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## **CUSTODIAL TORTURE AND VIOLATION OF FUNDAMENTAL RIGHTS IN INDIA**

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### **ABSTRACT**

In any democratic society, work in a prison is public service. Prisons are places like schools and hospitals which should be run by civil power with object of contributing to the public good. Jails are the critical part of any justice system and as a public sector responsibility, most states require operating jails or housing their prisoners in other local government facilities. Custodial crimes infringe upon human rights and the confession so extracted often fails to stand the legal scrutiny. Violence of any kind at the hands of police or any governmental or non-governmental agencies is counterproductive. It can turn innocent suspects or prisoners into hardcore criminals. The grudges they have against any particular official sometimes motivate them to rebel against the whole country and its citizens. Therefore custodial management is very important to the overall jail management program so that the authorities are able to accomplish the mission despite various challenges. The government must re-educate the police out of their sadistic arts and inculcate a respect for the human being, a process which must begin more by example than by exhortations. If any policeman or for that matter any other officer of any other agency of the government is found to have misconducted, the authorities should not hide the crime under the pretext of police solidarity or brotherhood. Custodial violence is amongst the worst crimes in any civilized society. It is a blatant violation of human dignity. It strikes at the very roots of the rule and law. Custodial violence and abuse of power is not only peculiar to India but it is also widespread. It has been the concern of the international community as the problem is not a regional problem but is universal and the challenge is almost global. Third degree torture and custodial deaths, rape, molestation etc. have become an intrinsic part of police investigations and the injury inflicted on the inmates is sometimes unbearable.

In all custodial crimes what 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 a physical assault or rape in police custody, the extent of trauma, a person experiences is beyond the purview of

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law. "Custodial violence" and abuse of police power is not only peculiar to this country (India) but it is widespread. It has been the concern of international community because the problem is universal and the challenge is almost global.

**Keywords:** Torture, custody, death, violence, lock-up etc.

## **Introduction**

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 the 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. "Torture" has not been defined in the 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 with the darker side of the human civilisation.

Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also such intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone paralyzing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself.. "Custodial torture" is a naked violation of human dignity and degradation which 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 what 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 a 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 (India) 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 1948, which marked the emergence of a 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 cruel, 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 get information regarding the crime, the accomplices<sup>1</sup> and the case property or to extract confessions, but with the development of common law<sup>2</sup> and more radical ideas imbibing human thought 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-Papers 8092 of 1981). 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<sup>3</sup> upon arrest for an offence should continue only on one or more for the following criteria:

- (a) the person's unwillingness to identify himself so that a 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 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 failing to appear at court to answer any charge made against him.

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<sup>1</sup> **Meaning of Accomplice:** At law, an **accomplice** is a person who actively participates in the commission of a crime, even though they take no part in the actual criminal offense. For example, in a bank robbery, the person who points the gun at the teller and asks for the money is guilty of armed robbery. However, anyone else directly involved in the commission of the crime, such as the lookout or the getaway car driver, is an accomplice, even though in the absence of an underlying offense keeping a lookout or driving a car would not be an offense.

<sup>2</sup> A **common law** legal system is a system of law characterized by **case law** which is law developed by judges through decisions of courts and similar tribunals. Common law systems also include statutes enacted by legislative bodies, though those statutes typically either codify judicial decisions or fill in areas of the law not covered by case law.

<sup>3</sup> **Meaning of Detention:** Custody or confinement, especially of a suspect awaiting trial

## Indian Constitution and Fundamental Rights:

Fundamental rights occupy a place of pride in the Indian Constitution. Article 21 provides "no person shall be deprived of his life or personal liberty except according to procedure established by law". Personal liberty, thus, is a sacred and cherished right under the Constitution. The expression "life or 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 he 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)<sup>4</sup> 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 safeguards provided to a person with a view to protect his personal liberty against any unjustified assault by the State. In tune with the constitutional guarantee a number of statutory provisions also seek to protect 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 safeguards which are required to be followed by the police to protect the interest of the arrested person. Section 41<sup>5</sup>, Cr. P.C. confers powers on any police officer to arrest a

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### <sup>4</sup> Article 20 in The Constitution Of India 1949

#### Protection in respect of conviction for offences

(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence

(2) No person shall be prosecuted and punished for the same offence more than once

(3) No person accused of any offence shall be compelled to be a witness against himself

### <sup>5</sup> Section 41, Cr.P.C, 1973:

#### When police may arrest without warrant

- (1) Any police officer may without an order from a 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; or
  - (b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking; or
  - (c) who has been proclaimed as an offender either under this Code or by order of the State Government; or
  - (d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or
  - (e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or
  - (f) who is reasonable suspected of being a deserter from any of the Armed Forces of the Union; or
  - (g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any

person under the circumstances specified therein without any order or a warrant of arrest from a Magistrate. Section 46<sup>6</sup> provides the method and manner of arrest. Under this Section no formality is necessary while arresting a person. Under Section 49<sup>7</sup>, the police is not permitted to use more restraint than is necessary to prevent the escape of the person. Section 50<sup>8</sup> 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<sup>9</sup> contains a mandatory provision requiring this police officer making an arrest without warrant to produce the arrested person before a Magistrate without unnecessary delay and Section 57<sup>10</sup> echoes Clause (2) of Article 22 of the Constitution of India. There are some

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place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law

relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 365; or

(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition

(2) Any officer in charge of a police station may, in like manner, arrest or cause to be arrested any person, belonging to one or more of the categories of person specified in section 109 or section 110

<sup>6</sup> **Section 46, CrP.C, 1973:**

**Arrest how made**

(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life

<sup>7</sup> **Section 49, CrP.C, 1973:**

**No unnecessary restraint**

The person arrested shall not be subjected to more restraint than is necessary to prevent his escape

<sup>8</sup> **Section 50, CrP.C, 1973:**

**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

<sup>9</sup> **Section 56, CrP.C, 1973:**

**Person arrested to be taken before Magistrate or officer in charge of police station**

A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station

<sup>10</sup> **Section 57, CrP.C, 1973:**

**Person arrested not to be detained more than twenty-four hours**

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 twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court

other provisions also like Sections 53<sup>11</sup> 54<sup>12</sup> and 167<sup>13</sup> 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<sup>14</sup> requires the Magistrate to hold an enquiry into the cause of death.

<sup>11</sup> **Section 53, CrP.C, 1973:**

**Examination of accused by medical practitioner at the request of police officer**

(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonable necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner

<sup>12</sup> **Section 54, CrP.C, 1973:**

**Examination of arrested person by medical practitioner at the request of the arrested person**

When a person who is arrested, whether on a charge or otherwise, alleges, at the time when he is produced before a Magistrate or at any time during the period of his detention in custody that the examination of his body will afford evidence which will disprove the commission by him of any offence or which will establish the commission by any other person of any offence against his body, the Magistrate shall, if requested by the arrested person so to do direct the examination of the body of such person by a registered medical practitioner unless the Magistrate considers that

the request is made for the purpose of vexation or delay or for defeating the ends of justice

<sup>13</sup> **Section 167, CrP.C, 1973:**

**Procedure when investigation cannot be completed in twenty-four hours**

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the

investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that—

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding—

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police

<sup>14</sup> **Section 176, CrP.C, 1973:**

**Inquiry by Magistrate into cause of death -**

(1) When any person dies while in the custody of the police or when the case is of the nature referred to in clause (i) or clause (ii) of sub-section (3) of section 174, the nearest Magistrate empowered to hold inquests shall, and in any other case mentioned in sub-section (1) of section 174, any Magistrate so empowered may hold an inquiry

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.

In *Joginder Kumar v. State*<sup>15</sup>, court 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 a person his liberty is a serious matter.

### **Suggestion by Law Commission of India (113<sup>th</sup> Report):**

The Law Commission of India in the 113th Report regarding "Injuries in police custody" suggested incorporation of Section 114-B<sup>16</sup> in the Indian Evidence Act, 1872. The Law Commission recommend 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 that person during that period. The Commission further recommended that the Court, while considering

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into the cause of death either instead of, or in addition to, the investigation held by the police officer; and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence

(2) The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any manner hereinafter prescribed according to the circumstances of the case

(3) Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined

(4) Where an inquiry is to be held under this section, the Magistrate shall, wherever practicable, inform the relatives of the deceased whose names and addresses are known, and shall allow them to remain present at the inquiry

<sup>15</sup> 1994CriLJ1981

<sup>16</sup> **Section 114 in The Indian Evidence Act, 1872**

**Court may presume existence of certain facts:** The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common

course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Illustrations The Court may presume--

(a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars

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.

### **Third Report of the National Police Commission:**

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

An arrest during the investigation<sup>17</sup> of a cognizable<sup>18</sup> case may be considered justified in one or other of the following circumstances:

(i) 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 and the processes of law.

(iii) The accused is given to violent behavior 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 reflected the constitutional concomitants<sup>19</sup> of the fundamental right to personal liberty and freedom.

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<sup>17</sup> **Meaning of Investigation:** A searching inquiry for ascertaining facts; detailed or careful examination

<sup>18</sup> As defined by the first schedule of the code of criminal procedure in the criminal justice system of India and Pakistan, a **cognizable offence** is a criminal offence in which the police is empowered to register an FIR, investigate, and arrest an accused without a court issued warrant. According to the law in India cognizable cases are those that involve criminal offences. Some examples of these are Murder, Robbery, Theft, Rioting, Counterfeiting etc. Non-cognizable offences are less serious offences. Some examples are Public Nuisance, **Causing Simple Hurt, Assault, Mischief etc.**

<sup>19</sup> **Meaning of Concomitants:** Existing or occurring together; associative



### **Guidelines of Supreme Court regarding Arrest and Detention:**

(1) The police personnel carrying out the arrest and handling the interrogation<sup>20</sup> of the arrestee should bear accurate, visible and clear identification and name tags 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 and 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 center 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 as 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 the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

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<sup>20</sup> **Interrogation** (also called **questioning** or **interpellation**) is interviewing as commonly employed by officers of the police, military, and Intelligence agencies with the goal of extracting a confession or incriminating statements. Subjects of interrogation are often suspects involved in crimes. Information from victims and witnesses is usually obtained through interviews. Interrogation may involve a diverse array of techniques, ranging from developing a rapport with the subject to outright torture.

(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 a 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 State or Union Territory. Director, Health Services should prepare such a panel 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 illaqa 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.

Court held that failure to comply with the requirements mentioned above shall apart from rendering the concerned official liable for departmental action, also render him 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. Court further held that 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.

## **Conclusion**

In any democratic society, work in a prison is public service. Prisons are places like schools and hospitals which should be run by civil power with object of contributing to the public good. Jails are the critical part of any justice system and as a public sector responsibility, most states require operating jails or housing their prisoners in other local government facilities. Custodial crimes infringe upon human rights and the confession so extracted often fails to stand the legal scrutiny. Violence of any kind at the hands of police or any governmental or non- governmental

agencies is counterproductive. It can turn innocent suspects or prisoners into hard core criminals. The grudges they have against any particular official sometimes motivate them to rebel against the whole country and its citizens. Therefore custodial management is very important to overall jail management program so that the authorities are able to accomplish the mission despite various challenges. The government must re-educate the police out of their sadistic arts and inculcate a respect for the human being, a process which must begin more by example than by exhortations. If any policeman or for that matter any other officer of any other agency of the government is found to have misconducted, the authorities should not hide the crime under the pretext of police solidarity or brotherhood. Custodial violence is amongst the worst crimes in any civilized society. It is a blatant violation of human dignity. It strikes at the very roots of the rule and law. Custodial violence and abuse of power is not only peculiar to India but it is also widespread. It has been the concern of the international community as the problem is not a regional problem but is universal and the challenge is almost global. Third degree torture and custodial deaths, rape, molestation etc. have become an intrinsic part of police investigations and the injury inflicted on the inmates is sometimes unbearable.

Essence of custodial management comes down to three key objectives:

- 1-Protecting the safety of the inmates, jail personnel and visitors
- 2-Preventing property damage and loss
- 3- Preserving inmate rights.