PETITIONER: SHRI D.K. BASU,ASHOK K. JOHRI

Vs.

RESPONDENT: STATE OF WEST BENGAL,STATE OF U.P.

DATE OF JUDGMENT: 18/12/1996

BENCH: KULDIP SINGH, A.S. ANAND

ACT:

HEADNOTE:

JUDGMENT:

WITH WRIT PETITION (CRL) NO. 592 OF 1987

J U D G M E N T

DR. ANAND, J.

The Executive Chairman, Legal Aid Services, West Bengal, a non-political organisation registered under the Societies Registration Act, on 26th August, 1986 addressed a letter to the Chief Justice of India drawing his attention to certain news items published in the Telegraph dated 20, 21 and 22 of July, 1986 and in the Statesman and India express dated 17th August, 1986 regarding deaths in police lock-ups and custody. The Executive Chairman after reproducing the new items submitted that it was imperative to examine the issue in depth and to develop "custody jurisprudence" and formulate modalities for awarding compensation to the victim and/or family members of the victim for attrocities and death caused in police custody and to provide for accountability of the efforts are often made to hush up the matter of lock-up deaths and thus the crime goes unpunished and "flourishes". It was requested that the letter alongwith the new items be treated as a writ petition under "public interest litigation" category.

Considering the importance of the issue raised in the letter being concerned by frequent complaints regarding custodial violence and deaths in police lock up, the letter was treated as a writ petition and notice was issued on 9.2.1987 to the respondents.

In response to the notice, the State of West Bengal filed a counter. It was maintained that the police was no hushing up any matter of lock-up death and that whereever

police personnel were found to be responsible for such death, action was being initiated against them. The respondents characterised the writ petition as misconceived, misleading and untenable in law.

While the writ petition was under consideration a letter addressed by Shri Ashok Kumar Johri on 29.7.87 to the Hon'ble Chief Justice of India drawing the attention of this Court to the death of one Mahesh Bihari of Pilkhana, Aligarh in police custody was received. That letter was also treated as a writ petition and was directed to be listed alongwith the writ petition filed by Shri D.K. Basu. On 14.8.1987 this Court made the following order :

"In almost every states there are allegations and these allegations are now increasing in frequency of deaths in custody described generally by newspapers as lock-up deaths. At present there does not appear to be any machinery to effectively deal with such allegations. Since this is an all India question concerning all States, it is desirable to issues notices to all the State Governments to find out whether they are desire to say anything in the matter. Let notices issue to all the State Governments. Let notice also issue to the Law Commission of India with a request that suitable suggestions may be returnable in two months from today."

In response to the notice, affidavits have been filed on behalf of the States of West Bengal, Orissa, Assam Himachal Pradesh, Madhya Pradesh, Harayana, Tamil Nadu, Meghalaya , Maharashtra and Manipur. Affidavits have also

been filed on behalf of Union Territory of Chandigarh and the Law Commission of India.

During the course of hearing of the writ petitions, the Court felt necessity of having assistance from the Bar and Dr. A.M. Singhvi, senior advocate was requested to assist the Court as amicus curiae.

Learned counsel appearing for different States and Dr. Singhvi, as a friend of the court. presented the case ably and though the effort on the part of the States initially was to show that "everything was well" within their respective States, learned counsel for the parties, as was expected of them in view of the importance of the issue involved, rose above their respective briefs and rendered useful assistance to this Court in examining various facets of the issue and made certain suggestions for formulation of guidelines by this court to minimise, if not prevent, custodial violence and kith and kin of those who die in custody on account of torture.

The Law Commission of India also in response to the notice issued by this Court forwarded a copy of the 113th Report regarding "injuries in police custody and suggested incorporation of Section 114-B in the India Evidence Act."

The importance of affirmed rights of every human being need no emphasis and, therefore, to deter breaches thereof becomes a sacred duty of the Court, as the custodian and protector of the fundamental and the basic human rights of the citizens. Custodial violence, including torture and death in the lock ups, strikes a blow at the Rule of Law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law enforcing

officers is a matter of deep concern in a free society. These petitions raise important issues concerning police powers, including whether monetary compensation should be awarded for established infringement of the Fundamental Rights guaranteed by Articles 21 and 22 of the Constitution of India. The issues are fundamental.

"Torture" has not been defined in Constitution or in other penal laws. 'Torture' of a human being by another human being is essentially an instrument to impose the will of the 'strong' over the 'weak' by suffering. The word torture today has become synonymous wit the darker side of human civilisation.

"Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is not way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone paralyzing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself."

Adriana P. Bartow

No violation of any one of the human rights has been the subject of so many Conventions and Declarations as 'torture'- all aiming at total banning of it in all forms, but inspite of the commitments made to eliminate torture, the fact remains that torture is more widespread not that ever before, "Custodial torture" is a naked violation of human dignity and degradation with destroys, to a very large extent, the individual personality. IT is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward-flag of humanity must on each such occasion fly half-mast.

In all custodial crimes that is of real concern is not

only infliction of body pain but the mental agony which a person undergoes within the four walls of police station or lock-up. Whether it is physical assault or rape in police custody, the extent of trauma a person experiences is beyond the purview of law.

"Custodial violence" and abuse of police power is not only peculiar to this country, but it is widespread. It has been the concern of international community because the problem is universal and the challenge is almost global. The Universal Declaration of Human Rights in 1984, which market the emergency of worldwide trend of protection and guarantee of certain basic human rights, stipulates in Article 5 that "No one shall be subjected to torture or to curel, inhuman or degrading treatment or punishment." Despite the pious declaration, the crime continues unabated, though every civilised nation shows its concern and takes steps for its eradication.

In England, torture was once regarded as a normal practice to ger information regarding the crime, the accomplices and the case property or to extract confessions, but with the development of common law and more radical ideas imbibing human though and approach, such inhuman practices were initially discouraged and eventually almost done away with , certain aberrations here and there notwithstanding. The police powers of arrest, detention and interrogation in England were examined in depth by Sir Cyril Philips Committee- 'Report of a Royal Commission on Criminal Procedure' (command - Paper 8092 of 1981). The report of the Royal Commission is, instructive. In regard to the power of arrest, the Report recommended that the power to arrest without a warrant must be related to and limited by the object to be served by the arrest, namely, to prevent the suspect from destroying evidence or interfering with witnesses or warning accomplices who have not yet been arrested or where there is a good reason to suspect the repetition of the offence and not to every case irrespective of the object sought to be achieved.

The Royal Commission suggested certain restrictions on the power of arrest on the basis of the `necessity principle'. The Royal commission said :

"…. We recommend that detention upon arrest for a offence should continue only on one or more of the following criteria :

(a) the person`s`s unwillingness to identify himself so that summons may be served upon him;

(b) the need to prevent the continuation or repetition of that offence;

(c) the need to protect the arrested person`s himself or other persons or property;

(d) the need to secure or preserve evidence of or relating to that offence or to obtain such evidence from the suspect by questioning him; and

(e) the likelihood of the person`s failing to appear at court to answer anycharge made against him."

The Royal Commission also suggested :

"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 finger printed or

to participate in an identification parade. It could also be extended to attendance for interview at a time convenient both to the suspect and to the police officer investigating the case…."

The power of arrest, interrogation and detention has now been streamlined in England on the basis of the suggestions made by the Royal Commission and incorporated in police and Criminal Evidence Act, 1984 and the incidence of custodial violence has been minimised there to a very great extent.

Fundamental rights occupy a place of pride in the India Constitution. Article 21 provides "no person shall be deprived of his life or personal liberty expect according to procedure established by law". Personal liberty, thus, is a sacred and cherished right under the Constitution. The expression "life of personal liberty" has been held to include the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries. Article 22 guarantees protection against arrest and detention in certain cases and declares that no person who is arrested shall be detained in custody without being informed of the grounds of such arrest and the shall not be denied the right to consult and defend himself by a legal practitioner of his choice. Clause (2) of Article 22 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. Article 20(3) of the Constitution lays down that a person accused of an offence shall not be compelled to be a witness against himself. These are some of the constitutional safeguard provided to a person with a view to protect his personal liberty against and unjustified assault by the State, In tune with the constitutional guarantee a number statutory

provisions also seek to project personal liberty, dignity and basic human rights of the citizens. Chapter V. of Criminal Procedure Code, 1973 deals with the powers of arrest of a person and the safeguard which are required to be followed by the police to protect the interest of the arrested person. Section 41, Cr. P.C. 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. Section 46 provides the method and manner of arrest. Under this Section no formality is necessary while arresting a person. Under Section 49, the police is not permitted to use more restraint than is necessary to permitted to use more restraint than is necessary to prevent the escape of the person. 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 the grounds for such arrest. The police officer is further enjoined to inform the person arrested that he is entitled to be released on bail and he may arrange for sureties in the event of his arrest for a non-bailable offence. Section 56 contains a mandatory provision requiring the police officer making an arrest without warrant to produce the arrested person before a Magistrate without unnecessary delay and Section 57 echoes Clause (2) of Article 22 of the Constituion of India. There are some other provisions also like Section 53, 54 and 167 which are aimed at affording procedural safeguards to a person arrested by the police. Whenever a person dies in custody of the police, Section 176 requires the Magistrate to hold and enquiry into the cause of death.

However, inspite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidence of torture and deaths in police custody has been a disturbing factor. Experience shows that worst violations of human rights take place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third

degree methods including torture and adopts techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. A reading of the morning newspapers almost everyday carrying reports of dehumanising torture, assault, rape and death in custody of police or other governmental agencies is indeed depressing. The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the creditibility of the Rule of Law and the administration of criminal justice system. The community rightly feels perturbed. Society's cry for justice becomes louder.

The Third Report of the National Police Commission in India expressed its deep concern with custodial demoralising effect with custodial torture was creating on the society as a whole. It made some very useful suggestions. It suggested :

"…….An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances :-

(1) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror stricken victims.

(ii) The accused is likely to abscond and evade the processes of law.

(iii) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.

(iv) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again. It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines……"

The recommendations of the Police Commission (supra) reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. These recommendations, however, have not acquired any statutory status so far.

This Court in Joginder Kumar Vs. State [1994 (4) SCC, 260] (to which one of us, namely, Anand, J. was a party) considered the dynamics of misuse of police power of arrest and opined :

"No arrest can be made because it is lawful for the police officer to do so. The existence of the power of arrest is one thing. The justification for the exercise of it is quite another…No. arrest should be made without a reasonable satisfaction reached after some investigation about the genuineness and bonafides 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 person his liberty is a serious matter."

Joginder Kumar's case (supra) involved arrest of a

practising lawyer who had bee called to the police station in connection with a case under inquiry on 7.1.94. On not receiving any satisfactory account of his whereabouts, the family member of the detained lawyer preferred a petition in the nature of habeas corpus before this Court on 11.1.94 and in compliance with the notice, the lawyer was produced on 14.1.94 before this court the police version was that during 7.1.94 and 14.1.94 the lawyer was not in detention at all but was only assisting the police to detect some cases. The detenue asserted otherwise. This Court was not satisfied with the police version. It was noticed that though as on that day the relief in habeas corpus petition could not be granted but the questions whether there had been any need to detain the lawyer for 5 days and if at all he was not in detention then why was this Court not informed. Were important questions which required an answer. Besides, if there was detention for 5 days, for what reason was he detained. The Court' therefore, directed the District Judge, Ghaziabad to make a detailed enquiry and submit his report within 4 weeks. The Court voiced its concern regarding complaints of violations of human rights during and after arrest. It said:

"The horizon of human rights is expanding. at the same time, the crime rate is also increasing, Of late, this Court has been receiving complaints about violations of human rights because of indiscriminate arrests. How are we to strike a balance between the two?

……..

A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and

individual duties, obligations weighing and balancing the rights, liberties and privileges of he single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding with comes first-the criminal or society, the law violator or the abider….."

This Court then set down certain procedural "requirements" in cases of arrest.

Custodial death is perhaps one of the worst crimes in a civilised society governed by the Rule of Law. The rights inherent in Articles 21 and 22(1) of the Constitution required to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture of cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchanism. No civilised nation can permit that tp happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal court of human rights jurisprudence. The answer, indeed, has to be an emphatic 'No'. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicted undertrials, detenues and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

In Neelabati Bahera Vs. State of Orissa [1993 (2) SCC, 746], (to which Anand, J. was a party) this Court pointed

out that prisoners and detenues are not denuded of their fundamental rights under Article 21 and it is only such restrictions as are permitted by law, which can be imposed on the enjoyment of the fundamental rights of the arrestees and detenues. It was observed :

"It is axiomatic that convicts, prisoners or undertrials are not denuded of their fundamental rights under Article 21 and its is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen o life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the constitution of India cannot be denied to convicts, undertrials or other prisoners in custody, expect according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is responsible if the person

in custody of the police is deprived of his life except according to the procedure established by law.

Instances have come to out notice were the police has arrested a person without warrant in connection with the investigation of an offence, without recording the arrest, and the arrest person has been subjected to torture to extract information from him for the purpose of further investigation or for recovery of case property or for extracting confession etc. The torture and injury caused on the body of the arrestee has sometime resulted into his death. Death in custody is not generally shown in the records of the lock-up 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 officers because of ties 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 turn a blind eye to such complaints. Even where a formal prosecution is launched by the 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 is away from the public gaze and the witnesses are either police men or co-prisoners who are highly reluctant to appear as prosecution witness due to fear of letaliation by the superior officers of the police. It is often seen that when a complaint is made against torture, death or injury, in police custody, it is difficult to secure evidence against the policemen responsible for resorting to third degree methods since they are incharge of police station records which they do not find difficult to manipulate. Consequently, prosecution against the delinquent officers generally results in acquittal. State of Madhya Pradesh Vs. Shyamsunder Trivedi &

Ors. [1995 (3) Scale, 343 =] is an apt case illustrative of the observations made by us above. In that case, Nathu Bnjara was tortured at police station, Rampura during the interrogation. As a result of extensive injuries caused to him he died in police custody at the police station. The defence set up by the respondent police officials at the trial was that Nathu Banjara had been released from police custody at about 10.30 p.m. after interrogation 13.10.1986 itself vide entry EX. P/22A in the Roznamcha and that at about 7.00 a.m. on 14.10.1981, a death report Ex. P/9 was recorded at the police station, Rampura, at the instance of Ramesh respondent No. 6, to the effect that he had found "one unknown person" near a tree by the side of the tank riggling with pain in his chest and that as a soon as respondent No. 6 reached near him, the said person died. The further case set up by SI Trivedi, respondent No. 1, incharge of the police station was that after making a Roznamcha entry at 7.00 a.m. about his departure from the police station he (respondent No. 1- Shyamsunder Trivedi) and Constable Rajaram respondent proceeded to the spot where the dead body was stated to be lying for conducting investigation under Section 174 Cr.P.C. He summoned Ramesh Chandra and Goverdhan respondents to the spot and in their presence prepared a panchnama EX. P/27 of the dead body recording the opinion therein to the effect that no definite cause of death was known.

The First Additional Sessions Judge acquitted all the respondents of all the charges holding that there was no direct evidence to connect the respondents with the crime. The State of Madhya Pradesh went up in appeal against the order of acquittal and the High Court maintained the acquittal of respondents 2 to 7 but set aside the acquittal of respondent No. 1, Shyamsunder Trivedi for offences under Section 218, 201 and 342 IPC. His acquittal for the offences under Section 302/149 and 147 IPC was, however, maintained. The State filed an appeal in this court by special leave.

This Court found that the following circumstances have been

established by the prosecution beyond every reasonable doubt and coupled with the direct evidence of PWs 1, 3, 4, 8 and 18 those circumstances were consistent only with the hypothesis of the quilt of the respondents and were inconsistent with their innocence :

(a) that the deceased had been brought alive to the police station ad was last seen alive there on 13.10.81;

(b) That the dead body of the deceased was taken out of the police station on 14.1.81 at about 2 p.m. for being removed to the hospital;

(c) that SI Trivedi respondent No. 1, Ram Naresh shukla, Respondent No. 3, Raja Ram, respondent No. 4 and Ganiuddin respondent No. 5 were present at the police station and had all joined hands to dispose of the dead body of Nathu-Banjara:

(d) That SI Trivedi, respondent No. 1 created false evidence and fabricated false clues in the shape of documentary evidence with a view to screen the offence and for that matter, the offender:

(e) SI Trivedi respondent in connivance with some of his subordinates, respondents herein had taken steps to cremate the dead body in haste describing the deceased as a 'lavaris' though the identity of the deceased, when they had interrogated for a sufficient long time was well known to them.

and opined that:

"The observations of the High Court that the presence and participation of these respondents in the crime is doubtful are not borne out from the evidence on the record and appear to be an unrealistic over simplification of the tell tale circumstances established by the prosecution."

One of us (namely, Anand, J.) speaking for the Court went on to observe :

"The trial court and the High Court, if we may say so with respect, exhibited a total lack of sensitivity and a 'could not careless' attitude in appreciating the evidence on the record and thereby condoning the barbarous there degree methods which are still being used, at some police stations, despite being illegal. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact situations and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic

approach of the Courts because it reinforces the belief in the mind of the police that no harm would come to them if an odd prisoner dies in the lock-up, because there would hardly be and evidence available to the prosecution to directly implicate them with the torture. The Courts, must not loose sight of the fact that death in police custody is perhaps on of the worst kind of crime in a a civilised society, governed by the rule of law and poses a serious thereat to an orderly civilised society."

This Court then suggested :

"The Courts are also required to have a change in their outlook and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the case of custodial crime so that as far as possible within their powers, the guilty should not escape so that the victim of crime has the satisfaction that ultimately the Majesty of Law has prevailed."

The State appeal was allowed and the acquittal of respondents 1, 3, 4 and 5 was set aside. The respondents were convicted for various offences including the offence under Section 304 Part II/34 IPC and sentenced to various terms of imprisonment and fine ranging from Rs. 20,000/- to Rs.. 50,000/-. The fine was directed to be paid to the heirs

of Nathu Banjara by way of compensation. It was further directed :

"The Trial Court shall ensure, in case the fine is deposited by the accused respondents, that the payment of the same is made to the heirs of deceased Nathu Banjara, and the Court shall take all such precautions as are necessary to see that the money is not allowed to fall into wrong hands and is utilised for the benefit of the members of the family of the deceased Nathu Banjara, and if found practical by deposit in nationalised Bank or post office on such terms as the Trial Court may in consultation with the heirs for the deceased consider fit and proper."

It needs no emphasis to say that when the crime goes unpunished, the criminals are encouraged and the society suffers. The victim of crime or his kith and kin become frustrated and contempt for law develops. It was considering these aspects that the Law Commission in its 113th Report recommended the insertion of Section 114B in the Indian Evidence Act. The Law Commission recommended in its 113th Report that in prosecution of a police officer for an alleged offence of having caused bodily injury to a person, if there was evidence that the injury was caused during the period 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 the 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 with the Magistrate may have recorded. Change of burden of proof was, thus, advocated. In sham Sunder Trivedi's case (supra) this Court also expressed the hope that the Government and the legislature would give serious thought to the recommendation of the Law Commission. Unfortunately, the suggested amendment, has not been incorporated in the statute so far. The need of amendment requires no emphasis - sharp rise i custodial violence, torture and death in custody, justifies the urgency for the amendment and we invite Parliament's attention to it.

Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of a an offence but it must be remembered that the law does not permit use of third degree methods or torture of accused in custody during interrogation and investigation with that view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purpose full to make the investigation effective. By torturing a person and using their degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No. society can permit it.

How do we check the abuse of police power? Transparency of action and accountability perhaps are tow possible safeguards which this Court must insist upon. Attention is also required to be paid to properly develop work culture, training and orientation of police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the constitutional ethos. Efforts must be made to change the attitude and approach of the police personal handling investigations so that they do not sacrifice basic human values during interrogation and do not resort to questionable form of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time during the interrogation may deter the police from using third degree

methods during interrogation.

Apart from the police, there are several other governmental authorities also like Directorate of Revenue Intelligence, Directorate of Enforcement, Costal 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, Tariff Police, Mounted Police and ITBP which have the power to detain a person and to interrogated him in connection with the investigation of economic offences, offences under the Essential Commodities Act, Excise and Customs Act. Foreign Exchange Regulation Act etc. There are instances of torture and death in custody of these authorities as well, In re Death of Sawinder Singh Grover [1995 Supp (4) SCC, 450], (to which Kuldip Singh, j. was a party) this Court took suo moto notice of the death of Sawinder Singh Grover during his custody with the Directorate of Enforcement. After getting an enquiry conducted by the additional District Judge, which disclosed a prima facie case for investigation and prosecution, this Court directed the CBI to lodge a FIR and initiate criminal proceeding against all persons named in the report of the Additional District Judge and proceed against them. The Union of India/Directorate of Enforcement was also directed to pay sum of Rs. 2 lacs to the widow of the deceased by was of the relevant provisions of law to protect the interest of arrested persons in such cases too is a genuine need.

There is one other aspect also which needs out consideration, We are conscious of the fact that the police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals, Many hard core criminals like extremist, the terrorists, drug peddlers, smugglers who have organised

gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalisation and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogation. It is felt in those quarters that if we lay to much of emphasis on protection of their fundamental rights and human rights such criminals may go scot-free without exposing any element or iota or criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the ends of justice. This 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 and bring to book those who are involved in the crime. The cure cannot, however, be worst than the disease itself.

The response of the American supreme Court to such an issue in Miranda Vs. Arizona, 384 US 436 is instructive. The Court said :

"A recurrent argument, made in these cases is that society's need for interrogation out-weighs the privilege. This argument is not unfamiliar to this Court. See. e.g. Chambers v. Florida, 309 US 227, 240-41, 84 L ed 716, 724, 60 S Ct 472 (1940). The whose thrust of out foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of Government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against

himself. That right cannot be abridged. "

(Emphasis ours)

There can be no gain saying that freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statures has been upheld by the Courts. The right to interrogate the detenues, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. The latin maxim salus populi est supreme lex (the safety of the people is the supreme law) and salus republicae est suprema lex (safety of the state is the supreme law) co-exist an dare not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however must be "right, just and fair". Using any form of torture for extracting any kind of information would neither be 'right nor just nor fair' and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated - indeed subjected to sustained and scientific interrogation determined in accordance with the provisions of law. He cannot, however, be tortured or subjected to third degree methods or eleminated with a view to elicit information, extract confession or drive knowledge about his accomplices, weapons etc. His Constitutional right cannot be abridged except in the manner permitted by law, though in the very nature of things there would be qualitative difference in the methods of interrogation of such a person as compared to an ordinary criminal. Challenge of terrorism must be met wit innovative ideas and approach. State terrorism is not answer to combat terrorism. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to 'terrorism'. That would be bad for the State, the community and above all for the Rule of Law. The State must, therefore, ensure that various agencies deployed

by it for combating terrorism act within the bounds of law and not become law unto themselves. that the terrorist has violated human rights of innocent citizens may render him liable for punishment but it cannot justify the violation of this human rights expect in the manner permitted by law. Need, therefore, is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge.

In addition to the statutory and constitutional requirements to which we have made a reference, we are of the view that it would be useful and effective to structure appropriate machinery for contemporaneous recording and notification of all cases of arrest and detention to bring in transparency and accountability. It is desirable that the officer arresting a person should prepare a memo of his arrest on witness who may be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. The date and time of arrest shall be recorded in The memo which must also be counter signed by The arrestee.

We therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures :

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name togs with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest a such memo shall be attested by atleast one witness. who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of he next friend of the person who has been informed of the arrest an the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned Stare or Union Territory. Director, Health Services should prepare such a penal for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the illaga

Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and state headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

Failure to comply with the requirements hereinabove mentioned shall apart from rendering the concerned official liable for departmental action, also render his liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country, having territorial jurisdiction over the matter.

The requirements, referred to above flow from Articles 21 and 22 (1) of the Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies also to which a reference has been made earlier.

These requirements are in addition to the constitutional and statutory safeguards and do not detract from various other directions given by the courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee.

The requirements mentioned above shall be forwarded to the Director General of Police and the Home Secretary of every Stare/Union Territory and it shall be their obligation to circulate the same to every police station under their charge and get the same notified at every police station at conspicuous place. It would also be useful and serve larger interest to broadcast the requirements on the All India Radio besides being shown on the National network of Doordarshan and by publishing and distributing pamphlets in the local language containing these requirements for information of the general public. Creating awareness about the rights of the arrestee would in out opinion be a step in

the right direction to combat the evil of custodial crime and bring in transparency and accountability. It is hoped that these requirements would help to curb, if not totally eliminate, the use of questionable methods during interrogation and investigation leading to custodial commission of crimes.

PUNITIVE MEASURES

UBI JUS IBI REMEDIUM - There is no wrong without a remedy. The law will that in every case where man is wronged and undamaged he must have a remedy. A mere declaration of invalidity of an action or finding of custodial violence or death in lock-up does not by itself provide any meaningful remedy to a person whose fundamental right to life has been infringed. Much more needs to be done.

Some punitive provisions are contained in the Indian Penal Code which seek to punish violation of right to life. Section 220 provides for punishment to an officer or authority who detains or keeps a person in confinement with a corrupt or malicious motive. Section 330 and 331 provide for punishment of those who inflict injury of grievous hurt on a person to extort confession or information in regard to commission of an offence. Illustration (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 confess the commission of a crime or to induce him to point out places where stolen property is deposited. Section 330, therefore, directly makes torture during interrogation and investigation punishable under the Indian Penal Code. These Statutory provisions are, However, inadequate to repair the wrong done to the citizen. Prosecution of the offender is an obligation of the State in case of every crime but the victim of crime needs to be compensated monetarily also. The Court, where the infringement of the fundamental right is established, therefore, cannot stop by giving a mere declaration. It must proceed further and give compensatory relief, nor by way of damages as in a civil action but by way of compensation

under the public law jurisdiction for the wrong done, due to breach of public duty by the State of not protecting the fundamental right to life of the citizen. To repair the wrong done and give judicial redress for legal injury is a compulsion of judicial conscience.

Article 9(5) of the International convent on civil and Political Rights, 1966 (ICCPR) provides that "anyone who has been the victim of unlawful arrest or detention shall have enforceable right to compensation". of course, the Government of India as the time of its ratification (of ICCPR) in 1979 had made a specific reservation to the effect that the Indian legal system does not recognise a right to compensation for victims of unlawful arrest or detention and thus did not become party to the Convent. That reservation, however, has now lost its relevance in view of the law laid down by this Court in number of cases awarding compensation for the infringement of the fundamental right to life of a citizen. (See with advantage Rudal Shah Vs. State of Bihar [1983 (4) SCC, 141]: Sebastian M. Hongrey Vs. Union of India [1984 (3) SCC, 339] and 1984 (3) SCC, 82]; Bhim Singh Vs State of J & K [1984 (Supp) SCC, 504 and 1985 (4) SCC, 677] Saheli Vs. Commissioner of Police. Delhi [1990 (1) SCC 422]}. There is indeed no express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life, nonetheless, this Court has judicially evolved a right o compensation in cases of established unconstitutional deprivation of person liberty or life. [See : Nilabati Bahara Vs. State (Supra)]

Till about tow decades ago the liability of the government for tortious act of its public servants as generally limited and the person affected could enforce his right in tort by filing a civil suit and there again the defence of sovereign immunity was allowed to have its play. For the violation of the fundamental right to life or the basic human rights, however, this Court has taken the view that the defence of sovereign immunity is not available to the State for the tortious act of the public servants and

for the established violation of the rights guaranteed by Article 21 of the Constitution of India. In Nilabati Behera Vs. State (supra) the decision of this Court in Kasturi Lal Ralia Ram Jain Vs. State of U.P. [1965 (1) SCR, 375] wherein the plea of sovereign immunity had been upheld in a case of vicarious liability of the State for the tort committed by its employees was explained thus:

"In this Context, it is sufficient to say that the decision of this Court in Kasturilal upholding the State's plea of sovereign immunity for tortious acts of its servants is confined to the sphere of liability in tort, which is distinct from the State's liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional remedy under Articles 32 and 226 of the Constitution which enables award of compensation for contravention of fundamental rights, when the only practicable mode of enforcement of the fundamental rights can be the award of compensation. The decisions of this court in Rudul Sah and others in that line relate to award of compensation for contravention of fundamental rights, in the constitutional remedy upon Articles 32 and 226 of the Constitution, On the other hand, Kasturilal related to the value of goods seized and not returned to the owner due to the fault of government Servants,

the claim being of damages of the tort of conversion under the ordinary process, and not a claim for compensation for violation of fundamental rights. Kasturilal is, therefore, inapplicable in this context and distinguishable."

The claim in public law for compensation for unconstitutional deprivation of fundamental right to life and liberty, the protection of which is guaranteed under the Constitution, is a claim based on strict liability and is in addition to the claim available in private law for damages of tortious acts of the public servants. Public law proceedings serve a different purpose than the private law proceedings. Award of compensation for established infringement of the indefeasible rights guaranteed under Article 21 of the Constitutions is remedy available in public law since the purpose of public law is not only to civilise public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved. Grant of compensation in proceedings under Article 32 or 226 of the Constitution of India for the established violation or the fundamental rights guaranteed under Article 21, is an exercise of the Courts under the public law jurisdiction for penalising the wrong door and fixing the liability for the public wrong on the State which failed in the discharge of its public duty to protect the fundamental rights of the citizen.

The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much, as the protector and custodian of the indefeasible rights of the citizens. The courts have the obligation to satisfy the social aspirations of the citizens because the court and the law are for the people and expected to respond to their aspirations. A Court of law cannot close its consciousness and aliveness to stark

realities. Mere punishment of the offender cannot give much solace to the family of the victim - civil action for damage is a long drawn and cumber some judicial process. Monetary compensation for redressal by the Court finding the infringement of the indefeasible right to life of the citizen is, therefore, useful and at times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim. Who may have been the bread winner of the family.

In Nilabati Bahera's case (supra), it was held:

"Adverting to the grant of relief to the heirs of a victim of custodial death for the infraction or invasion of his rights guaranteed under Article 21 of the Constitution of India, it is not always enough to relegate him to the ordinary remedy of a civil suit to claim damages for the tortious act of the State as that remedy in private law indeed is available to the aggrieved party. The citizen complaining of the infringement of the indefeasible right under Article 21 of the constitution cannot be told that for the established violation of the fundamental right to life he cannot get any relief under the public law by the courts exercising Writ jurisdiction, The primary source of the public law proceedings stems from the prerogative writs and the courts have therefore, to evolve ' new tools' to give relief in public law by moulding it according to the situation with a view to preserve

and protect the Rule of Law. While concluding his first Hamlyn Lecture in 1949 under the title "freedom under the Law" Lord Denning in his own style warned :

No one ca suppose that the executive will never be guilty the of the sins that are common to all of us. Your may be sure that they will sometimes to things which they ought to do : and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient, out procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari and actions on the case are not suitable for the winning or freedom in the new age. They must be replaced by new and up-to date machinery by declarations, injunctions and actions for negligence… This is not the task of Parliament… the courts must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfare state : but abused they lead to a totalitarian state. None such must ever be allowed in this country."

A similar approach of redressing the wrong by award of monetary compensation against the State for its failure to protect the fundamental rights of the citizen has been adopted by the Courts of Ireland, which has a written constitution, guaranteeing fundamental rights, but which also like the Indian Constitution contains no provision of remedy for the infringement of those rights. That has, however, not prevented the Court in Ireland from developing remedies, including the award of damages, not only against individuals guilty of infringement, but against the State itself.

The informative and educative observations of O' Dalaigh CJ in The State (At the Prosecution of Quinn) v. Ryan [1965] IR 70 (122) deserve special notice. The Learned Chief Justice said:

"It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substances were being assured to the individual and that the Courts were the custodians of those rights. As a necessary corollary, it follows that no one can with impunity set these rights at nought of circumvent them, and that the Court's powers in this regard are as ample as the defence of the Constitution require."

(Emphasis supplied)

In Byrne v. Ireland [1972] IR 241, Walsh J opined at p 264:

"In several parts in the Constitution duties to make certain provisions for the benefit of the

citizens are imposed on the State in terms which bestow rights upon the citizens and, unless some contrary provision appears in the Constitution, the Constitution must be deemed toe have created a remedy for the enforcement of these rights. It follows that, where the right is one guaranteed by the State. It is against the State that the remedy must be sought it there has been a failure to discharge the constitutional obligation impose"
(Emphasis supplied)

In Maharaj Vs. Attorney General of Trinidad and Tobago [(1978) 2 All E.R. 670]. The Privy Council while interpreting Section 6 of the Constitution of Trinidad and Tobago held that though not expressly provided therein, it permitted an order for monetary compensation, by way of 'redress' for contravention of the basic human rights and fundamental freedoms. Lord Diplock speaking for the majority said:

"It was argued on behalf of the Attorney General that Section 6(2) does not permit of an order for monetary compensation despite the fact that this kind of redress was ordered in Jaundoo v. Attorney General of Guyana. Reliance was placed on the reference in the sub-section to 'enforcing, or securing the enforcement of, any of the provisions of the said foregoing sections' as the purpose for which orders etc. could be made. An order for payment of compensation, it was submitted, did not amount to the

enforcement of the rights that had been contravened. In their Lordships' view of order for payment of compensation when a right protected under Section 1 'has been' contravened is clearly a form of 'redress' which a person is entitled to claim under Section 6 (1) and may well be any only practicable form of redress, as by now it is in the instant case. The jurisdiction to make such an order is conferred on the High Court by para (a) of Section 6(2), viz. jurisdiction 'to here and determine any application made by any person in pursuance of sub-section (1) of this section'. The very wide power to make orders, issue writs and give directions are ancillary to this."

Lord diplock then went on to observe (at page 680) :

"Finally, their Lordships would say something about the measure of monetary compensation recoverable under Section 6 where the contravention of the claimant's constitutional rights consists of deprivation of liberty otherwise that by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. IT is a claim in public law for compensation for

deprivation of liberty alone."

In Simpson was, Attorney General [Baigent's case] (1994 NZLR, 667) the Court of Appeal in NewZealand dealt with the issue in a very elaborate manner by reference to a catena of authorities from different jurisdictions. It considered the applicability of the doctrine of vicarious liability for torts, like unlawful search, committed by the police officials which violate the New Zealand Bill of Rights Act, 1990. While dealing with the enforcement of rights and freedoms as guaranteed by the Bill of Rights for which no specific remedy was provided. Hardie Boys, J. observed :

"The New Zealand Bill of Rights Act, unless it is to be no more that an empty statement, is a commitment by the Crown that those who in the three branches of the government exercise its functions, powers and duties will observe the rights hat the Bill affirms. it is I consider implicit in that commitment, indeed essential to its worth, that the Courts are not only to observe the Bill in the discharge of their own duties but are able to grant appropriate ad effective remedies where rights have been infringed. I see no reason to think that this should depend on the terms of a written constitution. Enjoyment of the basic human rights are the entitlement of every citizen, and their protection the obligation of every civilised state. They are inherent in and essential to the structure of society. They do not

depend on the legal or constitutional form in which they are declared. the reasoning that has led the Privy Council and the Courts of Ireland and India to the conclusions reached in the cases to which I have referred (and they are but a sample) is in my opinion equally valid to the New Zealand Bill of Rights Act if it is to have life and meaning." (Emphasis supplied)

The Court of appeal relied upon the judgment of the Irish Courts, the Privy Council and referred to the law laid down in Nilabati Behera Vs. State (supra) thus:

"Another valuable authority comes from India, Where the constitution empowers the Supreme Court to enforce rights guaranteed under it. In Nilabati Bahera V. State of Orissa (1993) Cri. LJ 2899, the Supreme Court awarded damages against the Stare to the mother of a young man beaten to death in police custody. The Court held that its power of enforcement imposed a duty to "forge new tools", of which compensation was an appropriate on where that was the only mode of redress available. This Was not a remedy in tort, but one in public law based on strict liability for the contravention of fundamental rights to which the principle of sovereign immunity does not apply. These observations of Anand, J. at P 2912 may be noted.

The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much as protector and guarantor of the indefeasible rights of the citizens. The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations. The purpose of public law is not only to civilize public that they live under a legal system which aims to protect their interest and preserve their rights."

Each the five members of the Court of Appeal in Simpson's case (supra) delivered a separate judgment but there was unanimity of opinion regarding the grant of pecuniary compensation to the victim, for the contravention of his rights guaranteed under the Bill of Rights Act, notwithstanding the absence of an express provision in that behalf in the Bill of Rights Act.

Thus, to sum up, it is now a well accepted proposition in most of the jurisdictions, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is nor available and the citizen must revive the amount of compensation from the State, which shall have the right to be indemnified by the wrong doer. In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element.

The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal courts in which the offender is prosecuted, which the State, in law, is duty bound to do, That award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will. of course, depend upon the peculiar facts of each case and no strait jacket formula can be evolved in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under he public law jurisdiction is, in addition to the traditional remedies and not it derrogation of them. The amount of compensation as awarded by the Court and paid by the State to redress The wrong done, may in a given case , be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit.

Before parting with this judgment we wish to place on record our appreciation for the learned counsel appearing for the States in general and Dr. A.M. Singhvi, learned senior counsel who assisted the Court amicus curiae in particular for the valuable assistances rendered by them.