police station, where he is interrogated. Many a time, he is made to wait for hours and sometimes even for days together and if during interrogation, the witness pleads ignorance of the incident which may be the subject matter of investigationg he is threatened, coerced, assaulted and even tortured at the police station. Some persons have raised the question whether it is necessary to call a witness to the police station for interrogation. A witness

is not an accused, he need not visit the police station to give evidence though as a responsible citizen, it is the duty of every citizen to furnish to the police information regarding the facts and events which may be in his knowledge. That information from him may be obtained by the police officer at the place of the witness. However, there may be special circumstances in some cases where the presence of the witness at the police station may be necessary, but, by and large, the provision requiring the witness to appear at the police station for interrogation by the investigating officer does not appear to be necessary or desirable. This section provides an easy handle and occasion to the police to coerce and torture the withess at the police station. We are, there fore, of the opinion that section 160 needs mldification to the effect that ordinar ily attendance of the witness at the police station shall not be neceassary; instead, he should be interrogated or examined at his place of residence but, if in any particular case it is necessary to do so, reasons must be recorded and the witness must be summoned by a written order. Section 160(1) needs amendment to avoid the prevailing malpractice.

6.4 Need for Penal Sanction

The principal objective of the proviso to Sec. 160(1) is to ensure that the examination of young persons and of women is undertaken in an environment familiar to them, so that the possibility of physical abuse is eliminated, as also the possibility of creation of psychological tension in their minds. In the modern era when the protection of privacy is given great importance, this provision obviously assumes considerable significance. In any case, the under lying assumption that calling the woman etc. to the police station is an extremely undesirable eact impliet that the provision must be complied with scrupulously. Unfortunately, ar present, the law while enacting this restriction, has failed to enact *a direct and specfic provision* to enforce this salutary prohibition. It is to remedy this situation that a penal provision in the nature of criminal sanction is needed.

6.5 Section 164A I.P.C. Recommended

As discussed earlier, section 160 of the Criminal Procedure Code, 1973 is observed more in its breach, than in its compliance. As a result, the object of protection by law to safeguard the interest of witness is defeated. The Law Commission in its 84th Report on "*Rape and Allired Offences : Some Question of Subsantive Law, Procedure and Evidence*" considered this question and recommended to enact a specific provision as Section 166A in the Indian Penal Code to cover violation of Section 160 of the Criminal Procedure Code. Again in tits 135th Report on "*Women in Custody*", the Law Commission recommended the insertion of Section 166A in the Indian Penal Code providing for punishment to a public servant who knowingly disobeys any direction of the law prohibiting him from requiring the attendance of a person for the purposes of investigation into an offence. Unfortunately earlier recommendations have not been implemented. Consequently the safeguard provided to a witness continues to be defeated.

6.6 In the light of what we have stated in this Chapter, we reiterate the recommendation made in the aforesaid earlier Reports[1] of the Law Commission of India to the effect that after section 166 of the Indian Penal Code, there should be inserted a new section 166A punishing the violation of section 160 of the Code of Criminal Procedure, 1973, Even if the view is taken that the situation is governed by section 166 of the Penal Code or by some other section of the code, we are very strongly of the view that there is need for a specific provision as recommended by us.

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[1]. Law commission of India, 84th Report on Rape and allied offiences—some questions of substantive law, procedure and evidence' and 135th Report on' Women in Custody'

CHAPTER 7

MEDICAL EXAMINATION

7.1 Beneficial and adverse aspect

The subject of medical examination has relevance to the malpractices committed during investigation, in the following two aspects :

(a) Medical examination of an arrested person may be useful as establishing the fact that certain injuries were inflicted on his body during custody. If undertaken immediately after arrest, it may be useful for establishing that at the time of arrest, there were no injuries on his body. This is the "beneficial aspect" Medical examination of a public servant accused of custodial rape is also important from the evidentiary angle and can equally be described as falling under the beneficial aspect.

(b) In contrast with the above, there is an adverse aspect of medical examination. At the time of, or during medical examination, malpractices may occur, particularly in the case of victims of sexual offences who offer themselves for medical examination. The law has to guard against this possibility also. Of course, the malpractice perpetrated on an alleged victim of sexual crime does not technically fall within "custodial" crime. but there have been cases of sexual crime on women in custody. We think it necessary to discuss various aspects of this topic.

7.2 Various situations categorised

Sections 53 and 54 of the Code of Criminal Procedure provide for the medical examination of an arrested person. Under section 53, a police officer has power to get an arrested person medically examined by a registered medical practitioner if there are reasonable grounds for believing that medical examination of his person will afford evidence to the commission of offence. Once the police officer entertains reasonable grounds for believing that the examination of the arrested person will afford evidence to the commission of the crime, it would be *compulsory* for the accused to undergo medical examination. Section 54, on the other hand, confers a right on the arrested person to get himself medically examined, if, at the time of his production before the magistrate he makes an allegation that the examination of his body will afford evidence which will disprove the commission by him of an offence or which will establish the commission by any other person of an offence against his body. On such a request being made, the magistrate is bound to issue a direction for the medical examination of the body of such a person by a registered medical practitioner unless the magistrate considers that the request is made for the purpose of delay or for defeating the ends of justice. These two general 'provisions regulate the question of medical examination, in all kind of cases including rape and cognate offences and custodial crimes.

7.3 Medical examination of the accused generally :

Sections 53-54, Cr. P.C.

Theoretically, medical examination can be categorised under the following heads :

(a) Medical examination of the accused generally.

(b) Medical examination of the accused in cases of rape and cognate offences.

(c) Medical examination of the victim generally.

(d) Medical examination of the victim in cases of rape and cognate offences.

So far as medical examination under category (c) is concerned, it does not generally present any problem of malpractice. As regards the medical examination of category (b) and (d), both relate to the offences of rape and cognate offences. In such cases medical examination of the accused as well as the victim is necessary, as it provides valueable evidence regarding proof of the allegations. Medical examination of accused and the victim in cases of rape and cognate offences has been exhaustively considered by the Law Commission in its 84th Report.[1] After a detailed discussion, the Commission was of the opinion that the existing provisions in Sections 53 and 54 of the Criminal Procedure Code were not adequate to afford evidence of commission of offence. The Commission recommended amendent of Section 53 as well as insertion of section 164A of the Code of Criminal Procedure. We agree with those recommendations and reiterate that the same should be carried out.

Incidentally, we find that the bill to amend the Criminal Procedure Code introduced recently (9th May, 1994)[2] seeks amendment of Section 53 and 54 of the principal Act on the subject on the basis of the recommendations of the Report of the Law Commission. However, we find that in the Notes on Clauses no reference has been made to the Law Commission's Report. It would have been helpful if this had been done.

7.4 Medical examination of the accused

Section 53 of the Code of Criminal Procedure, 1973 relates to compulsory medical examination of the accused at the request of the police, while Section 54 is concerned with the right of the accused to get himself medically examined. Section 54 is a beneficiary provision which provides an opportunity to an arrested person to get himself medically examined to disprove the commission of any offence by him or to establish the commission of any offence against his body. This provision is directly connected with the custodial crimes. Under the existing provisions of Section 54, if a person under arrest is tortured or assaulted he may, when produced before the magistrate, make a request to the magistrate for the medical examination of his body to establish that he had been subjected to torture and physical assault during the period of detention. Though this right exists. Yet, as pointed out earlier, most of the arrested persons, especially those against whom custodial crimes are committed, are ignorant of their right. Even if the arrested person who is produced before the magistrate is aware of this right, he does not dare to make a complaint to the magistrate or make a request for medical examination in the presence of the police. In order to minimise the chances of custodial torture or sexual exploitation, it is necessary and desirable that Section 54 should be strengthened in the interest of preventing malpractices. When the accused is produced before a magistrate, it should be mandatory for the magistrate to enquire from the arrested person whether he has any complaint of torture and maltreatment or sexual exploitation in custody and the Magistrate should further intimate to the arrested person that he has a right under the law to get himself medically examined. As observed by Supreme Court in *Sheela Barse* V. *State of Maharashtra*[3] it is also desirable that giving of such intimation and making enquiries should be in the absence of the police officer. The magistrate, before making an enquiry from the arrested person, should ensure that no police officer is present along with the accused. We are of the opinion that Section 54 needs amendment to make it more effective and meaningful. We are further of opinion that the amended section should set out in detail the matters to be recorded in the medical report. We may incidentally note that in Uttar Pradesh by U.P. Act 1 of 1984 amendments have been made in Section 54.

7.5 Comments on the Working Paper

We may mention at this stage that along with our Working Paper we had invited views on the question as to whether there should be a provision for compulosry medical examination of accused in every case of arrest or during interrogation. There has been a mixed response to the question. Majority of the police officers and some of the lawyers do not consider it necessary. However, a senior police officer and some other persons are of the opinion that there is necessity

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1. Law Commission of India, 84th Report on "Rape and Allied Offiences--Some Questions of Substantive Law, Procedure and Evidence".
2. Code of Criminal Procedure Amendment Bill, 1994 (9th May, 1994).
3. AIR 1983 SC 378.

to provide for compulsory medical examination especially in cases of custodial crimes. Some of the responses suggest compulsory medical examination of a person immediately on his arrest and before interrogation. We are unable to accept this suggestion, as it will delay investigation.

7.6 Recommendation

In view of the above discussion, we reommend that section 54 of the code of Criminal Procedure, 1973 should be amended to incorporate the points made in paragraph 7.4 of this Chapter. While drafting the amendment for incorporting the details of medical report, assistance may be taken from the Law Commission's 84th Report, Chapter 4.

CHAPTER 8

FIRST INFORMATION REPORT AND INQUIRY

8.1 Introduction

Chapters 12 and 13 of the Code of Criminal Procedure, 1973 lay down the procedure for investigation of the offence and trial of the accused. The police machinery is ignited on receiving information relating to the commission of an offence. Such information, if relating to a cognizable offence, is recorded under section 154 and if the information is non-cognizable, it is recorded under section 155. Both these sections are important, as, if the scheme of the section is carried out in its fullness, the machinery of criminal process at the pre-trial stage (arrest, interrogation, investigation, forwarding of the report to the court) is set in motion.

On receiving information of a cognizable offence under section 154, the police has power to investigate without order of any court, whereas under section 155 the police officer has no power to investigate non-cognizable offence without the order of a magistrate. Any information relating to the commission of a cognizable or non-cognizable offence if given to the police must be recorded in accordance with Sections 154 and 155. Generally, this is not done and it is, more so, in the case of custodial crimes. We propose in the secceeding paragraphs of this chapter to examine some of the factors contributing to the above situation and to suggest such measures by way of law reform as appear to be necessary.

8.2 Non-Registration of Information

Section 154 of the Code of Criminal Procedure, 1973 makes it obiligatory for the police to register information relating to a cognizable offence. Section 157 further makes it obligatory for the police to investigate the facts and circumstances of the case and to take measures for the discovery and arrest of the offender. Unfortunately, compliance with these provisions is very often wanting even in non-custodial offences. Non-registration of complaints is a common malpractice in police station. There are several reasons for this malady. The National Police Commission took note of the act that in a study conducted by the Indian Institute of Public Administration, New Delhi, on the "Image of the Police in India", it was found that over 50 percent of the respondents had mentioned non-registration of complaints as a common malpriactice in police station. The National Police Commission[1] further set out several factors accounting for such non-registration which included extraneous influence and corruption, besides the disinclination of the staff to take on additional load of investigational work in the midst of heavy pressure of several other duties. It was also stated that somtimes there was a desire to keep the figure of reported crime on the records low, in order to show "efficient police administration under their charge". This is due to the statistical approach applied by the higher echelons of police administration, for assessing the crime situation and evaluating police performance, with the result that this attitude permeates the entire heirarchy down the line and is reflected among the officers at the police station in their reluctance and refusal to register cases and when crimes are brought to their notice. Experience has shown that whenever a serious attempt was made by the police administration to remove this malpractice, there was a marked increase in the number of registered cognizable crimes. Refusal by the police to record information relating to commission of an offence is a serious matter, which puts the complainant to harassment and also affects the credibility of the police. We are strongly of the view that there should be effective sanctions for the non-registration of the first information given to the police, of a cognizable offence.

8.3 Section 167A I.P.C. Recommended

Under the existing law, there is no provision for taking penal action against the police for their refusal to record information as contemplated by Section 151 (1) of the Code. Sub-section (3) of section 154 provides that on the refusal by the

[1]. National Police Commission, 4th Report (1980), Page 2.

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police to register a case, the aggrieved person may send the substance of the complaint in writing to the Superintendent of Police who may investigate the case himself or direct any officer in-charge of police station to investigate the same. This procedure is, no doubt, useful as is illustrated by a reported case but it is not, in itself adequate, for meeting the problem of non-registration. The Law Commission of India in its 84th Report on "*Rape and Allied Offences*" took note of this position. The Commission found that administrative action or providing alternative method of lodging the information do not prove more effective and there was a need for suitable penal provision providing for the punishment of the erring police officers for their failure to record information relating to the commission of a cognizable offence. The Commission recommended the enactment of Section 167A in the Indian Penal Code. The draft of the recommended section was as under :—

> "167—whoever, being an officer in-charge of a police station and required by law to record any information relating to the commission of cognizable offence reported to him refuses or without reasonable cause fails to record such information, shall be punished with imprisonment of either description for a term which may extend to one year or with fine or with both.

The above penal provision, if implemented will certainly have a deterrent effect on the police and it may discourage or prevent the malpractice of refusing to register information relating to commission of cognizable offences. We are in full agreement with the recommendation made by the Commisssion in its 84th Report and we reiterate the same.

8.4 Investigation by the police and other agencies

Generally, complaints relating to an a offence against the body of a person in the custody of police is not recorded by the police officers on account of brotherhood and fellow feeling. Information or complaint by the wife or children of the deceased person or by the victim, generally ignored and since such a class of persons generally have no resources, they are not in a position to approach the Superintendent of Police or the courts for redressal of their grievances. If the police which protects the citizens itself violates the law in committing torture and assault on a person in custody and if complaint against their action is not recorded by the police, the question arises how the allegation of a civtim or his relation is to be investigated. In such a situation courts have been compelled to direct the Central Bureau of Investigation to investigate the cases. The Supreme Court[2] in a case of alleged death in the custody of Directorate of Enforcement and the Delhi High Court[3] in the case of alleged death in police custody directed the Central Bureau of Investigation to investigate. There are many reported decisions where the allegations of custodial crimes have been directed to be investigated. In some cases the courts have appointed judicial officers like the Chief Judicial Magistrate, Sessions Judge or a District Judge to hold inquiry into the police excesses relating to custodial crimes. These episodes show the desirability of having an independent investigating agency to inquire and investigate into allegations relating to custodial crimes.

In some of the responses to our questionnaire, a suggestion has been made to have an independent agency other than the police to investigate the complaints relating to custodial crimes. A suggestion has also been made to entrust investigation in such matters to the Central Bureau of Investigation. There is another suggestion to provide for inquiry by judicial officers through the agency of Magistrates and the Sessions Judges as has been done by courts in several cases. Having given our anxious consideration to this vexed problem, we think that it may not be possible or feasible owing to financial considerations to set up another independent agency exclusively for the purpose of investigating complaints relating to the commission of custodial offiences. We are of the opinion that there is a need for the higher officers of the police administration to impress upon the police officers in-charge of the police stations the need to record information relating to the commission of custodial crimes and every administrative effort should be made to implement this policy and to take disciplinary action against the erring officials. But this administrative exercise would not in itself meet the present need. We think that it would be desirable and proper to provide by law for the filing

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2. *Bhagwan Singh* v. *State of Punjab*, (1992) 2 All India Crim. Rep. page 546.

of petition on the refusal of the police to register a case of custodial violence before a judicial officer for inquiry and prosecution of the erring police officers. The inquiry by the judicial officer would keep the police under supervision and control and it will also inspire people's confidence.

8.5 Recommendation to insert section 154A, Cr. P.C.

It appears to us that having regard to the paramount need for prompt, effective and independent investigation of allegations of offences in the nature of custodial crime, the Code of Criminal Procedure should be amended to insert a specific provision which will ensure such investigation. At the same time, we do not consider it necessary, at least for the present, to go so far as to recommend the creation of a new agency for the purpose. A new agency may not be feasible owing to financial considerations, as stated above, even assuming that administrative problems will not arise. What we envisage is proposal whereunder, on refusal by the police to register a case of custodial (conizable) offence, it should be possible to approach an appropriate judicial authority who should be empowered to conduct a preliminary inquiry and then (if satisfied that such action is called for) to direct the filling of a complaint before the competent Magistrate. The appropriate judicial authority would be the Court of Session in a case of (alleged) custodial death and the Chief Judicial Magistrate in a case of (allieged) custodial offence not resulting in death. We recommend that a new section 154A be inserted in the Code of Criminal Procedure, 1973 on the above lines. It may also be provided that the Court of Sessions or the Chief Judicial Magistrate (as the case may be) may, if satisfied that such action is called for, direct the Ministerial officer to make a complaint as set out above.

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[1]. In re : *death Sarvinder Singh Grover* 1993 (1) Cr. LR 163 (SC).

[2]. *Bharat Bhushan* v. *The State*, (1986) Cri. LJ 1624 (Delhi).

CHAPTER 9

INQUIRIES AND INQUESTS INTO DEATH

9.1 Introduction

We propose, in this chapter, to deal very briefly with the present legal framework as to inquiries and inquests into cases of suspicious deaths.

9.2 Role of the police

By section 174 of the Code of Criminal Procedure, 1973, in case the of suicide, death by accident or death under circumstances raising a reasonable suspicion of an offence, the police officer in charge of a police station or some other empowered officer must intimate the fact to the nearest executive magistrate empowered to hold inquests and to proceed to the place and investigate. In certain cases involving death of a woman and also where there is a doubt regarding the cause of death, section 174(3) of the Code makes a special provision. Section 175 confers on the police officer power to summon persons as witnesess.

9.3 Inquiry by Magistrate

Section 176(1) of the Code, as amended in 1983, *inter alia*, makes an inquiry by the Magisrate into the cause of death mandatory, where any person dies while in the custody of the police. We need not discuss the procedure in detail as contemplated by this section. However, this kind of enquiry has generally been a formality and it does not inspire confidence, as the Inquiry is made by an Executive Magistrate.

9.4 Coroners

In the towns of Calcutta and Bombay, the Corners Act, 1871 is applicable and inquests into suspicious deaths are conducted by the Coroner or his deputies, appointed under the act.

9.5 Commission of Inquiry

Where the death of a person in police custody or otherwise under suspicious circumstances is regarded by the State Government as a fit subject for the appointment of a Commission of Inquiry, an order for the constitution of such a Commissionis made under the Commissions of Inquiry Act, 1952.[1]

9.6 Special Acts

Special Acts applicable to particular subjects may provide for an inquiry into deaths, caused in transport such as railways, aircraft, merchant shipping etc.

9.7 Writ jurisdiction

Where a matter is raised before the Supreme Court or a High court having jurisdiction, an order for inquiry into the cause and circumstances of death may be passed by those courts under their constitutional jurisdiction.

9.8 Custodial deaths

The provisions briefly outlined by us in this Chapter may not be adequate to specifically deal with the problem of custodial deaths. It is for this reason that we have made a specific and separate recommendation on the subject, which envisages an inquiry by the Sessions Judge in case of custodial deaths or by the Chief Judicial Magistrate in cases of bodily injuries not resulting in death, occuring during custody.[2]

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1. See *Report of the Commission of Inquiry into the death of Sri U. Narashima in the Police, Custody* at Sanjeeva Reddy Nagar Police Station, Hyderabad on 10-7-1986, 28 Govt. of Andhra Pradesh (1986); *Report of the Commission of Inquiry on the death of T. Murlidharan at V. Town Police Station*, Vijayawada, on 17-9-1986 (Govt. of Andhra Pradesh, 1987): *Report of the Inquiry Commission on the death of Dadagula Sankuriah* in the outpost of Yelleswaram on 26-8-1985 (Govt. of Andhra Pradesh, 1986); *Report of the Commission of Inquiry into the death of Sri Macherla Anjiah* while in the police custody at Thungathurthi on 6-9-1986 (Govt. of Andhra Pradesh); A.G. Noorani, "Death in Police Custody", 20 *Economic and Political Weekly* 1161 (1985); Special Report "Andhra Sadist Cops and Lockup Deaths", *The Blitz*, 5 Nov. 1986, p. 10; Sri Sankar Sen's articles in the *Statesman* 15th & 16th April, 1994.

2. Paragraph 8.5, *supra*.

CHAPTER 10

SANCTION FOR PROSECUTION

10.1 Present Position

We are concerned, in this Chapter, with an important provision of the Code of Criminal Procedure, 1973—section 197—under which certain categories of public servants cannot be prosecuted without the sanction of the appropriate Goernment, the condition being that the offence must have been committed by the public servant "while acting or purporting to act in the discharge of his official duties". It is common knowledge that public servants prosecuted for misconduct often resort to this section as a bar to prosecution, because the section deprives the court of its jurisdiction to try the offence in question. The words "while acting or purporting to act" etc. have not been found to be very precise. Much case law has gathered around them and, notwithstanding this vast mass of case law, an attempt is made, every time a public servant is prosecuted, to take shelter under this section. We are not concerned, for the moment, with the various ramifications of the section. What is relevant for our purpose is the question, how an abuse of the protection given by this section to public servants may be avoided in respect of custodial crimes. Of course, a clarification of the provisions of the section may not necessarily be confined to such crimes.

10.2 History

It is interesting to note that in the Code of Criminal Procedure of 1898 (predecessor of the present Code), the corresponding words in section 197, (before that section was amended in 1923), were "is accused *as such judge or public servant of any offence.*" This gave rise to a conflict of decisions, as to the precise scope of those words. While one view was that these words covered only cases where the offence was such that the fact of the offender being a public servant was an essential ingredient of the offence as defined in law, a contrary view also came to be taken. Thus, according to the first view, if a judge used defamatory language while trying a case, section 197 of the 1898 Code did not apply[1]. On the other hand, according to the wider view, the section would cover all cases where the offence had some connection with the official duty. The amending Act of 1923 substituted the words "while acting or purporting to act in the discharge of his official duties", for the words "as such judge or public servant". Courts have usually regarded this amendment as widening the scope of the section.[2-3]

10.3 Amendment

After the 1923 amendment, as stated above, the court has to decide in each case whether the offence was committed while purporting to act in the discharge of offical duties. Our concern at the present stage is with the question whether the section needs to be clarified to ensure that the obstacle of requirement of sanction under the section shall not be pleaded as a bar to the prosecution of an officer for custody related offences. Having regard to the fact that in almost every case, the sanction is sought to be resorted to, we consider it necessary to make a clarification in this regard. Of course, even without such amendment it can be argued that the language of the section will not cover torture or death caused in custody. In a case which arose under section 270(1), Government of India Act, 1935 (worded in similar language), the Federal Court, speaking through Justice Varadachariar, observed as under[4]:—

> "In one group of cases it is insisted that there must be something in the nature of the act complained of that attaches it to the official character of the person doing it. In another group, more stress has been laid on the circumstances that the official character or status of the accused gave him the opportunity to commit" the offence. It seems to me that the first is the correct view. In the third

1. *Nandu Lal Barak* v. *N. N. Mitter*, (1899) ILR 26 Cal. 853, 861, 862.
2. *R. P. Kapur* v. *Ch.. Daryao Singh*, (1965) 1 Cri. LJ 593.
3. *Hemendra Nath Gupta* v. *Emperor*, AIR 1937 Pat 160, 162.
4. *Hori Ram Singh* v. *Emperor*, AIR 1939 FC 43, 56: 40 Cri. LJ 468.

group of cases, stress is laid almost exclusively on fact that it was at a time when the accused was engaged in his official duty that the alleged offence was said to have been committed. The use of the expression 'while acting' etc. in section 197 Criminal Procedure Code (particularly its introduction by way of amendment in 1923), has been held to lend some support to this view. While I do not wish to ignore the significance of the time factor, it does not seem to me right to make it the test. To take an illustration suggested in the course of the argument, if a medical officer, while on duty in the hospital, is *alleged to have committed rape on one of the patients* or to have stolen a jewel from the patient's person, it is difficult to believe that it was the intention of the legislature that he could not be prosecuted for such offence except with the previous sanction of the Local Government."

Section 190 of the Code empowers a magistrate to take cognisance of any offence. Section 197 embodies one of the exceptions to the general rule laid down in Section 190, as it regulates the competence of the court and bars its jurisdiction in certain cases. The object and purposes of the section is to ensure that public servants and officials while acting in their official discharge of duties are not subjected to needless or vexatious prosecutions. Prosecution is permissible only after sanction is granted on the well-considered opinion of the superior authority. The Supreme Court[1] held that the offence alleged to have been committed must have something to do or must be related in some manner with the discharge of official duty. No question of sanction can arise under section 197 unless the act complained of is an offence; the only point to determine is whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty. There is a plethora of decided cases on the section. We do not cosider it necessary to make any reference to them for the present purpose. However, no court has taken the view that sanction is necessary for the prosecution of a public servant for custodial offences.

10.4 Cases of torture

Coming more specifically to the question of torture, reference may be made to a Madras case where the charge was under section 330 of the Indian Penal Code.[2] In that case, a Magistrate who had power to arrest and keep under custody persons suspected of certain offences, held in confinement a person whom he had arrested and tortured that person to force him to confess his guilt. It was held that in committing such torture, he was not purporting to act in the discharge of his official duties and no sanction under section 197, Cr. P.C. was needed.

We may note here that in the replies received on our questionnaires most of the Advocates and Judges and majority of even police officers have expressed the view that sanction in such cases is either not needed or should not be required. (Issue No. 8).

10.5 Need for clarification/Recommendation

Theoretically, it can be argued with great force that custodial offences in the nature of causing death or bodily injury or commission of sexual offences have no connection with the official duties of a public servant and section 197 cannot apply to them. But (as stated above) the very fact that in the past such attempts have been made to seek shelter under section 197, and the serious possibility that such attempts will continue to be made in the future, would seem to justify a clarificatory amendment. There are enough difficulties in the way of the successful prosecution of offences committed by public servants and one need not add to them by allowing a provision operating as a bar to prosecution to nullify attempts to bring such offenders to trial. Our recommendation, therefore, is that below section 197(1) of the Code of Criminal Procedure 1973 the following Explanation should be added :—

"*Explanation*—For the avoidance of doubts, it is hereby declared that the provisions of this section do not apply to any offence committed by a judge or public servant, being an offence against the human body committed in respect of a person in his custody, nor to any other offence constituting an abuse of authority."

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1. *Prabhakar v. Sinari*, AIR 1969 SC 686.
2. *Ganapathy Gounder v. Emperor*, AIR 1932 Mad. 214, 215 : 33 Cri. LJ 557.

CHAPTER 11

LAW OF EVIDENCE

11.1 Introduction

It is often said that facts constitute nine points of the law. This is all the more true of criminal prosecutions, where a pretty large bulk of the evidence comes to the court through the medium of witnesses giving oral testimony in court, unlike a civil trial, where some reliable material would be available in the shape of documentary evidence, evidence of possession, entries in the books of accounts, certificates issued by public officers, commercial usage, knowledge and information available to members of the family, Government records and the like. Besides this, in a criminal trial, certain special rules become applicable. In particular, as per judicial practice, the quantum of evidence, or rather, the standard of proof in a criminal trial is higher than that required in a civil suit. Moreover, long history of abuse of the power of criminal prosecution has persuaded so many countries of the world, including India to incorporate in their constitution elaborate protections which operate more frequently in a criminal prosecution, than in a civil suit.

11.2 Prosecutions for torture etc.

The special features of a criminal charge, with reference to the law of evidence mentioned in the preceding paragraph, become all the more prominent where a police officer is to be prosecuted for custodial crimes. To state the position in broad terms (sections 101 to 104, Evidence Act), the prosecution must prove the guilt of the accused. This problem is highlighted in the context of custodial crimes by reason of the peculiar situation in which such crimes are usually committed. The matter received serious attention at the hands of the Supreme Court in a judgement of 1985,[1] in the wake of which the Law Commission prepared and forwarded a separate Report dealing with prosecutions of police officers in certain situations.[2] The case related to a highly shocking incident of torture of a suspect in police custody who died within almost six hours of his arrest. When two hours after his arrest, the person was produced before the Magistrate, he was found to be badly injured and in a serious condition. In fact, he could not even walk up to the room of the Magistrate, who had to come out and examine him in the verandah of the court room. Both the Magistrate and the prison doctor were told by the accused about the beating by the police constable. The constable was convicted by the Court of Session of the offence of culpable homicide not amounting to murder (section 304 of the Indian Penal Code). The case went through the usual hierarchy of appeals with which we are not concerned. It was the Supreme Court which emphasised the extremely peculiar character of the situation where none else than the police officer having custody can give evidence regarding the circumstances in which the person in custody came to receive injuries. Persons on whom atrocities are perpetrated by the police in the police station, are, thus, left without any evidence (except their own statement) to prove who the offenders are. For this reason, the court called for re-examination of the law of burden of proof in such cases. As mentioned above, after this judgement, the Law Commission of India made a specific recommendation dealing with the injuries in custody, to which we refer in the next paragraph.

11.3 Law Commission's recommendation (113th Report)

After the judgement in *State of U.P.* v. *Ram Sagar Yadav*, referred to in the preceding paragraph, the Law Commission of India, after a survey of the law, recommended the insertion of a new section in the Indian Evidence Act, 1872, as under :—

> "114B. (1) In a prosecution of a Police Officer for an offence constituted by an act alleged to have caused bodily injury to a person, if there is evidence that the injury was caused during a period when that person was in the custody of the police, the court may presume that the injury was caused by the Police Officer having custody of that person during that period.

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1. *State of UP* v. *Ram Sagar Yadav*, AIR 1985 SC 416.
2. Law Commission of India, 113th Report on "Injuries in Police Custody".

(2) The Court in deciding whether or not it should draw a presumption under sub-section (1) shall have recourse to all the relevant circumstances, including, in particular, (a) the period of custody, (b) any statement made by the victim as to how the injuries were received, being a statement admissible in evidence, (c) the evidence of any medical practitioner who might have examined the victim, and (d) evidence of any magistrate who might have recorded the victim's statement or attempted to record it."

11.4 Later Decisions

It may be mentioned that after the above judgment of the Supreme Court, followed by the above Report of the Law Commission, the question of burden of proof in such cases has come before the courts more than once. In one of the cases,[1] the following observations occur :—

"If a person is in police custody, then what has happened to him is peculiarly within the knowledge of the police officials who have taken him into custody. When the other evidence is convincing enough to establish that the deceased died because of the injuries inflicted by the accused, the circumstances would only lead to an irresistible inference that the police personnel who caused his death must also have caused the disappearance of body."

In another case,[2] where the victim taken into police custody was on the next day found dead at a place near the police post, the court held that the burden was on the State how the victim came to sustain the injuries resulting in his death. The need for a change in the rule regarding burden of proof was adverted to in this case also.

11.5 Recommendation for Amendment of Section 114

In the light of the material contained in the preceding paragraphs of this Report, we are very strongly of the opinion that the recommendation made by the Law Commission in its 113th Report should be carried out by inserting Section 114B of the Indian Evidence Act and we would add two points by way of amplification. The provision in the first place may specifically include death even though that is implicit in the draft that was recommended in the eralier Report. Secondly, the provisions of the new section should be made applicable to every public servant who has power under the law to arrest and detain a person in custody. The actual placing of the section, we leave to the draftman. We may mention that a response to our Questionnaire the majority have favoured such a rebuttable presumption (Issue No. 4).

11.6 Section 27, Evidence Act

The provisions of the Indian Evidence Act, 1872 relating to confessions particularly those relevant for the present purpose are contained in sections 25, 26 and 27 of that Act. While sections 25 and 26 exclude confessions made by a person to a police officer or confessions made by a person (to a police officer or to a third person) while in custody, section 27 carves out an exception in respect of cases where the confession is made in the form of information leading to the discovery of a fact, being information given by a person in custody. This section has created several problems of interpretation with which we are not, for the moment, concerned. Our concern for the present is mainly with the possibility that section 27 creates of misuse by resort to malpractice. Let us quote the section :—

"27. *How much of information received from accused may be proved*—Provided that, when any fact is deposed to as discovered in consequence of information received from a person "accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

This section, because it constitutes an escape valve against the prohibition otherwise imposed by preceding section or sections in relation to confessions made during the custody of a police officer, tends to create a desire to resort to its provision even where the person in custody is not really volunteering the information. To put it voluntly, what cannot come in because of an exclusionary rule contained in the earlier provisions, would be sought to be brought in by recourse to the permissive rule or enabling provision in section 27. If information spoken of in section 27 is not forthcoming voluntarily, the police may have recourse to procuring the same by other

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1. *Bhagwan Singh* v. *State of Punjab*, (1992) 3 SCC 249

2. *NIilabati Behera* v. *State of Orissa* (1993) 2 SEC 746

means. This is not to say that in every case the information is compelled to be given. But it cannot be gainsaid that the very existence of the section (in the form in which it appears at present in the Act) creates an impression or an urge to resort to means not desirable or legitimate so that the section is pressed into service in situations never intended by the legislature. We are convinced that the section needs amendment, if not repeal, in order to completely ward off the tendency mentioned above.

In order to meet the malady two courses are open. Section 27 may be repealed in toto and that is our first preference. But if that course is not acceptable, the minimum that can be done is to revise the section so as to confine it to make admissible the fact discovered but not the information. This alternative, though it is the milder one, will be more intelligible by presenting a brief analysis. The analysis is as under :—

(*i*) A criminal trial is concerned with proof of facts which are at issue.

(*ii*) If the facts in issue cannot be directly proved, the law allows them to be proved by facts declared to be relevant by the law.

(*iii*) If a certain fact relating to discovery, such as discovery of a weapon, discovery of clothes etc. of the victim or any other relevant fact, is the result of the so-called information given by a person, the requirements of the trial would be satisfied by taking the fact of discovery on the record (assuming that it is a relevant fact).

(*iv*) The law need not go further and admit the confession part of the information. For the reasons stated above, the confession part is mostly tainted with coercion and torture even though this may not be on the surface.

(*v*) The information part, if it does not amount to a confession may not be objectionable in theory but in practice, it is not easy to keep the information element and the confession element separate from each other.

Therefore, if the milder alternative of merely amending section 27 (and not its total repeal) is to be adopted, we would recommend that section 27 may be replaced by the following section :—

"27. *Discovery of facts at the instance of the accused.*—When any relevant fact is deposed to as discovered in consequence of information received from a person accused of any offence, whether or not such person is in the custody of a police officer, the fact discovered may be proved, but not the information, whether it amounts to a confession or not".

11.7 Recommendation to extend Sections 25 and 26 to other officers

We are further of the view that the exclusionary provisions contained in sections 25 and 26 of the Evidence Act which are, at present, confined to police officers, should be extended to all public servants having power to arrest and detain persons in custody. If this recommendation is accepted, it follows that section 27 of the Act (unless it is repealed as per our first alternative) should also be extended to such public servants (after it is amended on other points according to our second alternative recommendation in the preceding paragraph).

CHAPTER 12

COMPENSATION

12.1 Introduction

As has been indicated in one of the earlier Chapters, legal action in regard to custodial crimes could be preventive, investigatory, punitive or remedial. In the present Chapter, we propose to deal with the remedy in the shape of compensation to be awarded to the victim of a custodial crime or (in the case of his death) to his dependants.

12.2 General Law

Under the general law, primarily the law of torts, compensation is available and can be claimed at the instance of the victim against the person causing death or bodily injury, provided the requirements of civil liability in that regard are satisfied. Leaving aside special enactments, such as the Motor Vehicles Act, 1988, the Workmen's Compensation Act, 1923 and the Public Liability Insurance Act, 1991, the matter is basically governed by the principles of the law of torts as modified or supplemented by relevant legislation. In the case of wrongful death, it is the fatal Accidents Act, 1855 which becomes applicable in general. The Act essentially deals with, what may be called, "wrongful death", an aspect amply indicated by the convenient and concise phrase "wrongful act, neglect or default". We need not enter into details of the content of the Act for the present purpose but it will suffice to note that the Act is referred to specifically in section 357(1)(c) of the Code of Criminal Procedure, 1973.

12.3 State's liability for compensation in Tort

The general law of torts i.e. the English Common Law as imported into India on the principle of justice, equity and good conscience, with statutory modifications of that law is in force in India. Article 300 of the Constitution provides for the filing of a suit against the Union as well as State Government. The second part of the Article provides, *inter alia,* that the State may sue or be sued in relation to its affairs if a corresponding Province might have been sued or be sued if the Constitution had not been enacted, subject to any law made by legislature. Thus if a suit is to be filed against the Government in tort, the suit can be filed if such a suit could have been filed against the corresponding provisions of the Constitution had not been enacted. The Article contemplates that the appropriate Legislature would enact law in this respect. The Legislature has, however, made no law as contemplated under Article 300. The question whether the Government is liable to be sued for damages in tort at the instance of an aggrieved citizen remains in a state of quandry and confusion on account of non-exercise of legislative function. Ordinarily, in a welfare state, a suit in tort for damages should be maintainable against the State and its servants causing injury to an individual. But in the absence of appropriate legislation, as contemplated by Article 300, the liability of the State for the tortious acts of its servants remains the same as it existed prior to the enactment of the Constitution.

Prior to the Constitution the doctrine of the common law of England that King commits no wrong and he cannot be liable for negligence or misconduct, consequently he could not be responsible for the negligence or misconduct of his servants, was in force. This doctrine was based on the premise that the State was not liable for damages caused to any individual in the exercise of sovereign functions. However in England this legal position has been substantially altered by the Crown Proceedings Act, 1947. There the law has been liberalised and the distinction between the sovereign and non-sovereign functions and governmental or non-governmental functions are no longer in vogue to determine the liability of the State. In India no similar steps were taken. The Law Commission of India considered the question of the liability of the State in tort and it recommended that under Article 300 it was necessary to enact law affording protection to the citizens as even in England the immunity of the Crown was substantially reduced.[1] The Law Commission recommended that legislation be enacted making the State liable for the torts committed by

1. First Report of the Law Commission of India on 'Liability of State in Tort'.

its employees while acting within the scope of their employment. In respect of duties of care imposed by the statute, the Commission recommended that if a statute authorised the doing of an act, which was in itself injurious, the State should not be liable, but the State should be liable without proof of negligence for breach of statutory duty imposed on it or its employees which may cause damage. It further recommended that the State should be liable if in the discharge of statutory duties imposed upon it or its employees, the employees act negligently or maliciously and whether or not discretion is involved in the exercise of such duty. The recommendations made by the Commission, have, however, not been implemented so far and no law as recommended has been enacted, with the result that there is considerable amount of uncertainty on the question of liability of the State for the tortious acts of its servants. We reiterate the Commission's recommendations in this regard and recommend that the relevant law as suggested should be enacted.

12.4 State's Judicial decisions on the question of tortious liability

In the absence of legislative exercise, the Supreme Court and High Courts by their judicial innovations have been awarding damages against the State for the tortious acts of the public servants of the State. The Supreme Court in *State of Rajasthan* v. *Smt. Vidyawati*[1] awarded damages for injury caused by a Government car which was rashly and negligibly driven by the employee of State of Rajasthan. The Supreme Court, upheld the liability of the State for damages in respect of tortious acts committed by its servants within its scope of employment. The view taken in Vidyawati's case was, however, subsequently not approved by a Constitution Bench of the Supreme Court in *Kasturi Lal's* case.[2] The facts of that case were that Kasturi Lal the plaintiff was arrested by the police on the suspicion of stolen property and on a search of the body of the plaintiff, a large quantity of gold was seized and kept in Malkhana. On his release the plaintiff claimed return of the gold seized from him but that was not returned on the ground that the Head Constable in-charge including the gold seized from the plaintiff. On a suit by the plaintiff against the State for the return of the gold or in the alternative for damages for the loss caused to him, the trial court decreed the same. On appeal, the High Court set aside the decree. The plaintiff approached the Supreme Court in appeal. A Constitution Bench of the Supreme Court relying on the doctrine of sovereign immunity held that since no law had been enacted, as contemplated by Article 300, the suit was not maintainable on the ground of the immunity of the State for the tortious acts of its servants. The Court observed that the doctrine of sovereign immunity followed in India on the basis of common law principle which prevailed in England in regard to claims made against the State for the tortious acts committed by its servants. The Court further held that this immunity was with regard to the damages resulting from injury caused by negligent or malicious acts of the servants if the employment was referable to sovereign power. The Court referred to the non-exercise of legislative power and expressed its concern in the following words :—

> "In dealing with the present appeal, we have ourselves been disturbed by the thought that a citizen whose property was seized by process of law, has been told when he seeks a remedy in court of law on the ground that his property has not been returned to him, that he can make no claim of the State, that we think, is not very satisfactory position in law. The remedy to cure this position, however, lies in the hands of the legislature."

Unfortunately, the anxiety expressed by the Supreme Court, and the recommendations made by the Law Commission both have gone unheeded, as no law has been enacted, as yet, with the result, the law laid down by the Constitution Bench of the Supreme Court in Kasturi Lal's case holds the field.

12.4(a)

The Supreme Court, however, exercising its power under Article 32 has awarded damages to the petitioners for the injuries suffered both on account of the tortious act of its servants and also on ground of the State being liable to pay compensation for the violation of their Fundamental Rights. A survey of the decided cases would reveal that the Supreme Court in its judicial activist role adopted two ways to redress the victims of abuse of power by the public servants as palliative to the victims by way of right of compensation and to penalise the State for the negligence of its servants. We do not consider it necessary to discuss all these cases in detail, however,

1. AIR 1962 SC 993.
2. *Kasturi Lal* v. *State of U. P.*, AIR 1965 SC 1039.

a brief reference may be made to some of them.[1–15] The High Courts have also awarded compensation under Article 226 of the Constitution.[16–17] Apart from granting relief under Article 32 of the Constitution, the Supreme Court has in a number of cases upheld the award of damages to the aggrieved person against the State.[18–19]

In *Nilabati Behra* v. *State of Orissa*, (1993, 2 SCC 476), the Supreme Court referred to its decision in Kasturi Lal's case and observed that the principle of sovereign immunity does not apply to a claim made under a public law, it accordingly directed the State of Orissa to pay damages to the petitioner in the case of custodial death as it violated Article 21 of the Constitution. The Court observed that the State had a right to be indemnified and to take such action as may be available against the wrong doers in accordance with law. The brief survey of the judicial decisions would show that though technically Kasturi Lal's case still holds the field, nonetheless courts have been granting relief to the aggrieved persons. But the legal position is not clear, it is, therefore, necessary that statutory enactment is made with regard to the State's liability for the tortious acts of its servants.

12.5 Machinery for claiming compensation

Assuming that conduct resulting in custodial death or constituting any other custodial crime is a tort, the person entitled to damages under the law of torts can, under the general procedure, file a civil suit in the competent civil court against the persons liable. The question "who are the persons liable" will have to be determined in conformity with the principles of the law of torts, which *inter alia*, are relevant for matters such as conditions of liability (including the requirement of fault), immunity from liability and vicarious liability of governmental and non-governmental agencies. As stated above, special enactments applicable to particular types of situations may fortify or supplement the general rule prevailing relating to the law of torts.

12.6 Section 357 of the Code

Apart from the machinery of the civil court, the provisions of section 357 of the Code of Criminal Procedure, 1973 can be utilised, whereunder a criminal court can, in certain circumstances, make an order the payment of compensation by a convicted person.[20] Such order can be passed not only where fine is imposed Section 357(1), but also where any other sentence is imposed section 357(3).

12.7 Recommendation to insert section 357A

In our opinion, in order to have a specific provision regarding compensation in custodial offences, it would be proper to insert in the Code of Criminal Procedure section 357A, a draft whereof is given below. Our intention is to provide specifically for the joint and several liability of the guilty officers and the Government and to set out the important factors to be taken into account in assessing the compensation, we recommend the following section.

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1. *State of Rajasthan* v. *Vidyawati*, AIT 1862 SC 993.
2. *Sir Basava Patil* v. *State of Mysore*, AIR 1977 SC 1749.
3. *Nilabati Behra* v. *State of Orissa*, (1993) 2 SCC 746.
4. *State of Gujarat* v. *Memom Mohammed Hazi Hussain*, AIR 1967 SC 1885.
5. *Rudal Shah* v. *State of Bihar*, AIR 1983 SC 1086.
6. *Sebastian M. Monghray* v. *Union of India* (1984) 1 SCC 339.
7. *Bhim Singh* v. *State of J & K*, 1988 Supp. SCC 564.
8. *Bhim Singh* v. *State of J & V* (1985) 4 SCC 677.
9. *Saheli* v. *Commissioner of Police* (1990) 1 SCC 422.
10. In Re : death of *Sarvinder Singh Grover*, (1993) 1 Cr. L. R. 163 (SC).
11. *V. Varmlamma* v. *State of Andhra Pradesh*, 1993 (1) SCALE 19.
12. *Rethinam* v. *State of Gujarat*, 1993 (2) SCALE 631.
13. *Ravi Kanth* v. *Director General of Police*, State of Maharashtra, 1990 ACJ 1060.
14. *R. Gandhi* v. *Union of India*, AIR 1980 Mad 20.
15. *Nalini Bhanot* v. *Commissioner of Police*, 1990 ACJ 345.
16. *Sir Basava Patil* v. *State of Mysore*, AIR 1977 SC 1749.
17. See para 3 29 *Supra*.
18. AIR 1962 SC 1 :

Section 357A, Cr. P.C.

Compensation in custodial offences

(1) Notwithstanding the provisions of Section 357, where the court convicts a public servant of an offence resulting in death or bodily injury being an offence constituted by an act of such public servant against a person in his custody, the provisions of this section shall apply.

(2) The court, when passing judgment in any case to which this section applies, shall order that the Government in connection with the affairs of which such public servant was employed at the time when such act was committed, shall be liable jointly and severally with such public servant to pay, by way of compensation such amount as may be specified in the order.

(3) An order for payment of compensation under this section may also be made by an appellate court or by the High Court or Court of Session when exercising its powers of revision.

(4) While rewarding compensation in any subsequent suit relating to the same matter, the civil court shall take into account any sum paid or recovered as compensation under this section.

(5) The amount awarded under this section shall not be less than :

(a) Rupees twenty five thousand in case of bodily injury, not resulting in death;

(b) Rupees one lakh, in case of death;

(6) In fixing the amount of compensation under this section, the court shall, subject to the provisions of sub-section (5), take into account all relevant circumstances, including (but not necessarily limited to) the following :

(a) the type and severity of the injury suffered by the victim;

(b) the mental anguish suffered by the victim;

(CA) the expenditure incurred or likely to be incurred on the treatment and rehabilitation of the victim;

(d) the actual and projected earning capacity of the victim and the impact of its loss on the persons entitled to compensation and other members of the family;

(e) the extent, if any, to which the victim himself contributed to the injury.

(f) the expenses incurred in the prosecution of the case.

(7) In case of death or permanent disablement of the victim, the court may take into account the estimated annual income of the victim as multiplied by the number of years of his estimated span of life.

(8) Pending final determination of the proceeding, the court may award, by way of interim relief, such compensation as it may think proper in the circumsances of the case at any stage of the case, even before judgment of conviction is passed.

(9) The Government may recover any amount paid by it as compensation under this section wholly or partly as it may think proper, from the delinquent public servant."

CHAPTER 13

ORGANIZATION OF THE POLICE

13.1 Introduction

In the earlier chapters, we have referred to the various aspects of the custodial crimes arising out of abuse of power by the police and other public officers. The police is in the dock, day in and day out, it has to face mounting severe public criticism. The allegations of incompetence, corruption, ruthlessness, violation of human rights, communalization, unlawful and partisan behaviour are often made against the police. But one should not have the feeling that all policemen are 'blood-thirsty hounds.' The police is in an essential organisation being part of the Executive to maintain law and order and to prevent crimes. The police is a necessity for a civilized society. The citizens look to the police for security and protection and it has served the society well. Unfortunately, due to various factors, the police in India has not been able to play its effective role in people's service. It is proposed to deal in this chapter certain matters concerning police organization. Of course, this report is not on the organisation of police force, but we consider it necessary to refer to some of the factors which are responsible for the malpractices connected with investigation of crimes, as in our opinion, unless those factors are removed the police as a whole will continue to suffer with the maladies and it would be difficult for it to transform itself into an instrument of service to the people.

13.2 Role of Police under British Rule

The present police system in India is a British legacy. It is the creation of British Government and it rests on the basic ideals of efficiency and subordination to the law of the land. During British Rule the rule of police was limited to the role invested by the Police Act, 1861—whose main objective was to make the police an efficient instrument for the prevention and detection of crime and to use it as an effective weapon at the disposal of the foreign government to put down firmly any challenge to its authority. Their approach was not public service oriented, instead their objective was to maintain status quo. During the British Rule in India, the police had to take effective repressive meaures, at the bidding of the then rulers, against our own people engaged in freedom struggle, as a result of which, the image of the police was greatly tranished and it came to be identified with tyranny and oppression.

13.3 Role of Police after Independence

After India became independent, it declared itself to be a Republic. It ceased to be a Police State, instead it was transformed into a Welfare State. The Constitution guranteed Fundamental Rights to the citizens and it also enacted new legislations, special laws, regulatory measures and progressive law reforms. The implementation and enforcement of many of these laws was entrusted to the police. Various laws including measures like Maintenance of Internal Security Act, Defence of India Act, Terrorist and Disrupitve Activities Act conferred wide discretionary power on the police. Such powers are to be exercised in conformity with the Fundamental Rights and in accordance with the statutory provisions. Unfortunately, the police was not reorganized to meet the new challenge. Recruitment policies, training and hierarchical controls introduced during British days have basically continued to be in force even today with the result that the police have not been able to meet the need of the society.

In recent years, police have to perform difficult and delicate task particularly in view of the deterioriating law and order situation, communical priots, political turmoil, students unrest, terriorist activities, radical politicism lihe extremists and among others, the increasing number of white collar crimes like bribery and corruption, evasion of taxes, violation of fiscal laws and smuggling, etc. Organized criminal gangs have taken strong roots in the society. Such criminal gangs use ultra modern weaponry, explosives and many other devices to completely smash the objectives without leaving a little, or no evidence at the place of offence. Similarly, dealing with insurgent and terrorist groups is also vastly different from dealing with the traditional criminals. This category of criminals is also well trained, hardened and equipped with ultra

modern weaponry. An ordinary policeman carrying a small ruler or even a gun does not match to the excrutiating speed of terrorists. The widening of the sphere of activities and responsibility has confronted the police with challenges and crisis ushering in a series of new and significant problems, for which they have not been trained or equipped so they fail to serve the people in accordinace with the Constitutional and human rights norms.

In addition to aforementioned factors, prolonged stress and strain and a long hours of duty in connection with law and order and VIP duty, very little time is left for police to investigate cases for detection of crimes. The police, under pressure of quota of work assigned to them, driven by a desire to achieve quick results, leave the path of patience, reticence and scientific interrogation, instead they resort to the use of physical force in different forms to pressurise the suspect or accused to disclose all the facts known to him. While law recognizes the need for use of force by the police in the discharge of their duties on some specified occasions like the dispersal of violent mob or the arrest of a violent bad character who may resist the arrest, they use force against the individual in their custody.

13.4 Reports of Police Commission

The Indian police today finds itself handicapped not only in its numerical strength but also in its adquate infrastructural facilities like modern weaponry, equipment, communication network and more importantly need based training which is of paramount importance to make it efficient and effective instrument of law enforcement. The National Police Commission has gone into the whole range of problems of police administration and it has made several reports for reform in the police organization. In one of its reports, the Police Commission (January 1980) emphasized the need to modernize the method of investigation by harnessing science and technology to aid efficient police performance. It also made recommendation for improved facilities for communication, transport, computerized study and assistance from forensic science. The recommendations highlighted the establishment of more Central Forensic Science Laboratories and Medical Examination Laboratories, State Handwrting Bureaus and Regional Laboratories to handle certain types of cases which frequently arise in the normal crime work of the state. It also recommended for the constitution of Central investigation effective, the Police Commission recommended that training should be made more scientific. By another report the Commission made a series of recommendations to improve effectiveness and efficiency of the police by making administrative changes. The recommendations made by the Police Commission have not been fully implemented. In our opinion, the Police Commission's Reports, if implemented,will go a long way to remove the causes of aberration in police and minimise the chances of abuse of power and custodial crimes.

13.5 Need for separation of Investigation Wing from Law & Order Wing

The enactments relating to the police force as operative in various parts of India —whether it be the Police Act, 1861or the Provincial Act or State Act governing the police, primarily contemplate at least two major functions for the police force. The first is the maintenance of law and order, while the second is the investigation of offences, particularly cognizable offences. Prior to independence when the population was low, the crime rate was not high and the area to be governed by the then rulers was not very large, there was no need to keep these functions separate. Now the situation has changed, and it seems to us that efficiency and integrity in the performance of the functions of the police cannot be maintained at a reasonable level without embarking upon a scheme of separation of the two functions. Of course, this pre-supposes that the structure and organization of the police force in each State will have to be re-modelled a matter which we do not propose to deal with in detail. But there is no doubt that such a change is needed from a variety of angles.

13.6 Recommendations relating to Police Organisations

We are of the opinion that, to a large extent, the problem of torture and other malpractices in the course of investigation of offences owes itself to the fact that police officers who are kept busy in other work do not find time and cannot have an inclination to devote their best intellectual and physical resources to the investigation of crimes. The faculties of the mind which must be brought into play at the time of investigation are different from those which are to be exercised when dealing with an urgent situation of breach of public order. It is desirable that there should be a separate wing for the investigation of offences, manned by officers of the necessary

expertise and approach who can devote their full time energy to the detection and investigation of cognizable offences. We are aware that this is not a new approach. We cannot also say that it can be put into practice very easily. Beside this (except for Union Territories), it can only be put into concrete shape by the State Governments. Nevertheless, we must reiterate our view in this regard, so that the cause of personal liberty and other fundamental rights may not suffer, merely be reason of official lethargy or inaction. The scheme may involve a little bit of additional expenditure in the beginning. However, in the long run, it may save not only time and duplication of Work, but also money. If any work studies are to be made in this reagrd, the same can be undertaken. The exeperience of those States in which such a scheme might have been tried in the past can also be taken into account. But, at the same time, the idea should not be thrown out at the outset, because its adoption could go a long way in contributing to a solution of a problem which has baffled well-meaning persons for quite some time and which is not going to disappear in a reasonable time unless it is dealt with on a variety of fronts.

The Commission feel's that immediate measures should be taken to improve the functioning of the police. We accordingly recommend that the following measures be taken :—

(i) Investigating agency should be separated from the law enforcement wing;

(ii) Investigating agency should be trained especially to have an intimate knowledge of the procedural and penal provisions of various criminal and economic laws and they should also be trained in modern sophisticated gadgets and equipments;

(iii) Special stress must be laid in the training programme requiring the policemen to respect the Constititutional and human rights and laws of the land in the discharge of their duties; and

(iv) Orientation and refresher courses should be organized to apprise the police of the new developments and techniques in investigation.

CHAPTER 14

RECOMM ENDATIONS

14.1 In the light of the discussions made in the earlier Chapters of this Report, the Commission is of the opinion that it is essential to make appropriate provisions in the Indian Penal Code, 1860, the Code or Criminal Procedure, 1973, and the Indian Evidence Act, 1872 to foreclose torture in custody by public servants and to protect the inteest of the victims of custodial crimes. The proposed amendment in the relevant enactments have already been discussed in the preceding Chapters of the Report but for convenience a draft of the proposed amendments is being set out hereinafter.

14.2 **Indian Penal Code**

The Law Commission reiterates its earlier recommendation made in the 135th Report on 'Women in Custody'. We recommend that a new section 166A be inserted in the Indian Penal Code, 1860 for punishing the violation of section 160 of the Code of Criminal Procedure, 1973 :

"166A. Whoever, being a public servant—

(a) knowingly disobeys any direction of the law prohibiting him from requiring the attendance at any place of any person for the purpose of investigation into an offence or other matter, or

(b) knowingly disobeys any other direction of the law regulating the manner in which he shall conduct such investigation, to the prejudice of any person shall be punished with imprisonment for a term which may extend to one year or with fine or with both."

The proposed offence should be cognizable bailable and triable by any magistrate."

(Para 6.5)

14.3 The Commission reiterates need for insertion of section 167A in the Indian Penal Code, 1860 as recommended in its 84th Report of 'Rape and Allied Offences, and some question of substantive law, procedure and evidence.' (para 3.3), on the following lines :—

"167A.—Whoever, being an officer in charge of a police station and required by law to record any information relating to the commission of a cognizable offence reported to him, refuses or without reasonable cause fails to record such information, shall be punished with the imprisonment of either description of or a term which may extend to one year or with fine or with both."

(Para 8.3)

14.4 **Code of Criminal Procedure, 1973**

The Commission recommends that section 41(1) of the Code of Criminal Procedure, 1973 be amended and a new section 41(1A) be inserted in the Code of Criminal Procedure, 1973 on the following lines :

"41(1A) A police officer arresting a person under cluase (a) of sub-section (1) of this section must be reasonably satisfied, and must record such satisfaction, relating to the following matters :—

(a) the complaint, information or suspicion referred to in that clause, is not only in respect of a congnizable offence having been committed, but also in respect of the complicity of the person to be arrested, in that offence;

(b) arrest is necessary in order to bring the movements of the person to be arrested under restraint, so as to inspire a sense of security in the public or to prevent the person to be arrested from evading the process of the law or to prevent him from committing similar offences or from indulging in violent behaviour in general."

(Para 5.20)

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14.5 It is further recommended that recommendations No. 1 and 2 made in the Law Commission of India's 135th Report (Women in Custody) wich relate to the arrest of women, should be implemented.

(para 5.17)

14.6 The Commission recommends that a new section 41—A should be inserted in the Code of Criminal Procedure, 1973 on the following lines :—

"41A. *Notice of appearance.*—Where the case falls under clause (a) of sub-section (1) of Section 41, the police officer may, instead of arresting the person concerned, issue to him a notice of appearance requiring him to appear before the police officer issuing the notice or at such other place as may be specified in the notice and to cooperate with the police officer in the investigation of the offence referred to, in clause (a) of sub-section (1) of Section 41. (2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of that notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence feferred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice, it shall be lawful for the police officer to arrest him for the offence mentioned in the notice, subject to such orders as may have been passed in this behalf by a competent court."

(Para 5.21)

14.7 The Commission is of the view that there is a need to insert a new section 50-A after secton 50 in the Code of Criminal Procedure, 1973 on the following lines :—

50A (1) Whenever a person is arrested by a police officer, intimation of the arrest shall be immediately sent by the police officer (along with intimation about the place of detention) to the following person :—

(a) a relative or friend of other person known to the arrested person, as may be nominated by the arrested person;

(b) failing (a) above, the local legal aid committee.

(2) Such intimation shall be sent by telegram or telephone, as may be convenient, and the fact that such intimation has been sent shall be recorded by the police officer under the signature of the arrested person.

(3) The police officer shall prepare a custody memo and body receipt of the person arrested, duly, signed by tim and by two witnesses of the locality where the arrest has been made, and deliver the same to a relative of the person arrested, if he is present at the time of arrest, or, in his absence, send the same along with the intimation of arrest to the person mentioned in (1) above.

(4) The custody memo referred to in (3) above shall contain the following particulars :—

(i) name of the person arrested and father's name or husband's name;

(ii) address of the person arrested;

(iii) date, time and place of arrest;

(iv) offence for which the arrest has been made;

(v) property, if any, recovered from the peson arrested and tken in to charge at the time of the arrest; and

(vi) any bodily injury which may be apparent at the time of arrest.

(5) During the interrogation of an arrested person, his legal pratitioner shall be allowed to remain present.

(6) The police officer shall inform the person arrested, as soon as he is brought to the police station, of the contents of this section and shall made an entry in the police diary about the following facts :—

(a) the person who was informed of the arrest;

(b) the fact that the peson arrested has been informed of the contents of this section; and

(c) the fact that a custody memo has been prepared, as required by this section.

(Para 5.16)

14.8 The Commission is of the opinion that in addition to the recommendations contained in Chapter 4 of the 84th Report of the Law Commission, section 54 of the Code of Criminal Procedure be amended on the following lines :

"54. *Examination of arrested person by medical practitioner.* When a perso who is arrested, whether on a charge or otherwise, alleges at any time during th the period of his detention in custody that the examination of his body may afford evidence which will disprove the commission by him of any offence; or is produced before a Magistrate, the Magistrate shall inform the accused so arrested, about his right of medical examination which will establish the commission by any other person including the public servant of any offence against his body committed during the custody and record in writing about the fact of communication of such right to the accused who exercised this right without any coercion or fear of any public servant having effected his arrest or without the presence of such public servant, the Magistrate shall if so alleged by the arrested person, unless the Magistrate considers that the allegation is made for the purpose of vexation or delay or for defeating the ends of justice get the examination of the body of such person by a registered medical practitioner in the manner prescribed hereunder and mention the following particulars :—

(a) The examination of the accused victim shall be conducted by a Registered Medical Practitioner or through a Government Hospital available, as the Magistrate may direct.

(b) The Registered Medical Practitoner to whom such person is forwarded shall without delay examine him/her and prepare a report and specifically record the following details :

(i) the name and address of the victim and of person by whom he was brought;

(ii) the age of the victim;

(iii) injuries external/internal if any, on the person;

(iv) general mental condition of the victim;

(v) other material particulars and any other relevant details.

(c) The report of the said examination shall precisely state the reasons for such conclusion arrived at.

(d) The exact time of commencement and completion of examination shall also be noted in the report and the registered medical practitoner shall without delay forward the report to the Magistrate who shall thereafter act in accordance with the provisons contained in the Code of Criminal Procedure."

(Para 7.6)

14.9 With a view to having a greater and effective compliance of the various safeguards, the Commission recommends that section 57-A be inserted in the Code of Criminal Procedure, 1973 on the following lines

"57A. *Duty of Magistrate to verify certain facts*—When a person arrested without warrant is produced before the Magisrtrate, the Magistrate shall, by inquiries to be made from the arrested person, satisfy himself that the provisions of sections.....have been complied with (section relating to safeguards in connection with arrest, rights on arrest, etc. to be entered) and also inquire about, and record, the date and time of arrest."

(Para 5.22)

14.10 If the police officer refuses to reord the FIR, the aggrieved person should have a right to file a petition (i) before the Chief Judicial Magistrate in the case of custodial injury or torture and all custodial crimes other than killing and (ii) before

the Sessions Judge in the case of death in custody. Accordingly, the Commission recommends that a new Section 154A be inserted in the Coce of Criminal Procedure, 1973, on the following lines :—

"154A. Notwithstanding anything contained in Section 154.

(1) Any person (including Legal Aid, Centre or NGO, or any friend or relative) aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) of that section, in cases relating to custodial offences, may file a petition giving the substance of such information—

(a) before the Chief Judicial Magistrate , in case of custodial offences other than those involving death of the victim; or

(b) before the Sessions Judge, in cases of custodial offences involving death of the victim.

(2) The Chief Judicial Magistrate or the Session Judge, if satisfied, on a preliminary enquiry that there is a *prima facie* case, may himself hold enquiry into the complaint or direct some other Judicial Magistrate or Additional Sessions Judge, as the case may be, to hold enquiry and thereupon direct the ministerial officer of the Court to make a coplaint to the competent court in respect of offence that may appear to have been committed. (3) Notwithstanding anything contained in Section 190 of the Code of Criminal Procedure on a complaint made under Sub-section (2) the competent court shall take cognizance of the offence and try the same.

(4) The Chief Judicial Magistrate or the Sessions Judge may obtain the assistance of any public servant or authority as they made may deem fit in holding the enquiry under sub-section (2).

(Para 8.5)

14.11 The Commission recommends that after the existing Proviso contained in Section 160(1) of the Code of Criminal Procedure, 1973, a second proviso be added, on the following lines :—

"Provided that no person shall be required to attend at any place other than his or her dwelling place unless, for the reasons to be recorded in writing by the investigating officer it is necessary to do so; and every such person shall be so summoned by an order in writing."

(Para 6.3)

14.12 The Commission recommends that below section 197(1)of the Code of Criminal Procedure, 1973 an Explanation should be added on the following lines:—

"*Explanation.*—For the avoidance of doubts, it is hereby declared that the provisions of this section do not apply to any offence committed by a judge or public servant, being an offence against the human body, committed in respect of a person in his custody, nor to any other offence constituting an abuse of authority."

(Para 10.5)

14.13 In order to provide separately for compensation for custodial offences, the Commission recommends insertion of a new section 357A in the Code of Criminal Procedure, 1973, on the following lines :—

"*Section 357A : Compensation in custodial offences*

(1) Notwithstanding the provisions of Section 357, where the court convicts a public servant of an offence resulting in death or bodily injury, being an offence constituted by an act of such public servant against a person in his custody, the provisions of this section shall apply.

(2) The Court, when passing judgment in any case to which this secton applies, shall order that the Government in connection with the affairs of which such public servant was employed at the time when such act was committed, shall be liable jointly and severally with such public servant to pay, by way of compensation such amount as may be specified in the order.

(3) An order for payment of compensation under this section may also be made by an appellate court or by the High Court or Court of Session when exercising its powers of revision.

(4) While rewarding compensation in any subsequent suit relating to the same matter, the civil court shall take into account any sum paid or recovered as compensation under this section :

(5) The amount awarded under this section shall not be less than :

(a) Rupees twenty five thousand in case of bodily injury, not resulting in death;

(b) Rupees one lakh, in case of death;

(6) In fixing the amount of compensation under this section, the court shall, subject to the provisions of sub-section (5), take into account all relevant circumstances, including (but not necessarily limited to) the following :

(a) the type and severity of the injury suffered by the victim;

(b) the mental anguish suffered by the victim;

(c) the expenditure incurred or likely to be incurred on the treatment and rehabilitation of the victim;

(d) the actual and projected earning capacity of the victim and the impact of its loss on the persons entitled to compensation and other members of of the family;

(e) the extent, if any, to which the victim himself contributed to the injury

(f) the expenses incurred in the prosecution of the case.

(7) In case of death or permanent disablement of the victim, the court may take into account the estimated annual income of the victim as multiplied by the number of years of his estimated span of life.

(8) Pending final determination of the proceeding, the court may award, by way of interim relief, such compensation as it may think proper in the circumstances of the case at any stage of the case, even before judgment of conviction is passed.

(9) The Government may recover any amount paid by it as compensation under this section wholly or partly as it may think proper, form the delinquent public servant."

(Para 12.7)

14.14 **Indian Evidence Act, 1872.**

The Commission recommends that the exclusionary provisions contained in Sections 25 and 26 of the Indian Evidence Act, 1872, at present confined to police officers should be extended to all public servants the sections by amended as under :

"25. *Confession to public servant not to be proved.*—No confession made to a *public servant* shall be proved as against a person accused of any offence." In this section, "public servant" means

(a) a public servant not being a police officer, who has the power of arresting the person making the confession; and

(b) every police officer, whether he has or has not the power of arresting such person.

26. *Confession by accused while in custody of public servant not to be proved against him.* No confession made by any person while he is in custody of a a *public servant,* unless it be made in the immediate presence of a Magistrate, shall be proved as against such peson.

Explanation.—In this Section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a magistrate exercising the powers of a magistrate under the Code of Criminal Procedure, 1882 (10 of 1882)."

(Para 11.7)

14.15 The Commission recommends that for section 27 of the Indian Evidence Act, 1872 the following section be substituted :—

"27. *Discovery of facts at the instance of the accused.* When any relevant fact is deposed to as discovered in consequence of information received from a person accused of any offence, whether or not such person is in the custody of a police officer, the fact so discovered may be proved, but not the information whether it amounts to a confession or not."

(Para 11.6)

14.16 The Commission recommends the insertion of a new section in the Indian Evidence Act, 1872 as under :—

"114B. (1) In a presecution of a Police Officer for an offence constituted by an act alleged to have caused death or bodily injury to a person, if there is evidence that the death or injury was caused during a preiod when that person was in the custody of the police, the court may presume that the death or injury was caused by the Police Officer having custody of that person during that period.

(2) The Court in deciding whether or not it should draw a presumption under sub-section (1) shall have regard to all the relevant circumstances, including, in particular, (a) the period of custody, (b) any statement made by the victim as to how the injuries were received, being a statement admissible in evidence,

(c) the evidence of any medical practitioner who might have examined the victim, and (d) evidence of any magistrate who might have recorded the victims statement or attempted to record it."

(para 11.3)

14.17 We recommend that organisation of the police should be restructured so as to keep separate the wings dealing with investigation from the wing dealing with law and order. Further the police should be imparted suitable training in modern techniques of investigation.

(para 13.6)

Sd/-

(JUSTICE K.N. SINGH)
Chairman

Sd/-

(PROF: D.N. SANDANSHIV)
Member

Sd/-

(CH. PRABHAKARA RAO)
MEMBER-SECRETARY

Sd/-

(P. M. BAKSHI)
MEMBER (PART-TIME)

Sd/-

(M. MARCUS)
MEMBER (PART-TIME)

APPENDIX-I

CUSTODIAL CRIMES

(A Working Paper)

Complaints of police excesses and torture of suspects in police custody and other governmental agencies having power to detain a person for interrogation in connection with the investigation of an offence have been made in the past. Of late, such complaints have assumed wide dimensions as the incidents of torture, assault, injury and deaths in police custody have increased to alarming proportions. Article 21 of the Constitution guarantees right to life and personal liberty, although it does not, contain any express provision against torture in custody, but it is wide enough to protect the personal liberty of a person as no law or procedure established by law permits torture or assault on a person in custody. Statutory laws, including the Indian Penal Code and Criminal Procedure Code also ensure the personal liberty of a person against assault and injury. However, in spite of the constitutional and statutory provisions safeguarding the personal liberty and life of a person, growing incidence of torture and death in police custody has been disturbing factor. Almost every day one finds newspapers full of gory tales of dehumanising torture, assault and death in custody of police and other governmental agencies. Even though no reliable official statistics on custodial crimes is available in the country, Amnesty Internaltional, in its 1993 report indicates that in India 415 people were reported to have died in custody during 1985—1992. A recent press report also reveals that 46 persons died in custody during January—March 1993. Without entering intofthe correctness of these figures, it is evident that the incidence of torture and death in custody have assumed alarming proportions which are adverse affecting the credibility of the rule of law and the administration of criminal justice. It has priched the conscience of all freedom loving people and ignited criticism from law courts, human right activists and the media. The community feels that death in police custody must be viewed seriously for otherwise there will be big strides in the promotion of police *raj*. It should be curbed with heavy hand and the punishment should be such which would deter others indulging in such behaviour.

Custodial violence and abuse of the police power has been the concern of international community. The General Assembly of the United Nations adopted the Declaration for protection of pesrons from being subjected to torture and other crime of inhuman or degrading treatment or punishment on December 9, 1975. The Declaration prohibited the member States to permit or tolerate even in exceptional circumstances such as state of war or threat of war, or internal political stability. Article 5 required comprehensive training of law enforcement officers against torture. Article 7 required system of review of the interrogation, methods and practices as well as custodial arrangements. Article 7 obligates the States to ensure that the acts of torture are made offences under National Criminal Law. The Declaration also provides that victim shall be afforded redress and compensation. The Declaration which is part of the binding international law has not yet been implemented so far in our country. There also exists a code of conduct for law enforcement officials adopted by the General Assembly on December 17, 1979, under which substantive norms are prescribed for "effective maintenance of ethical standards" by the officials. Article 5 prohibits law enforcement officials from inflicting, instigating or tolerating any act of torture. This was followed by another Declaration on December 10, 1984, by a Convention which provides for more elaborate regime of 33 articles. The General Assembly adopted another Declaration known as "Carcus Declaration on Basic Principles of Justice for the Victims of Crime and Abuse of Power" on November 29, 1985. This Declaration also obligates the State to define laws "prohibiting the criminal abuse of power" and also for prohibition of recourse to third degree methods. India being a party to these Declarations and Conventions, is under an obligation to take effective steps, to prohibit abuse of power, including torture and custodial violence and providing for restitution and compensation to the victims and their kith and kin in accordance with the constitutional mandate under Article 51.

Invariably, the victims of torture and death in custody are poor persons who do not have adequate resources or finances to protect their life and liberty. In many cases the sole bread earner of a poor family is the victim of custodial death leaving the entire family in a State of penury and starvation. The Law Commission has, therefore, considered it necessary to take up this matter for consideration *suo moto* so that adequate steps are taken by amending laws to prevent recurrence of such incidents and also to provide for pinishment of the guilty persons and also for grant of pecuniary relief to the victims and their dependents.

Before we discuss the various issues arising in connection with the problem of custodial torture and death, it is necessary to briefly have a look at the constitutional provision safeguarding the right to life and guarantee against torture and assault in custody. Article 21 of the Constitution provides that no person shall be deprived of life and personal liberty except according to procedure established by law. The expression "life or personal liberty" includes the right to live with human dignity which would include guarantee against torture and assault by the State. Article 22 guarantees protection against arrest and detention in certain cases. It declares that no person who is arrested shall be detained in custody without being informed of the grounds of such arrest and he shall not be denied the right to consult and defined himself by a legal practitioner of his choice. Clause (2) of the Article directs that the person arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the Magistrate A person accused of an offence shall not be compelled to be witness against himself under Article 20(3) of the Constitution. The object of these constitutional provisions is to safeguard the life and liberty of an individual even after his arrest in connection with commission of an offence. Even though Articles 21 and 22 do not contain any express provision against torture, assault or injury inflicted on an are rested person while in custody, the Supreme Court held that Article 21 guarantee-protection against torture and assault by the State while a person is in custody.[1]

Consistent with the constitutional guarantee, the statutory provisions are contained in the Criminal Procedure Code and the Indian Penal Code for the protection of a person arrested in connection with the commission of an offence. Chapter V of the Criminal Procedure Code, 1973 provides for arrest of a person and the safeguards which are required to be taken by the police to protect the interest of the arrested person. Section 41 confers powers on any police officer to arrest a person under the circumstances specified therein without any order or a warrant of arrest from a Magistrate. This provision confers a very wide power on the police officer to interfere with the freedom and liberty of a person. Section 46 provides the method and manner of arrest. Under this Section, no formality is necessary as it may be made by action or word of mouth. While arresting a person the police is not permitted to use more restraint than is necessary to prevent the escape of a person.[2] Section 50 enjoins every police officer arresting any person without warrant, to communicate to him the full particulars of the offence for which he is arrested and grounds for such arrest. The police officer is further required to inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf in the event of his arrest for a non-bailable offence. It is persmissible to the police officer to get the arrested person emdialally examined; similarly arrested person has also a right to insist for his medical examination (Section 53 and 54). Section 56 contains a mandatory provision requiring the police officer making arrest without warrant to produce the arrested person before a Magistrate without unnecessary delay. Section 57 provides that no person shall be detained in custody by a plilce officer without warrant for a longer period than under all the circumstances of the case, is reasonable exceeding 24 hours, excluding the time necessary for travel from the place of arrest to the Magistrate's court. If, however, the police want to detain a person for a longer period for the purpose of interrogation and investigation, they have to obtain the orders of the Magistrate and follow the procedure as prescribed under Section 167. The arrest of a person without a warrant is to be reported to the District Magistrate or the Sub-Divisinoal Magistrate by the officer incharge of the police station making the arrest. These provisions afford procedural safeguard to a person arrested by the police. Whenever a person dies in custody of the police, Section 176 requireds the Magistrate to hold enquiry into

1. See *Sunil Batra* v. *Delhi Administration, A. I. R.* 1978 *S. C.* 1675, *Bachan Singh* v. *State of Punjab.*

A. I. R. 1980 *Sunil Batra* v. *Delhi Administration,* A. I. R. 1980 S.C. 1579.

2. Section 49.

the causes of death. The Magistrate is empowered to record evidence and to get the dead body examined to discover the cause of death. The object of this Section is to hold enquiry into a suspicious death. Such an enquiry and inquest report does not constitute substantive evidence as held by the courts.[3]

Punitive provisions are also contained in the Indian Penal Code which seek to prevent violation of right to life. Section 220 provides for punishment to an officer or authority who detains or keeps a person in confinement with the corrupt or a malilcious motive, Section 330 and 331 provide for punishment of those who inflict injury or grievious hurt on a person to extort confession or information in regard to commission of an offence. Illustrations (a) and (b) to Section 330 make a police officer guilty of torturing a person in order to induce him to confess the commission of a crime or to induce him to point out places where stolen property. is deposited. Section 330 therefore directly makes the torture punishable under the Indian Penal Code. These statutory provisions seek to safeguard the interest of an arrested person, but these are inadequate. Moreover, the police do not follow these provisions instead they evade the rigours of procedural law by manipulating records. As noted earlier, a person arrested without warrant must be presented before the Magistrate without unnecessary delay and he should also be informed of the offence for which he may have been apprehended or the ground for his arrest and he should be enlarged on bail if arrested for non-cognizable offence. The police is further required to make entry of his arrest in several documents under the Police Act and Police Manual, information to the District Magistrate and the Sub-Divisional Magistrate about the date and time of arrest. In order to avoid these rigours of law, the police makes informal arrest without making any entry into the records. Instances are not lacking where the police has arrested a person without warrant in connection with the investigation of an offence and the arrested person is subjected to torture to extract information from him for the purpose of further investigations or for recovery of weapons or goods and also for extracting confession in violation of the statutory law. The torture and the injury caused on the body of the prisoner sometiemes results into his death. The death in custody is not generally shown in records and every effort is made by the police to dispose of the body or to make out a case that the arrested person died after he was released from custody. Any complaint against such torture or death is generally not given any attention by the police officer on account of brotherhood. No first information report at the instance of the victim or his kith and kin is generally entertained and even the higher police officers prefer to turn a blind eye to such complaints. But even if a formal prosecution is launched victim or his kith and kin, no direct evidence is available to substantiate the charge of torture or causing hurt resulting into death as the police lock up where generally torture or injury is caused on the arrested person is away from the public gaze, where the sole witnesses are either policemen or co-prisoners who are highly reluctant to appear as prosecution witnesses firstly because of police brotherhood and secondly due to fear of retaliation by the superior officers of the police.

As the law stands today, if a complaint is made against torture death or injury, in police custody, no evidence is available to substantiate the charge in a court of law and the complainant or the prosecution is unable to produce evidence to prove the charge beyond 'all reasonable doubt'. In such cases it is difficult rather impossible to secure the evidence against the policemen responsible for resorting to third degree methods since they are incharge of police station record which they do not find difficult to manipulate. Consequently, prosecution against the delinquent officers generally results in acquittal. This difficulty was considered by the Supreme Court also in a series of cases and it observed that the situation required amendment of law relating to burden of proof in the law of evidence.

The law relating to burden of proof is contained in Sections 101—114 of the Indian Evidence Act. The general principle as deductible from these Sections is that the prosecution is under a mandatory duty to prove the essential elements of the offence charged against an accused person beyond all reasonable doubt. On the suggestions of the Supreme Court in *Ramsagar Yadav case*[4], the Law Commission in its 113th Report recommended the insertion of a new Section as Section 114B in the Indian Evidence Act. The Commission recommended that in a prosecution of a police officer for an alleged offences of having caused bodily injury to a person, if there was evidence that the injury was caused during the period

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3. (1955) ISCR 1090.

4. A. I. R. 1985 SC 446.

when the person was in the custody of the police, the Court may presume that the injury was caused by the police officer having the custody of that person during that period.

The Commission further recommended that the court, while considering the question of presumption, should have regard to all relevant circumstances including the period of custody, statement made by the victim, medical evidence and the evidence which the Magistrate may have recorded. The Supreme Court again considered this question in a recent case[5] and observed that where the admitted facts of the case indicate that victim was taken in custody and later, on the next day if he was found dead near the police post, the burden was clearly on the State to explain how the victim sustained those injuries which caused his death. The Court again amphasised the need for change of the rule of burden of proof in such cases. It is a matter of regret that inspite of the Law Commission's recommendations ans. the Supreme Court's observations in several cases the requisite amendment in the law of Evidence has not been made. In view of the sharp rise in police atrocities and custodial violence, tortures and death, it is of utmost importance to amend Section 114 of the Indian Evidence Act as suggested earlier. In this connection it is worth mentioning that the Parliament amended the Evidence Act for raising presumption in the case of rape in custody and dowry death with a view to meet the growing incidence of sexual exploitation during custody. The Parliament by amending the Act inserted Sections 114A and 114B of the Indian Evidence Act 1873 empowering the Court to draw presumption against the accused in prosecution for rape and dowry deaths. This legislative step was taken to meet the technical plea of lack of evidence in rape and dowry cases. There appears to be no reason as to why the same principle should not be extended in the case of custodial crimes.

There is need for making further provisions in the laws to eliminate the possiblility of torture and beating in custody during interrogation. Police is, no doubt, under a legal duty to arrest a criminal and to interrogate him during the investigation of the offence, the law does not permit use of third degree methods or torture of accused in custody but the police generally resorts to these methods with a view to solve the crime. It is a legitimate right of the police to arrest a suspect on receiving some credible information, or material, but the arrest must be in accordance with the law and the interrogation should not be accompanied with torture and use of third degree methods. The interrogation and investigation should be in true sense and purposeful to make the investigation effective. By torturing a person and using third degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. If the custodians of law themselves indulge in committing crime, then no member of the society would be safe and secure. In this situation, it would be worthwhile to amend the law to eliminate or at any rate minimise, the chances of torture or injury or death in custody.

When a person is arrested without warrant for a cognizable offence it should be imperative for the police officer to obtain from the accused the name of any relative or friend whom he would like to be informed about the arrest and the police should get in touch with such relative or friend and inform him about the arrest[6]. When the accused is produced before the magistrate it should be mandatory for the Magistrate to enquire from the arrested person whether he has any complaint of torture or mal-treatment in custody and he should further be informed that he has a right under Section 54 of the Code of Criminal Procedure to be medically examined.[7] Very often the arrested person is not aware of this right and on account of his ignorance he is unable to exercise his right before the Magistrate even though he may have been tortured or mal-treated by the police in the lock-up. It is, therefore, necessary that the law should be amended and a mandatory duty should be amended and a mandatory duty should be cast on the Magistrate to enquire from the arrested person about the torture and remind him of his right of medical examination under Section 54 of the Code.

Torture or beating of an arrested person in the lock-up is generally carried on behind the closed doors and no member of the public is permitted to be there and instances are not wanting where even the family members of the arrested persons are not allowed to meet them. In developed countries it is well recognised right of

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5. 1993 (2) SCC 346.

6. *Sheila Barse* v. *State of Maharashtra*, AIR 1983 SC 378 para 4.

7. *Shiela Barse* Ibid.

an arrested person to inisist for the presence of his counsel during the course of interrogation while in custody. The presence of counsel would deter the police from using third degree methods during interrogation. The Cr. P. C. does not confer expressly any such right on the accused but the Apex Court while interpreting the scope of Article 21 and 22 has held that the accused is entitled to have his counsel during interrogation.[8] The law declared by the Supreme Court is the law of the land under Article 141 of the Constitution. Since the decisions of the Supreme Court are not brought to the notice of each and every police officer, it would be proper and appropriate to amend the law in this respect. Amendment of Sections 41, 50 and 56 of the Criminal Procedure Code may be necessary to secure the aforesaid objectives.

Non-Recording of FIR

A first information report against a police officer is generally not recorded. Ordinarily, the police officer responsible for recording of FIR relating to commission of a crime would turn away the complainant if the complaint is against the police.

Therefore, in cases of custodial torture, violence and injury, even if the victim or the kith and kin of the victim take steps to lodge FIR, they are generally unsuccessful in their attempt. On refusal on the part of the officer incharge of police station to record the information, the complainant is entitled to approach the higher police officers namely the Superintendent of Police, Deputy Inspector General of Police and even the Inspector General of Police. But generally the higher authorities of the police department do not take these complaints seriously on account of their soft corner for their subordinate officers. It is true that in some cases the Superintendent of Police or higher officers have taken steps to record the FIR and investigate the case but, by and large, FIR is not recorded against the police at the instance of the victim or his kith and kin. In a number of cases the aggrieved party has approached the court and on its direction FIR has been recorded and case has been investigated and the prosecution has been launched. But, it is not possible for every aggrieved person to obtain the circuitous relief. In the circumstances, it is necessary to meet the situation by amending the law. If the police refuses to record the FIR, the aggrieved person should have the right to file a petition before the Chief Judicial Magistrate in the case of injury or torture and the District Sessions Judge in the case of death in custody and the petition so made should be treated as the FIR for the purpose of investigation and enquiry under the Cr. P.C.

Investigation of Complaint in Custodial Offences

As the law stands today, a complaint against the police in respect of torture, injury or death in custody is also required to be investigated by the police but such enquiry cannot be effective and free from bias.[9] In order to meet the situation, in some cases, investigation against the police torture have been entrusted to the Central Bureau of Investigation but, under the existing law, CBI cannot take up the investigation of all cases of custodial crimes since the State Governments consent to such investigation may not be available in many cases. The ideal course would be to have an independent agency for holding investigation and enquiry into such complaints, and this may be entrusted to the proposed Human Rights Commission. But, in the absence of such commission, it would be necessray to have an independent agency to deal with such matters in an objective and fair manner. One method may be to authorise the courts to hold enquiry into such complaints. Under Section 176 of the Code, enquiry in case of death of an arrested person while in custody is made by a Magistrate empowered to hold such inquest. The object of this enquiry is to verify the cause of death this enquiry is judicial but the Magistrate does not function as a court the inquest report or statement contained in the enquiry report do not constitute substantive evidence.[10] The Commission is, however, of the opinion that in case of complaint of torture or injury caused in police custody, the Chief Judicial Magistrate who is head of the Magistracy in the District should have the power to hold enquiry into the complaint and for that purpose he may obtain the assistance of the police officers of his own choice. In cases of custodial death, the Sessions Judge should be invested with authority to enquire into the matter. If on enquiry by the Sessions Judge/Chief Judicial

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[8]. *Nandini Satpati* v. *R. L. Thanani*, 1968 CRLJ 968 para 58, 59 per Krishnaswamy Ayyar J.

[9]. *State* v. *P. S. Yadav*, AIR 1985 SC 146.

[10]. (1955) 1 SCR 1083.

Magistrate/Metropolitan Magistrate, a prima facie case is made out, the Sessions Judge or the Chief Judicial Magistrate should be competent to direct for the registration of cases against the delinquent officers. This method may ensure awareness and objectivity in holding the enquiry into the complaints against the police.

Under the law no public servant, including police officers, can be prosecuted for an offence without the sanction of the State under Section 197 Cr. P.C. No doubt, there are a number of decisions of the court that torture, injury or causing death in custody is not within the discharge of official duties of a police officer and Section 197 is not attracted in such cases but invariably a technical plea of absence of sanction under Section 197 Cr. P.C. is raised by the members of the police force facing the prosecution. The controversy in regard to necessity of sanction causes lot of delay in the trial of cases. It would, therefore, be necessary to amend Section 197 of the Cr. P.C. to obviate the necessity of sanction of Government for prosecution of police officer against whom a prime facie case is made out on enquiry by the Sessions Judge/Chief Judicial Magistrate. In order to achieve this object, a proviso would be necessary to be inserted under Sub-section (1) of Section 197 in the following manner :—

> "Nothing contained in this Section shall apply in case of custodial offence where a court on an enquiry is prima facie of the opinion that the accused public servant committed an offence of penal nature within his custody."

Compensation

With the advance of civilisation, individual's right to restitution and compensation against the abuse of power by public servants has been well recognised throughout the civilised nations. In India, prior to independence the liability of the Government for the tortuous act of public servants was limited and the person affected could enforce his right in tort by filing a civil suit. But no restitution or compensation was available to a person if the damage or injury was caused in exercise of sovereign function. Even after independence the distinction between sovereign and non-sovereign functions of the State was maintained and the State's claim for immunity was upheld by the Supreme Court.[11] But without abandoning the distinction formally, the Supreme Court has recently taken a more realistic and enlarged view of the functions termed "non-sovereign". Further, the Supreme Court of India in a number of path breaking pronouncements has extended the fundamental right of life and personal liberty and fashioned compensatory and rehabilitative reliefs to the victims of custodial crimes. Despite the distinction between exercise of sovereign and non-sovereign functions, the Supreme Court has awarded compensation to the victims and their kith and kin for the injury caused to the victim by the police and other detaining authorities of the State.[12] Such damages have been awarded even for the injuries arising out of police firing killing innocent citizens in crowd or riot. Though the Supreme Court has awarded compensation to the affected persons but no uniform principles have been laid down. In the absence of specific legislation, there is uncertainty and the courts have adopted their own standards in awarding the compensation or in determining its quantum. The question that arises for consideration is whether legislative provision should be made for the award of compensation and, if so, what should be the principles for determining the amount of compensation. A further question that arises for consideration is whether in case of death of a person in custody of a public servant compensation upto a specified limit irrespective of the proof of fault should be provided for. It is felt that such a provision would be justifiable in the interest of social justice and the rule of law. Another interesting question that arises for consideration is whether the victim of torture and injury and his kith and kin in the case of his death should be awarded one time compensation or it should be continuous to provide means of sustenance and livelihood to the relatives of the victims. Under the general law prevailing in our country, any award of compensation or ex-gratia payment by the criminal court or the Supreme Court and the High Court under the writ jurisdiction or the ex-gratia payment by the executive is subject to the right of the

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11. *Kasturi Lal* v. *State of U. P.*, AIR 1965 SC 1039.

12. *State of Rajasthan* v. *Vidyawati*, AIR 1962 SC 933 ; *Sir Basava Patil* v. *State of Mysore*, *AIR* 1977 SC 1749; *Nilabati Behra* v. *State of Orissa*, (1993) 2 SCC 746; *State of Gujarat* v. *Memon Mohammed Haji Hasan*, AIR 1967 SC 1885; *Rudol Shah* v. *State of Bihar*, AIR AIR 1983 SC 1086; *Sebastian M. Hongray* v. *Union of India* (1984) 1 SCC 339; *Bhim Singh* v. *State of J & K*, 1989 Supp. SC 564; *Bhim Singh* v. *State of J & K*, (1985) 4 SCC 677 *Saheli* v. *Commissioner of Police* (1990) 1 SCC 422.

victim and his kith and kin to obtain decree for damages in tort before the civil court. If the criminal court is vested with power to award compensation to the victim of custodioal offences or his kith and kin why should they have another innings of litigation before civil court in tort. According to one view the amount awarded by the criminal court and the Civil Court and High Court under writ jurisdiction is tentative and the final amount of compensation is determined on consideration of the basis of the scrutiny of evidence and circumstances of the case in detail by the civil court. This question requires further consideration.

The Supreme Court[13] has granted compensation to provide support to the dependants of the deceased. An analysis of the decisions of the Supreme Court shows that the Court has awarded Rs. 75,000,[14] Rs. 1,50,000 [15] and Rs. 2,00,000/-[16] as interim measure[17] to the legal heirs of the victims who died in police custody. This indicates that the amount of compensation has not been uniform and no principles have been laid down or followed. The award of compensation has varied from case to case probably on the facts of each.[18]

If the law is required to lay down principles, the question arises what formula or principles should be prescribed for determining the quantum of compensation. The Indian courts have followed two kinds of formula to determine the amount of compensation payable to the dependants of the deceased in case of wrongful death *i.e.*, the interest theory and multiplier theory. In the case of former the proposition contemplates that only such amount should be payable to the claimants which would ensure the accrual of interest equal to the annual dependancy if the same were invested on a long term basis in the bank. Under the multiplier theory damages are computed on the basic annual figure of dependancy, by applying a multiplier which seeks to take care of uncertainity of vicissitudes of life. While determining the amount the damages must represent solatium for the mental pain, distress, indignity, loss of liberty and death.[19] The principles laid down by the English court[20] for determining the compensation in the case of worngful death have been followed by the Supreme Court of India.[21] These principles are as follows :

> "The deceased man's expectation of life has to be estimated keeping in view his age, his bodily health and the possibility of premature determination of his life by subsequent accident ;
>
> (2) The amount required for the future provision of his wife should be estimated having regard to the amount the deceased used to spend on her during his life time ;
>
> (3) This estimated annual sum should be multiplied by the number of years of the man's estimated span of life;
>
> (4) The said amount must be discounted so as to arrive at the correct equivalent in the form of lumpsum payable on his death, after making deductions for the acceleration of her interest in the estates; and
>
> (5) Deductions should also be made for the possibility of the wife dying earlier if the husband had full span of this life and also for the possibility that in case the widow remarriages, that may result in improvement of her financial position"

In this connection it would be worthwhile to refer to some of the proposals made in respect of relief to be provided to the victims of custodial crimes or their kith and kin placed before the Chief Minister's Conference on Human Rights held on 14th September, 1992. One of the proposals made contemplated that in case of

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[13]. *Rudal Shah* v. *State of Bihar* (1983) 4 SCC 141; (1983) 3 SCR 508; *Sebastian M. Hongray* v. *Union of India* (1984) A1 SCC 339 (1) ; ***Bhim Singh*** v. *State of J & K*, 1984 Supp. SCC 504; *Bhid Singh* v. *State of J & K* (1985) 4 SCC 677 ; *Saheli* : 4 *Women's Resource Centre* v. *Commissioner of Police, Delhi Police Headquarters* (1990) 1 SCC 422.

[14]. *People's Union of Democratic Rights* v. ***Police Commissioner*** (1984) 4 SCC 730.

[15]. *Nilabati Bahera* v. *State of Orissa,* (993) 2SCC 746.

[16]. *Snwaider Singh Grover* v. *State of West Bengal* (1993) 1 Criminal Law Reporter **163.**

[17]. *Rudal Shah* v. *State of Bihar* (1983) 4 SCC 141.

[18]. See *supra* notes 13 to 16.

[19]. *Saheli* v. *Commissioner of Police* 1961 SC 442.

[20]. (1951) AC 601.

[21]. AIR 1962 SC 1.

death the amount of compensation should be determined by the criminal court taking into account all relevant considerations and the court may further allow payment of interim relief. The extent of such interim relief may not be less than Rs. 10,000 and may extend upto Rs. 25,000 in case of death and in the case of other injury it may not exceed Rs. 10,000. As regards the final relief payable in the case of death, the proposal contemplated maximum amount of Rs. 5,00,000 and Rs. 50,000 in the case of injury.

Section 357 of Cr. P.C. confers power on court to direct for payment of compensation out of the fine awarded against the accused at the time of passing judgment The amount of compensation is contemplated to meet the expenses incurred in prosecution and compensation for loss of injury casued by the offence, if the compensation is recoverable in a civil court. Under this provision, compensation can be ordered to be paid only if the accused is convicted and sentenced and fine is imposed, but the payment of compensation is subject to appeal. The Supreme Court has interpreted this Section narrowly. The court held that the court has to consider in the first instance whether the sentence or fine is at all called for particularly when the offender is sentenced to death or life imprisonment. Even if the fine is to be awarded it should not be excessive.[22] The provisions of Section 357 are not adequate to provide for restitution or compensation to the persons entitled to compensation.

Apart from the police there are several other governmental authorities like Directorate of Revenue Intelligence, Directorate of Enforcement, Coastal Guard Central Reserve Police Force (CRPF), Border Security Force (BSF), the Central Industrial Security Force (CISF), the State Armed Police, Intelligence Agencies like the Intelligence Bureau, R. A. W., Central Bureau of Investigation (CBI), CID Traffic Police, Mounted Police and ITBP, which have power to detain a person and to interrogate him in connection with the investigation of economic offences under Essential Commodities Act, Excise and Customs Act, Foreign Exchange Regulations Act etc.

There are instances of torture and death in custody of authorities other than the police authorities.[23] it would be necessary to amend the law to protect the interest of arrested persons in such cases also. This may require amendment of the relevant provisions of law.

There is yet another view point which needs consideration. The police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, politcal turmoil, students unrest, terrorist activities, radical politicism like extremists and among others the increasing number of armed gangs and criminals. Many hard core criminals like extremists, the terrorists, drug peddlers, smuggles who have organised gangs, have taken strong roots in the society. One can visualise that with the more and more liberalisaion and enforcement of fundamental rights, it may lead to more difficulties in detection of crimes by such categories of hardened criminals. It is felt in certain quarters that if we provide them with more measure of safety and interests pertainig to their fundamental rights and human rights *vis-a-vis* torture of their person, such criminals will go scot-free without exposing any element or iota of criminality. To deal with such a situation a balance approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner.

Issues for Consideration

In view of the above discussion the following issues would arise for consideration:

1. Should the police continue to have unrestricted power to arrest any person at any time and at any place without any order or permission from the Magistrate or any other court ?

2. Should the law be amended to confer right on the suspect who is detained for interrogation to insist for the presence of his counsel at the time of interrogation ? If the amendment is made, will it not delay and interfere with the investigation of crimes ?

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22. 1972 SCC 634 para 12.

23. *Sarvinder Singh Grover* v. *State of West Bengal* (993) 1 Criminal Law Reporter 163 (SC).

3. Should the law provide that on the arrest of a person it should be mandatory for the police officer or any public servant holding the custody of a person to get him medically examined before commencing the interrogation ?

4. Whether Section 114 of the Indian Evidence Act should be amended to provide for raising of a presumption against the police officer or the public servant in case of any injury caused to a person in custody or resulting into death? Should the presumption be rebuttable?

5. Should the law provide for an indepedent agency for hoding enquiry into the complaint of torture of a person in police custody or death, if so, what should be the agency? Will it not serve the purpose if the enquiry is held by the Chief Judicial Magistrate or Metropolitan Magistrate in case of torture and injury and by the Sessions Judge of the District in case of death? Should they have the liberty to obtain the assistance of the Criminal Investigation Department or any police officer of their choice?

6. Should a Criminal case be registered against the delinquent police officer or the public servant, if a prima facie case of torture, injury, or death is found without any further investigation and without obtaining sanction of the Government for the prosecution of such delinquent public servants u/s 197 Cr. P.C.?

7. Should there be provision for the award of compensation by the Government on no fault basis in the case of death or injury caused to a person ? If so, what would be the appropriate amount to be fixed. Should the Court trying the aforesaid delinquent officer have the power to award final compensation to the victim or the dependants of the victim, notwithstanding their right to obtain damages in tort before Civil Court ?

8. Whether the law should provide for interim compensation in a case where as a result of the enquiry, prima facie case of torture, injury or death on account of injury caused in custody is made out ?

9. Should the law confer power on the Government to recover the amount of compensation from the delinquent officer?

10. Will the aforesaid steps not affect the functioning and morale of the police adversely in investigating cases and further whether it will result into non-investigation of crimes which will affect public order ? What measures should be taken to avoid these situations ?

The aforesaid issues arise out of our concern for the protection of the poor people who are generally subjected to torture in custody. The Law Commission has prepared this working paper indicating the various aspects of the problem which is neigther exhaustive nor final; instead it is tentative. The Commission will be obliged if the considered opinion of the Jurists, Judges, Lawyers, Law-teachers and non-Governmental organisations, Human Rights Activities are available to it as the same will be helpful in formulating the Commissions recommendations to the Government for amending the laws. Any suggestion for amendment of law or enactment of a new law or formulating of any scheme in this respct which would advance public interest would be welcome.

APPENDIX-II

COMMENTS RECEIVED ON THE WORKING PAPER

Introductory

As already stated, the Law Commission circulated a Working Paper on 'Custodial Crimes' for eliciting opinion from various quarters. In the working paper, the Law Commission formulated ten issues on various aspects of the problems relating to custodial crimes.

The Commission also invited further suggestions for amendment of the law or enactment of a new law or formulating a new scheme.

The Working Paper was sent to nine Academacians, fifty two Judges, fifty six Advocates, seventy four Police Officers of the rank of Director General of Police/ Commissioner of Police of all States; Commandant General of Home Guards of all States; Director General Industrial Security Force; Director, Central Bureau of Investigation; Director, Intelligence Bureau; Director, Enforcement; Director General, Indo-Tibetan Border Police; and Director General, Bureau of Police Research & Development, and 32 Home Secretaries of all States & Union Territories. Out of these, responses were received from two academicians, five judges, seven advocates, twelve police officers and nine State Governments (including UnionTerritories).

The working paper was also sent to the human rights activities and voluntary agencies like People's Union for Democratic Rights, People's Union for Civil Liberties; but it is regretted that the Commission received no response from these agencies on the important subject of 'custodial crimes', which is vitally connected with the protection of human rights.

1. Power of Police to Arrest.

ISSUE NO. 1

Should the police continue to have unrestricted power to arrest any person at any time and at any place without any order or permission from the Magistrate or any other court.

Views of Academicians

Both of academicians are of the view that police should not continue to have unrestricted power to arrest. In their view proper accountability has to be built up against power of arrest exercised by the police.

Views of Hon'ble Judges

The Hon'ble Ex-Chief Justice of India answered Issue No. 1 in affirmative. So do all the four of the High Courts. They regard the existing provisions to be satisfactory. According to the Ex-Chief Justice of India, the Constitution has imposed an obligation to convert the detention into judicial custody within 24 hours which is more than sufficient.

Views of Advocates

Out of seven, five have supported the power of police to arrest and one has deviated from the question and not replied the issue directly. The Calcutta Bar Association has responded in negative and has suggested to restrict the power of police regarding arrest. They feel that the term "cognizable" should be redefined so that the police may arrest without warrant only in appropriate cases. The law should also enjoin the police officer to record reason for arrest and as such he suggested that Section 41 of Cr. P. C. be deleted.

Views of Police Officers

Out of twleve, eleven officers have suggested that there is no need for any amendment in existing laws regarding arrest and one officer from Manipur (Imphal) has agreed and wanted the law be amended. They feel that the powers of arrest are not unrestricted. One officer says that the power of arrest should be restricted except in the case of hard core extremists, terrorists, drug paddlers and smugglers. Others say that any condition should not be placed in regard to their power of arrest. On the other hand, A.I.G. of Arunachal Pradesh, Itanagar, agrees with the proposal of Law Commission.

Views of State Governments

Six State Governments, namely, Government of Goa, West Bengal, Karnataka, Rajasthan and Bihar supported the powers of police to arrest as necessary to maintain law and order. They are of the view that if the police officer is required to take the permission for arrest from the Court the suspect may flee away. The Government of Goa feels that in case police have to obtain persmission from the Magistrate or any other Court it will go against Section 41 of Cr. P.C. and even a murderer will escape from the scene of offence. It will amount to permit members of unlawful assembly to escape after indulging into violence. If this power is taken away there will be serious adverse effect on law and order position. The Government of Andhra Pradesh is of the view that as the punitive provision contained in the Indian Penal Code under Sections 220, 330, 331 are inadequate and almost ineffective, there is every possibility of misusing such powers. They suggested that power of arrest under Section 41 Cr. P. C. may be curtailed and it should be limited to Terrorists, hard-core criminals but not to others. There should be no routine arrests. The State Governments/ Union Territories of Pondicherry, Mizoram, also support this view.

2. Presence of Counsel at the time of interrogation.

ISSUE NO. 2

Whether law should be amended to confer right on the suspect who is detained for interrogation to insist for the presence of his counsel at the time of interrogation. If the amendment is made, will it not delay and interfere with the investigation of crime ?

Views of Academicians

Both the academicians have supported the issue raised by Law Commission and suggested amendment in the present laws. One of them has apprehension about its success, as he feels it is not feasible. He questions who is poor man's counsel ? The other has suggested the presence of third party like family friends or legal consel will contribute to accountability of police powers. He has further suggested that senior police officers should be selected to make surprise visit of police station, to ensure that illegal arrests are not made and third degree method is not used. Both of them agreed that if a person is arrested in a village then 'Gram Pradhan' or 'Sarpanch' of the village should also be informed and the whereabouts of the arrested person should also be given to the family and friends of the arrested person. They have also suggested that there should be prescribed a "*Custody-Memo*" wherein complete information regarding arrested person and property taken by the police should be entered and details of the police officers making arrest should also be filled. This view is now supported by the recent judgement of the Supreme Court in the case of *Joginder Singh* V. *State of Uttar Pradesh*, (1994) 3 JT (SC) 423.

Views of Hon. Judges

Two of the High Courts, namely, Jammu & Kashmir and Gangtok have responded in negative. According to them the proposed amendment will serve no purpose and would delay investigation. They suggested that interrogation should be made on scientific lines by using an electronics and psychologistic pattern. According to them the presence of friend and relative will be sufficient and there is no need of presence of counsel. The Andhra Pradesh High Court has also responded to the issue in negative. It is of the view that there is no need to change the existing procedure. According to it, the presence of counsel will delay investigation. On the other hand, the ex-chief Justice of India has said that the presence of an advocate would be appropriate; only in exceptional cases the permission should be taken from the Court for investigation in privacy. Thus out of four

judicial opinions three are against the proposal to amend the existing law to allow the presence of a counsel during interrogation of the arrested person and Justice R.N. Mishra is in favour of amendment to provide the assistance of advocate during the investigation in exceptional cases.

Views of Advocates

Out of seven, four have categorically supported the proposal of Law Commission to provide the legal assistance during investigation by presence of the counsel. They feel that the presence of a counsel is desirable and would not delay or in any manner interfere with the investigation of crime. Accroding to them it is also in the tune of Article 22(1) and is supported by the ruling of the apex court in the *Nandini Satpati* v. *P.L. Dani*, (1978 Cr. LJ 968). They plead that appropriate amendment be made in Sections 41, 50 and 56 of Cr. P.C.

Views of Police Officers

Out of twelve, only one officer from Manipur, Imphal has supported the proposal by suggesting amendment to provide a Counsel during investigation. The other from Itanagar has suggested that help of a lawyer can be provided at a later stage of investigation. The rest of the senoir police officers fromDelhi, Bombay and U.P. do not consider it necessary to amend law for the presence of counsel at the time of interrogation because presence of counsel at the time of interrogation would adversely affect the proceeding and will cause delay and will also be an interference with the investigation of crime. A senior IPS officer from Sikkim feels that if this proposal is accepted investigation will be rendered impossible. It would interfere in investigation of cases and put terrible financial pressure up on the detenu. Another senior officer (former Commissioner of Delhi Police) is of the view that counsel should not be allowed except in the cases of murder, rape, dacoity, robbery, etc.

Views of State Governments

Out of nine responses of different State Governments, the Governments of Goa, Andhra Pradesh, Mizoram and Pondicherry have supported the proposal for view of amending Section 41, 50 and 56 of Cr. P.C. to entitle the accused to have his conusel present at the time of interrogation. The Government of Goa has also quoted the judgement of *Nandini Satpathi* v. *P.N. Dani*, 1978 Cr. L.J. 968. The Government of Andhra Pradesh states that in most of the countries, a person arrested by the police is allowed immediate access to his attorney. Even Article 22 of our Constitution lays down specifically that the arrested person should not be denied the right to consult and defend himself by a legal counsel of his choice. The Government of Andhra Pradesh is of the view that law on this point should be elaborated by specifically providing that before interrogation starts by the police, the arrested person should be allowed to consult his legal counsel. It also advocates that where arrested person cannot afford a legal counsel, the State should itself provide him the assistance of a legal counsel of his choice out of a panel of advocates appointed by the Human Rights Commission or the District Legal Aid Committee

The remaining State Governments have disagreed with such proposal and they have suggested not to confer any such right, as it will delay in investigation of crime.

3. Medical Examinatian of Victims/Suspects

ISSUE NO. 3

Should the law provide that on arrest of a person it should be mandatory for a police officer or a public servant holding the eustody of the person to get him medically examined, before commencing the interrogation ?

Views of Academicians

The academicians have supported the proposal of the Law Commission and responded in affirmative but they have raised the doubt whether such medical officer should be available to persons arrested in remote village areas or tribal areas. Despite this fact they have urged to amend the provisions in Cr. P.C. and make it mandatory on police to get the person medically examined before he is taken into custody.

Views of the Judges

Out of the five, three have supported the proposal of the Law Commission, one has disagreed and one has not given the reply directly. Those who are in favour of providing the provision for compulosry medical examination of person being arrested have felt that the amendment will be useful and serve as a safeguard against public atrocities.

Viwes of Advocates

Out os six advocates two have supported the proposal and recommended for amendment to provide medical examination of arrested person; one of them has deviated from direct reply and three have opposed the proposal as they do not feel it necessary. One advocate has advised that in addition to medical examination which is necessary as and when the arrested person is produced before a Magistrate, the Magistrate should satisfy himself that the arrest took place on the date and time as recorded by the police and not earlier and that arrested person has not been subjected to any torture before his production in the Court. A-Senior Advocate of the Supreme Court has stated that the person in custody has got the right of medical examination under Section 54 Cr. P.C. but the police officer while arresting such person should also inform him that he has got the right to be examined by a medical officer.

Views of Police Officers

Out of three, one of them feels that there is no need to make a provision, the other says that law may not be amended but administrative instructions may be issued, that if at the time of arrest a person is found infirm, injured, etc., he should be mediaclly examined. The third is in favour of the proposal of the Law Commission provided that the medical officer is available near the police station.

Views of State Governments

All the responses received from nine State Governments/Union Territories do not favour the proposal. The Government of Andhra Pradesh states that it may not be practicable to follow this in all cases. This may be followed in cases where the arrested person or his counsel or relatives request for a medical examination, the police should be duty bound to allow the same.

4. Presumption against Police Officer or public servant

ISSUE NO.

Whether Section 114 of Indian Evidence Act should be amened provide for raising presumption against the police officer or publice servant in case of any injury caused to a person in custody or resulting into death. Should the presumption be rebuttable ?

Views of Academicians

Out of two academicians, one has responded in affirmation. The other has not touched the issue.

Views of Judges

Out of five Judges, almost all of them are in favour of the presumption in case of custodial death and have answered it in affirmative. One of them Mr. Justice Rizvi from J & K High court says the presumption must be rebuttable. One of the judges has suggested to amend Section 114 of Evidence Act and the presumption should be rebuttable under Section 4 of the Evidence Act. Mr. Justice Ranganath Mishra is of the view that public sentiment seems to be in favour of raising presumption. However, an exception may be made in the cases of grievous injury and death and the rebuttable presumption could be proved in such cases.

Views of Advocates

Out of seven responses, five are in favour of rebuttable presumption. They feel that once the presumption under section 114 of Evidence Act is introduced, it would definitely go a long way in restricting and controlling the prosperity of public servant or police officer in existing custodial cruelty or torture on arrested person.

Views of Police Officers

Out of the twelve views received by the Law Commission, three senior police officers have supported the proposal of presumption and rest have opposed the same. Those who are against stated that there is no need of amending Section 114 of the Indian Evidence Act. The Police officers of higher ranks have no objection to third-degree method.

Views of States Governments

Out of nine State Governments/UnionTerritories, four are against the idea of presumption and five seem to have to objection to amending Section 114 of the Evidence Act to draw presumption that injury caused during custody was caused by the officer under whose custody the person was given at that time. The Government of Andhra Pradesh feels that the provisions contained in Section 114(A and 114(B) of the Indian Evidence Act, if extended to custodial crimes the police officer concerned will be made accountable and the custodial crimes can be checked. The Governments of Pondicherry and Mizoram follow this view. The Governments of Goa and Meghalaya also favour the proposal. The Government of Goa also states that it should be specified whether the benefit of presumption applies to cases of grievous hurt or to cases of simple injury as well.

5. Independent Agency for holding Enquiry

ISSUE NO. 5

The fifth issue raised by the Law Commission was whether the law should provide for independent agency for holding inquiry into the complaint of torture or death of a person in police custody. What should be that agency ? The Law Commission also raised further question whether the purpose will serve if the inquiry is held by the Chief Judicial Magistrate or Metropolitan Magistrate in case of torture and injury and by Sessions Judge of the District in case of death ? Should they get the assistance of C.I.D. or any police officer of their choice.

Views of academicians

The academicians favoured an independent agency for holding the enquiry into custodial crimes. One of them adds that Women's Commission Act provides for an independent agency.

Views of Judges

All the five judges are in favour of a law providing for an independent agency for investigation of cases. One Hon'ble Chief Justice of a High court has suggested that it will be really worthwhile to empower the Chief Judicial Magistrate and Sessions Judges to take cognizance of the reports to custodial violence and custoodial death respectively. By doing so police agencies will be supervised by judicial officers. The other Judge has indicated that newly constituted Human Rights Commission will be proper agency.

Views of Advocates

Except one advocate who has not replied to the question, rest of them are in agreement with Law Commission's suggestion that an independent agency is necessary for investigation of custodial death or torture during custody. They feel that if the inquiry is held by Chief Judical Magistrate or Metropolitan Magistrate or Senior judge as the case may be the Code of Criminal Procedure will have to be changed quite substantially for the purpose of holding the trial of offence. They have said that police administration should not be allowed to participate in such inquiry. They feel that C.B.I. being a part of police administration does not hold better position in public trust.

Views of Police Officers

Out of twelve only three are in favour in independent agency. One Ex-Commissioner of Police, Delhi, prefers setting up of a separate organisation under the Government headed by serving or retired judge in every State to look into the torture or custodial death. A majority of police officers are not in favour of

any such agency. They said that in Maharashtra there is an order of state Government for investigation of the cases of custodial deaths or custodial violence or rape by the State C.I.D. and similar practice is followed in other States also. In Tamil Nadu P.S.O. 445 Vol. I placed on the procedure in cases of police torture, death in custody, rape etc. for other public servants investigation is carried out by police and action taken according to law. Investigation by the Executive Magistrate is adequate in actual experience. According to them, the suggestion made by the Law Commission will not serve the purpose because C.J. Ms and Sessions Judges are already over-burdened and it will take a long time in enquiry and then case will be registered. The purpose would be served by making investigation of such cases by State C.I.D. or a central independent police agency mandatory and providing for investigation by Human Rights Commission in any case where the investigation by such an agency is not found to be satisfactory.

Views of State Governments/Union Territories

Most of the State Governments/UnionTerritories are against the suggesstion of an independent agency. One of these has suggested that an inquiry by a Magistrate under Section 176 Cr. P.C. will serve the purpose. The Government of Andhra Pradesh feels that the Human Rights Commission both at Central and State level created by an ordinance will have an investigating machinery of its own to investigate complaints of torture or death of a person in police custody. No other agency is required. The Governments of Mizoram and Pondicherry follow this view.

The Government of Karnataka is of the view that there are no two opinions as regards entrusting cases of torture or death in police custody to an independent agency for a thorough investigation. It adds that entrusting enquiry of all such case to the judicial authorities would not be advisable. In Karnataka cases of custodial death are referred to the COD. Cases of torture in custody are also dealt with departmentally.

The Government of Meghalaya holds that such mandatory inquiry may be conducted by an Executive magistrate. Section 176 Cr. P.C., may need amendment. The Magistrate may have the assistance of the CID or any police officer of his choice.

The Government of West Bengal is of the view that in case of torture or death in custody, it will be sufficient if a Judicial Magistrate having jurisdiction holds inquiry. He should have the liberty to obtain the assistance of the Criminal Investigation Department of any police officer within the jurisdiction.

The Government of Bihar and Goa are against the proposal.

Sanction for prosecution

ISSUE NO. 6

Should a criminal case be registered against the delinquent police officer or the public servant, if a *prima facie* case of torture, injury or death is found without any further investigation and without obtaining sanction of the Government for the prosecution of such delinquent public servants puunder Section 197 Cr. P.C.

Views of Academicians

Both the academicans are of the view that Section 197 Cr. P.C. should be amended.

Views of Judges

All the five Judges who have forwarded their views, answered the issue in affirmative. According to the ex-Chief Justice of India, the judicial opinion is clear and there is no need for sanction for prosecution.

Views of Advocates

Out of six Advocates, five Advocates have agreed with the proposal of Law Commission for amending Section 197 of Cr. P. C. one has suggested that delinquent officer should be kept under suspension immediately. One senior Advocate of the Supreme Court is against registration of a criminal case. He feels that the Court should take the cognizance of the case on the basis of report of the magistrate.

Views of Police Officers

Out of twelve, ten senior police officers are of the view that a criminal cases should be registered against the delinquent officer and no sanction of the Government is necessary under Section 197 Cr. P.C. But in circumstances like escaping from police custody and jumping from train at the time of transfer from one place to another, prosecution without sanction will be unfair and unjust.

Views of State Governments/Union Territories

Out of nine responses received from various State Governments/Union Territories, three are in favour of not amending Section 197 of Cr. P. C. One State Government is of the view that a criminal case be registered against the delinquent police officer or public servant after a thorough investigation is made and with the sanction of the government under Section 197 of Cr. P.C. The Governments of Rajasthan, Bihar and Meghalaya favoured the 'proposal. The Government of Andhra Pradesh states that the provision under sub-section (1) of Section 176 of Cr. P.C. suggested by the Law Commission will be more appropriate for dealing with the delinquent public servant. The Government of Mizoram endorses this view. The Government of Pondicherry is of the view that for registering a criminal case no sanction under Section 197 Cr. P.C. is necessary.

Compensation on no fault basis

ISSUE NO. 7

Should there be provision for the award of compensation by the Government on no fault basis in the case of death or injury caused to a person ? If so, what would be the appropriate amount to be fixed? Should the Court trying the aforesaid delinquent officer have the power to award final compensation to the victim or the dependents of the victim, notwithstanding their right to obtain damaages in tort before Civil Court ?

Views of Academicians

Both the academicians agree with the poposal of compensation. They have suggested payment of compensation. One of them suggested that the compensation should not be on the basis of earning and status as in matters of accident cases. He has suggested compensation of Rs. 5,00,000 in case of death, Rs. 3,00,000 in case of crippling and Rs. 1,00,000 for minor injury.

Views of Judges

All the Judges except a one have supported the proposal of compensation. Two of them are of the view that compensation should be on no fault basis. One of the Judges has suggested the amount of Rs. 50,000 in case of injury, between Rs. 2,00,000 to Rs. 5,00,000 in case of death. One judage is against any such move and he is of the view that State should not be made liable to pay compensation and the other has not responded to the issue.

Views of Advocates

All the six Advocates are in favour of compensation. Two of them recommended it in addition to civil remedy under torts. They want a public compensation system. The other two Advocates are of the view that the quantum of compensation should be determined judicially, while the fifth one has mentioned that the compensation should be fixed one. Sixth opinion is that quantum must depend on the nature of injury and liability of victim. One of the senior Advocates, Shri Anand Prakash is of the view that there should also be a scheme for rewards and compensation for exemplary work and for injuries received to a Police officer on duty.

Views of Police Officers

All the twelve police officers have supported the cause of compensation but on no fault basis. One officer has suggested Rs. 25,000 and Rs. 1,00,000 respectively in the case of injury and death. The other has reduced this figure to Rs. 25,000 and Rs. 50,000 respectively.

Views of State Governments/Union Territories

All the nine States Governments/Union Territories are in favour of paying compensation when a *prima facie* case is made out. One of these is not in favour of recovery of the money from the delinquent police officer. The other one says that Government should not pay the compensation and the individual police officer should pay the amount as per his financial condition and capability. The Government of Andhra Pradesh is of the view that the provision for payment of compensation to the custodial victims is necessary. It accepts the proposal of the Law Commission. Further, it highlights that in cases where a commission appointed by the Government finds the police officer in a particular custodial crime to be guilty, the departmental enquiries are resulting in these officers, in exoneration. According to the Government, it will be a travesty of justice. It suggests that where a departmental officer imposes a minor penalty like stopping of increments, censure etc., the head of the department should report the matter to the Government so that where the Government is satisfied that the punishment is not in proportion to the gravity, should review the punishment. The Government of Mizoram endorses this view.

The Government of Karnataka is of the view that there is no need for a separate provision under the statute for awarding compensation. There should not be a parallel proceedings in the civil courts for claiming damages.

The Government of Pandicherry is of the opinion that the court trying the delinquent officer should have the power to award final compensation and not the civil court. If the victim is not satisfied with final award, he may seek redress in appellate court and not in a civil court ?

Interim Compensation

ISSUE NO. 8

Whether the law should provide for interim compensation in a case where as a result of the enquiry *Prima facie* case of torture, injury or death on account of injury caused in custody is made out ?

Response of the Academicians

Both the academicians supported the proposal of the Law Commission for interim compensation if the *prima facie* case is made out.

Response of the Judges

Out of the fifteen Judges, four agreed with the proposal of interim compensation. One has suggested the amount of Rs. 1,00,000 in case of death and Rs. 50,000 in disablement, 20,000 for any other injury. Another gives Rs. 50,000 in death and Rs. 10,000 for injury. The other says reasonable compensation be given. One judge who disagreed feels that such a measure will create unnecessary complication. One judge has not responded to the issue directly.

Response of the Advocates

All the six Advocates are in favour of interim compensation. Out of them three Advocates are of the view that the interim compensation should be given by the Trial Court as soon as the charges are framed.

Response of the Police Officers

Out of these twelve Officers, ten have clearly recommended interim compensation and two have not touched the issue.

Response of State Governments/Union Territories

Out of nine, the views of five are in favour of interim compensation and four are opposed to such proposal. The Government of Andhra Pradesh is of the view that a provision for payment of interim compensation when a *prima facie* case is made out, is essential. The Governments of Pondicherry and Mizoram also endorse this view. The Governments of Bihar and Goa also favoured the proposal.

Recovery from Officers

ISSUE NO. 9

Should the law confer power on the Government to recover the amount of compensation from the delinquent officer ?

Views of the Academicians

Both are of the view that compensation amount should be recovered from the delinquent officer in full or in part but one has raised doubt as to how the money will be collected from individual police man.

Views of the Judges

Out of five judges, four are in favour of recovering the amount from individual and not from the Government. One has not responded to the issue directly. All of them have supported the proposal that recovery should be made from delinquent officer. One has suggested that the recovery should be to the extent it is feasible. The other Advocate is of the view that the recovery should be imposed only in the cases of gross neglect of law causing hurt, torture or injury or death.

Views of the Police Officers

Out of twelve Police Officers, only three are in favour while rest of eight disagreed with the recovery of compensation from iindividual and one is of the view that it should be left to the discretion of the Government.

Views of State Governments/Union Territories

Out of nine, three of these are in favour of recovering the amount from the delinquent officer and two State Governments are in favour of the recovery from delinquent officer to the extent of 50 per cent of the amount. The Government of Pondicherry views that at least a small percentage of the compensation should be made recoverable from the delinquent officer. The Government of Goa disagrees with the proposal. Government of Andhra Pradesh suggests for considering the issue carefully because it is a critical issue. The Government of Mizoram also endorses this view. The Government of Karnataka is of the view that since the trial court will have to determine the quantum of compensation, there need not be any other provision

Effect of the proposed amendments on police functioning

ISSUE NO. 10

Will the aforesaid steps not affect the functioning and morale of the police adversely in investigating cases and further whether it will result into non-investigation of crimes which will affect public order ? What measures should be taken to avoid these situations ?

Views of Academicians

None of the academicians have responded to the issue directly.

Views of the Judges

Out of the five judges two are of the view that it will adversely affect and two are of the view that there will be no adverse effect on the morale of police. One has not responded to the issue.

Views of the Advocates

All the six Advocates who have responded say that this will not affect the morale of the police and investigation will also not be adversely affected.

Views of the Police Officers

Out of the twelve police officers, six say that it will not affect the morale. 6 say that there will be no effect.

Views of State Governments/Union Territories

Out of nine responses received, five State Governments/Union Territories do not agree with the view. Government of West Bengal suggested that a balanced approach should be taken. The Government of Rajasthan emphasizes that in the short term the steps recommended will lead to some dislocation of police functioning and also erosion of police morale but ultimately they will help in reducing police excesses. Once these steps are implemented, the police will function under a lot of constraints and the courts should take cognizance of the same. The courts would have to take into account the near absence of recovery of incriminating material and would have to rely on oral evidence. Thus a new interpretation of the Law of Evidence would emerge and any failure of the courts to place faith in police investigation would adversely affect public order in the long run.

The Government of Andhra Pradesh is of the view that the steps contemplated in the working paper will not affect the functioning and morale of the police. On the other hand, the police excess can be reduced to the minimum. Therefore, there is need and urgency for the police reforms which cannot brook any further postponement. The Governments of Mizoram and Pondicherry endorse this view. The Government of Karnataka states that it certainly does affect the functioning and morale of the police adversely who are investigating cases. To ensure that third degree methods are not employed during invsetigation of crimes. it is absolutely necessary that certain safeguards are provided to prevent such torture or custodial death of accused persons. Punishing guilty police officers does not, however, in any way be construed as weakening the morales of the investigating officer. An investigating officer should know his limitations and he should not have unbridled power which can be detrimental to the interests of the citizens.