

CUSTODIAL TORTURE AND THE ABSENCE OF AN ANTI-TORTURE LAW: CRITICAL ANALYSIS OF INDIA'S OBLIGATIONS UNDER THE UNITED NATIONS CONVENTION AGAINST TORTURE (UNCAT)

by

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1.Introduction

Custodial Violence is a common and a systemic issue and the way it is not being taken as seriously as other systemic issues is alarming. It is pervasive across the world but its presence in the third world countries, India being one of them, is statistically pronounced. It is one of the most serious failures of the criminal justice because it is done by the institute that is meant to enforce the law. It is so normalized in India that people tend to think that it is the only way to get confessions out of the accused and the witnesses. No Act in India recognizes Custodial Violence explicitly but the lawmakers did have an inkling of it happening and decided that confessions made to the Police is not admissible.¹ The reason for that is the police have a habit of getting fake confessions out of the accused and witness because they beat them so much that they think that giving them fake confessions is better than to keep suffering. The Court, however, realized that something needs to be done for this and hence gave guidelines for the prevention of police abuse, arbitrary arrests, and torture in custody in the case of *DK Basu v State of West Bengal*.² The guidelines were released way after and when the court realized that there are way too many cases of custodial violence and since legislature failed to make laws for the same, it was the duty of the judiciary to do this. The Universal Declaration of Human Rights- UDHR was adopted by UN in 1948 which includes protection from torture, slavery, and arbitrary arrest; right to fair trial and recognition before law.³ The UN realizing that Custodial Violence violates the Human Rights and requires a law against the same. So, they formed a committee against Torture which monitors compliance with the UN

¹ Indian Evidence Act, 1872, Act No. 1 of 1872 (India), s. 25; re-enacted as *Bharatiya Sakshya Adhiniyam*, 2023, Act No. 47 of 2023, s. 23 (no confession made to a police officer is admissible as evidence against the accused).

² *D.K. Basu v State of West Bengal*, (1997) 1 SCC 416 (Supreme Court of India).

³ United Nations General Assembly, *Universal Declaration of Human Rights*, GA Res. 217A (III), UN Doc. A/810 (10 December 1948).

Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. This formed the UNCAT. The committee however does not enforce laws but give non-binding recommendations according to the reports that are given to them. India did sign the UNCAT but still haven't ratified it meaning that though the representative of India did sign the document, but the State have not affirmed it to be binding as per International Law. If India wants to ratify UNCAT, then it'll have to take effective legislative, administrative, judicial and other measures to prevent acts of torture and will have to take accountability of the same. UNCAT released laws against prohibition of torture which hold the status of jus cogens norm of customary international law. Although India never ratified them but do they still impose binding obligations over India?

Custodial Violence in India however have always been a gravest and persistent human rights violation. Police use torture as an interrogation tool and justify it by mediocre reasons like the police being understaffed, criminals only answer to violence, etc. According to National Crime Records Bureau data, deaths recorded in police custody have fluctuated year on year rather than shown a sustained decline, and independent analysis of the 2010 to 2020 period attributes only around six per cent of such deaths to physical assault by the police, with illness and suicide together accounting for roughly two thirds of the total.⁴

The normalisation described above is not simply anecdotal. A nationwide survey of Indian police personnel found that around thirty seven per cent considered it part of their role to punish individuals for alleged minor offences without trial, while close to eighty per cent thought it acceptable to beat suspects in order to extract confessions. The death of Mohammad Adil, a thirty three year old carpenter who died after being questioned at a police station in Channagiri, Karnataka, in May 2024, illustrates how readily this attitude translates into practice: a fact finding report documented visible marks and injuries on his body, yet his family had received no compensation more than a year later. Findings such as these suggest that custodial torture in India persists less because of isolated misconduct than because of an institutional culture in which coercion is treated as a routine investigative tool rather than an aberration to be corrected.⁵ Does

⁴ Factly, 'The Trend in Custodial Deaths in India' (Factly, 4 July 2025) <<https://factly.in/the-trend-in-custodial-deaths-in-india/>> analysing National Crime Records Bureau data.

⁵ REDRESS, 'UN Experts Raise Alarm Over Custodial Torture in India' (REDRESS, 2026) <<https://redress.org/news/un-experts-raise-alarm-over-custodial-torture-in-india/>>.

India have constitutional and statutory protections against custodial violence to protect the accused? Does the Police face repercussions for the same? And does those protections including the NHRC Framework satisfy India's obligations under Customary International Law and UNCAT's minimum standards?

2.THE INTERNATIONAL LEGAL FRAMEWORK: UNCAT AND THE JUS COGENS PROHIBITION

After the second world war violation of human rights became a matter of international concern. UNCAT was formally adopted on December 10, 1984 and entered to force on June 26, 1987 after several years of diplomatic negotiations.⁶ The prohibition of torture is regarded as a general international law which needs to be obeyed and holds a non- derogable status.⁷ Under no circumstance can this be violated. The prohibition of torture is not just a treaty obligation but a customary international law and a peremptory norm and hence the ratification of a State just means that they don't have to follow the procedural and institutional obligations, but they still need to follow the basic idea.⁸ The UN realized the need for the victims to have an option of redress if the authorities misuse the power given to them. It is not a mere disciplinary violation but an abuse of state power.

It refuses to give any leeway or leniency to the police by allowing any kind of excuse to justify torture. This means that UNCAT treats prohibition of torture as non- derogable even if the State is in public order, insurgency or the national security is at stake. In India, torture is a recurrent practice during interrogation, police custody, counterterror settings, etc. justified by calling it a necessity.

2.1 The Architecture of UNCAT: Obligations, Definitions, and the Non-Derogability Clause

Article 1 of UNCAT defines what is 'torture'. It includes any physical or mental harm inflicted on someone with the intention to cause hurt to someone suspected of committing a crime to get information out of him. The intention behind this was that those officials with the power and duty

⁶ United Nations, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85, entered into force 26 June 1987.

⁷ United Nations, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, entered into force 23 March 1976, art. 7 (prohibiting torture and cruel, inhuman or degrading treatment or punishment in absolute terms).

⁸ United Nations Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (1992) (interpreting the absolute prohibition under Article 7 ICCPR and clarifying that no exceptional circumstances may justify torture).

to search for evidence and get confessions do not have the authority to use tactics that could cause hurt. In India and many other countries, confessions made to the police is not admissible in the court and that is because the Courts realise that the Police use tactics that could cause hurt to the suspect because there is no written law that can hold the police accountable for the same. They know that they will get away. Torture while in custody is so common that it is now considered to be a part of the interrogation process. Article 1 of UNCAT does not allow torture in any circumstance. There are four important elements in the definition and those are severity, intention, prohibited purpose and the involvement of state.⁹

Article 2 further puts an obligation on the states who have ratified that they must take effective measures to prevent acts of torture, and it not only includes legislation but also administrative and judicial changes. This reflects the core of the treaty which is that under any circumstance can torture be justified and be considered lawful. This counterattacks the assumption that torture is a part of investigation and the argument that it may be allowed by labelling it as preventive policing, counterinsurgency or investigative urgency.

In India due to the lack of laws against torture and the fear people have of the police because they are the one enforcing the laws, police not only get away with custodial torture but glorify while recounting the stories of the same. There is an infamous dialogue in India that people tend to intimidate by warning them off saying '*Sudhar jao warna police bulakr pitwa dege*'. This shows how somewhere police are looked at less as an authority to enforce laws but to beat people up to threaten or warn them off.

Article 4 requires the State to ensure that any act of torture including attempt, complicity and participation of the same must be punishable under law reflecting that the treaty is not just focused on a procedure and giving guidelines but also wants accountability from the authorities. Article 12 requires a prompt and impartial investigation while Article 13 ensures that the victim has a right to complaint and further Article 14 guarantees redress and compensation.¹⁰

2.1.1 The State-Agent Nexus and India's Definitional Gap

⁹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85, art. 1(1) (defining torture as severe pain or suffering inflicted by or with the acquiescence of a state official for prescribed purposes).

¹⁰ *Convention against Torture*, arts. 4 (criminalisation), 12 (prompt and impartial investigation), 13 (right to complain), and 14 (right to redress and compensation).

A defining feature of UNCAT is that it is a state agent nexus. State Agent Nexus is basically the relationship between a State and its officials; in this case officials are the law enforcement. It helps in determining when the conduct of a State Official can be attributed to the State, thereby making the state responsible for the same.¹¹ The person inflicting torture must be a State Official is a non-negotiable element of UNCAT. The punishments, guidelines and rules the UN set out in UNCAT is only for those who work for the State and have abused their power and authority. This includes not only the officials who are inflicting harm explicitly but also the officials who are aiding, enabling, authorizing, permitting, or knowingly refuse to step up and intervene to halt the torture who has the duty and capacity to do so.

The element that this treaty only covers torture by the State Officials during the course of their duty is significant and non-negotiable because when torturing is coming from a state officials who has the duty to enforce law, has the means to torture and can do so in a confined space makes the abuse more serious. The police officers are the guardians of the detained individuals and when the abuse is coming from someone who is entrusted with protection, investigation and detention of the detainee the crime gets graver.

For India, this reveals an important definitional gap. In India there are laws prohibiting assault, hurt, wrongful confinement, etc but they are laws applicable on everyone and not focused on the State Officials which requires more serious punishment.¹² The laws prohibiting assault, hurt, wrongful confinement is spread across different Acts as lesser offences which treats torture as a cluster of ordinary offences and not a violation of bodily integrity, dignity and state accountability. The weakens the symbolic condemnation.

There are three reasons that we need this gap to be filled. The first is legal precision, Legislature needs to use the elements used by UNCAT and use a similar definition provided by UNCAT of torture because in this scenario we are not discussing the ordinary torture but the torture by the State officials as custodial torture. If it needs to be used in a way that actually protects the victims, then the Legislature needs to have a law that is made keeping UNCAT in mind and as a blueprint.

¹¹ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/56/10 (2001), arts. 4–8 (attribution of conduct to the state when performed by state organs or persons exercising elements of governmental authority).

¹² *Bharatiya Nyaya Sanhita, 2023*, Act No. 45 of 2023 (India), ss. 115–130 (prescribing offences of hurt, grievous hurt, and wrongful confinement as general criminal offences applicable to all persons, without a specific provision targeting custodial torture by state officials).

The second would be the protection of victims. A person alleging that he has suffered through custodial torture he is already in a disadvantage because the police itself is going to investigate the case but if there is no specific legal category that he could invoke as well, another clause might understate his suffering, severity of the action and reduce the likelihood of meaningful redress. He'll be out of options if there is no specific law that he can invoke. The third reason is the weakening of institutional accountability. Since there is no specific law against custodial torture, it is easier for State Officials to get away because generic offences tend to narrow the inquiry and only focus on the immediate physical act. But if it's a torture- specific offence, it is easier to examine and investigate the case and in cases like custodial violence the official inflicting violence is not the only one responsible, but it is more than one person, who enabled it, who permitted it, who failed to intervene. It forces the institution to take accountability. If the state authorities have reasonable grounds to believe that an official is inflicting torture on a detainee and they fail to investigate and punish the offender, then they are equally liable for the torture. Custodial Violence is not just about inflicting torture, it goes way beyond that; Delayed medical examination, incomplete documentation, compromised enquires and reluctance in registering serious charges against police authorities. Custodial Torture is not a private assault, but it is often treated as such because our Acts lack the right kind of offence for which the State Officials must be prosecuted against.

A proper anti- torture law will close this gap by naming the conduct, identify the officials involved, and making it clear that custodial torture is not just excessive force but a specific abuse that is unlawful. The international law of torture insists on a definition that is anchored in state responsibility, official capacity, and acquiescence.

2.1.2 The Non-Derogability Clause and Its Implications for Emergency and Security Legislation

In UNCAT, the prohibition of torture is absolute. This means that custodial torture under any circumstance is not allowed and is unlawful. No justification like 'it was an exceptional circumstance', 'national security was at stake', 'we don't have enough officials so we need to take extreme measures' will be taken into consideration. Article 2 explicitly states that no excuse can

condone custodial torture, making it non-derogable which makes the offence non-suspendable.¹³ UNCAT shuts down the argument that exceptional circumstances require coercive policing because nothing can authorize and excuse severe pain or suffering as an investigation tactic.¹⁴

The implication of this is that Emergency and security laws expand State power but does not allow Custodial Violence and if the legal system fails to stop this or have laws for the same then it is failing at the basic level of UNCAT Compliance.

The Non-Derogability Clause is another element of the UNCAT treaty that is essential and works as a preventive measure which works as a safeguard to exceptions. It forces the Legislature to make laws and oversight systems that fulfil the requirements of the UNCAT. In India, the absence of an anti-torture law makes the safeguard weaker because custodial violence is normalized and considered to be a part of investigation. Its non-derogability clause insists that even in moments of crisis, the state must remain bound by the absolute prohibition of torture.

2.2 The Jus Cogens Status of the Torture Prohibition: Binding India Beyond Treaty Ratification

The prohibition of torture is considered to be jus cogens meaning that it is a peremptory rule of the general international and that it is so fundamental that even if a State hasn't ratified a treaty they still have to follow the fundamental and the core of the treaty. Refusing to ratify the treaty does not create a legal vacuum but just allows the State to implement their own framework to enforce the peremptory rule.¹⁵ Law Commission of India has acknowledged that the prohibition of torture has attained jus cogens this means that India has failed to fulfill the basic requirement of the international law because there is no anti-torture law in place for custodial violence still.¹⁶ India is treating it as a policy discretion but it is anything but. It is a peremptory norm that every State has to follow. Custodial torture is often justified with excuses like State having special powers or

¹³ *Convention against Torture*, art. 2(2) ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.").

¹⁴ UN Committee against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2 (24 January 2008) (clarifying that article 2 UNCAT imposes an absolute duty on states to take all measures to prevent torture, including by subordinate officials).

¹⁵ Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331, entered into force 27 January 1980, art. 53 (defining peremptory norms of general international law from which no derogation is permitted).

¹⁶ Law Commission of India, *Implementation of "United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment" through Legislation*, Report No. 273 (New Delhi: Government of India, 2017).

exceptional circumstances but the fact that the treaty is Jus Cogens overrides any mediocre excuse and defeats the logic by banning it be it in any circumstance.

The Judiciary has already acknowledged Custodial Torture as unlawful and has passed several judgement against it so introducing an anti- torture law will not be a foreign concept and will not be out of thin air. Ratification of UNCAT would just organize and clarify a duty that international law already treats as fundamental. That means procedural rules, detention powers, and policing laws should be interpreted narrowly where there is any risk of abuse, and any gap that permits torture-like conduct should be treated as legally unacceptable. The importance of this point is that it shifts the issue away from political choice and toward legal necessity.

2.2.1 The Erga Omnes Character of the Obligation and Its Consequences for India's Extradition Relationships

‘Erga Omnes’ is a Latin phrase that means ‘towards everyone’. It refers to the right that are universally applicable and enforceable against the whole world and not just limited to specific parties in a contract. Prohibition of torture being jus cogens is a customary international law and a peremptory norm which gives it a special status in international law.¹⁷

The anti-torture framework includes the principle that a person should not be transferred to a state where there are substantial grounds for believing they would be in danger of torture, because extradition cannot be separated from human-rights risk. India has faced extradition difficulties because the torture convention prevents extradition to a country where there is danger of torture. In other words, extradition law cannot operate as a purely diplomatic tool; it must be limited by the absolute prohibition of torture. If we look at it in the perspective of what happens if India seeks extradition of a fugitive from another country, they might be a little apprehensive about the same because they know that India does not have an anti- torture law and therefore there are a lot of chances that the fugitive might be subjected to torture in the name of hard policing. India will have to provide enough and good enough evidence to assure them that the fugitive will not be detained in inhuman conditions and will not be subjected to custodial torture. The second scenario would be another State seeking extradition from India. Indian authorities now would be the one needing assurance that they person won't be subjected to torture and if they have reasonable reasons to

¹⁷ International Court of Justice, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, ICJ Reports 1970, 3, para. 33 (establishing erga omnes obligations in international law).

believe that they would be subjected to custodial torture then International Law allows them to not agree to the extradition.

Recent extradition litigation illustrates this dynamic with unusual clarity. In 2025, the High Court of Justice of England and Wales, in *Bhandari v Government of India*, found that torture and ill treatment by investigative authorities in India were commonplace and endemic, creating a serious risk to a person who would likely be detained and interrogated by multiple state agencies if returned.¹⁸ That finding was subsequently invoked by the fugitive businessman Nirav Modi in an unsuccessful attempt to reopen his own extradition appeal in 2026, an appeal that the Government of India had earlier managed to keep alive only by furnishing detailed, case specific diplomatic assurances that he would be held in a designated barrack of Arthur Road Jail and given access to independent medical care.¹⁹ That a British court could describe custodial torture in India as endemic, and that the Government of India felt compelled to give individualised assurances rather than rely on its general legal framework, is a concrete illustration of the *erga omnes* argument developed above: the absence of a domestic anti torture law does more than embarrass India diplomatically, it measurably weakens the credibility of its criminal justice system before foreign courts.

This has a domestic reform consequence as well. If a State wants their extradition system to function properly and be credible internationally then there is a need for an anti- torture law and a reliable assessment mechanism for torture risk. Without it, it becomes hard for any State to assure that the detained will not be subjected to an abusive treatment, and it reduces the credibility of a State when it seeks extradition.

2.2.2 India's Position at the UPR and Its Response to International Pressure

The Universal Periodic Review is a unique mechanism of the Human Rights Council that calls for each UN Member State to undergo a peer review of its human rights records every 4.5 years.²⁰ India's position at the UPR has been marked because of acknowledgement but there has been no legal commitment. While India recognizes the need for an anti- torture law and promised to prohibit torture, India has not passed a law for the same for years. Although India has accepted

¹⁸ *Bhandari v Government of India* [2025] EWHC 449 (Admin).

¹⁹ 'UK HC Refuses to Re-Open Nirav Modi's Extradition Case' (SCC Times, 27 March 2026)

<<https://www.scconline.com/blog/post/2026/03/27/uk-hc-refuses-to-re-open-nirav-modi-extradition-case/>>.

²⁰ United Nations Human Rights Council, Resolution 5/1: Institution-Building of the United Nations Human Rights Council, UN Doc. A/HRC/RES/5/1 (18 June 2007) (establishing the Universal Periodic Review mechanism).

the recommendations and has assured that it understands the importance of the same, but no legal reform has been introduced and are sticking to acknowledging that domestic reforms are being considered.

This inaction makes us wonder if India is planning on any legislative reform. India's statement and agreeing with it at the UPR suggestion is seen as a willingness to be compliant but the non-compliance of the same for years shows that India does not plan on agreeing to the treaty's terms and conditions any time soon. India did try to pass an anti-torture bill in 2010, but it failed and there hasn't been any talks of the same for years. It strongly indicates that India is using the excuse of 'future legislation reform' to void being held accountable for not coming up with reforms and keep the UN in an illusion that they are in fact doing something about it. This also reveals that soft international pressure doesn't always work. The UN needs to take strict actions to ensure that all the UN States make legislative reforms for treaties that are jus cogens to the International law. Sometimes, recommendations are not enough to secure domestic implementation and not bringing any substantial reform then it is a form of institutional deferral.²¹ Acknowledging of a problem is no good if there is no action to bring any reform for the same.

This pattern of acknowledgement without reform has continued into the most recent period. In March 2026, the Special Rapporteur on torture, Dr Alice Jill Edwards, spoke at a UN Human Rights Council event on India's continuing inaction, identifying the requirement of prior governmental authorisation before prosecuting officials accused of custodial abuse, authorisation that is reportedly seldom granted, as a central driver of the country's climate of impunity, and weeks later she travelled to Delhi to hold a dedicated consultation on custodial torture in India.²² That a serving UN Special Rapporteur found it necessary to convene an entire consultation on this single issue, nearly a decade after the Law Commission's 273rd Report, is itself evidence that India's engagement with international scrutiny has generated dialogue without generating law.

Prohibition of torture is an important doctrinal reform as we'll see in the next section. There has been too many cases of custodial torture and they call for an anti-torture law. Resisting ratification

²¹ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: India, Third Cycle*, UN Doc. A/HRC/36/10 (6 July 2017) (recording India's acceptance of recommendations to ratify UNCAT and enact domestic anti-torture legislation while noting the absence of follow-through).

²² REDRESS (n 102); OHCHR, 'Consultation on Custodial Torture in India: Remarks of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Alice Jill Edwards' (Delhi, 9 May 2026).

is not only weakening international trust but also chipping away the foundation of the trust India was built on.

3. INDIA'S CONSTITUTIONAL FRAMEWORK ON CUSTODIAL RIGHTS: PROMISE AND STRUCTURAL LIMITATION

3.1 Constitutional Provisions and the Judicial Expansion of Article 21

In the Constitution of India there is nowhere the term 'torture' has ever been expressly used but Articles 20, 21 and 22 together create the foundation for custodial rights.²³ Article 20 protects the accused against double jeopardy and self-incrimination. Article 21 guarantees life and personal liberty which protects people from wrongful arrest and protects detainees from torture when in custody. Article 22 gives the procedural safeguards for arrest and detention. The Supreme Court expanded the scope of article 21 beyond the right to live life with dignity and included protection from torture, cruel treatment and custodial violence.²⁴ Though there haven't been any legislative reforms, the judiciary has brought a number of judicial reforms. This expansion allowed the courts to treat custodial violence as a direct violation of fundamental rights which helped the victims facing the same in the absence of a specific law protecting them from custodial violence. Judiciary filled the legislative gap to the best of its ability by recognized that the detainees have the right to be protected against torture as well reflecting the belief of the Supreme Court that imprisonment does not strip a person of basic rights under article 21.

The strength of this framework lies in its moral and doctrinal clarity, but its weakness lies in implementation. Although Article 20, 21 and 22 protect against custodial violence but it is more generic. Custodial violence is a systemic failure and requires more specific laws defining torture, penalties and ensures investigation. Though Article 21 is powerful in itself, it is still incomplete when it comes to custodial violence and hence it requires a legislative framework and institutional accountability. But the expansion of Article 21 was the foundation of the judgement in Nilabati Behera and D.K. Basu. Expansion of article 21 recognized the need of protection in custody and in Nilabati Behera and D.K. Basu the police authorities were forced to take accountability.

²³ Constitution of India, arts. 20 (protection against double jeopardy and self-incrimination), 21 (right to life and personal liberty), and 22 (safeguards against arbitrary arrest and detention).

²⁴ Prem Shankar Shukla v Delhi Administration, (1980) 3 SCC 526 (Supreme Court of India) (holding that handcuffing of undertrial prisoners without compelling justification violates Article 21 of the Constitution).

3.1.1 Landmark Jurisprudence: Nilabati Behera (1993) and D.K. Basu (1997) — Doctrinal Achievement

Article 21 expansion started from the Maneka Gandhi case where the Supreme Court held that under article 21 if any procedure deprives someone of liberty, they must be fair, just and reasonable.²⁵ The court further built on this in the Sunil Batra case where it was held that a being imprisoned does not snatch away the rights of a prisoner and torture and cruel treatment while in custody violates Article 21.²⁶

Then in 1993 came the case of Nilabati Behera v State of Orissa.²⁷ The judgement of Nilabati explained the expansion of Article 21 more and applied it. The court went ahead and used Sunil Batra as a precedent case and said that a person does not lose their fundamental rights on being arrested and that it is the duty of the State to protect life and bodily integrity of the detained. This means that if a person is subjected to custodial torture then it is the State violating their Right to Life and Liberty.

On this foundation the Court used Article 21 to recognize a public remedy in case of custodial death. The compensation was not granted as a private tort- style award but as a response to a violation of article 21.

In the case of Nilabati Behera v State, Suman Behera was taken into custody for a local theft investigation. The next morning, his dead body was found on a railway track with handcuffs and bore multiple injuries. It was later in the case found that the injuries on the deceased were due to the brutal beating he was subjected to at the hospital and then later placed on the tracks. The Court ordered the Government of Orissa to compensate Nilabati, his mother, with 1,50,000. The Court used article 21 to give a public remedy. In this case, we understood that on the violation of article 21, which protects the human dignity, the State can be held accountable in public law.

This expanded Article 21 further that the State is responsible towards the person in custody and when State fails in its duty, Constitutional courts have the right to compensate the victim's family directly instead of them having to file a civil suit as well. However, this also throws light on the limitations. It does not create a full criminal accountability structure for torture. The judgment

²⁵ Maneka Gandhi v Union of India, (1978) 1 SCC 248 (Supreme Court of India).

²⁶ Sunil Batra v Delhi Administration, (1980) 3 SCC 488 (Supreme Court of India).

²⁷ Nilabati Behera v State of Orissa, (1993) 2 SCC 746 (Supreme Court of India).

strengthened the constitutional framework by recognizing the wrong, yet it could not replace the need for a separate anti-torture law, independent investigation, and prosecution of individual wrongdoers. So, the significance of *Nilabati Behera* lies in the fact that it constitutionalized custodial harm but did not and could not by itself solve the deeper problem of impunity.²⁸

DK Basu further built its judgement on *Nilabati Behera*.²⁹ The Court realizing that the Legislature had no plans on introducing an anti- torture law or a law protecting detainees from custodial violence, introduced guidelines arrest, detention and interrogation targeting Custodial violence, torture in police stations and unexplained deaths in police lockups. The Court tried to bring preventive measures to avoid Custodial Violence by laying down safeguards for arrest, detention and interrogation.

The guidelines that were introduced were:

- 1) Police officers need to wear accurate identification with name tags and designations while making arrests or during interrogations.
- 2) A memo of arrest must be prepared at the time of arrest and should include the date and time of arrest. It must be attested by a witness and countersigned by the arrestee.
- 3) If the arrestee is taken to a police station outside the district, the time, place of arrest, and venue of custody must be notified to the nearest legal aid organization and the local police station within 8 to 12 hours after the arrest
- 4) The detainee has a right to inform about the arrest and place of custody to someone.
- 5) A police control room must be set up at all District and State headquarters to collect and track arrest information.
- 6) The district and the state Police Control Rooms must be aware about the arrest and the location of the arrested within 12 hours of the arrest and should be displayed on the control room notice board.
- 7) The arrested person has a right to be consult a lawyer during interrogation.
- 8) The detainee must be medically examined by a qualified doctor every 48hrs while he is in custody.

²⁸ *State of Madhya Pradesh v Shyamsunder Trivedi*, (1995) 4 SCC 262 (Supreme Court of India) (holding the state liable for custodial death caused by police officers and directing prosecution of the accused officials).

²⁹ *D.K. Basu v State of West Bengal*, (1997) 1 SCC 416 (Supreme Court of India).

- 9) Any major or minor injury must be recorded in an 'inspection memo' signed by the police and the arrestee. Arrestee can ask for a physical examination and the copy of the inspection memo must be provided to the arrestee.
- 10) A case diary must be maintained by the police officials handling the case. It shall include all the details about the case- the time, place of arrest, venue of custody, etc
- 11) All the copies of the arrested documents including the arrest memo must be forwarded to the magistrate.

The judgement in this case extended the reasoning given in Nilabati Behera case. In Nilabati the Court held the State accountable if its officials were to cause the death of an arrestee and in DK Basu Court recognizing the need to protect the arrestee formed guidelines to prevent and minimize custodial torture. However, we cannot look at guidelines as criminal statutes. There still exists a structural limitation because while these guidelines improve transparency it still does not criminalize custodial torture in a way that there is no specified law against it still. Although, the judgement is foundational, but it is incomplete because legislature still hasn't done its part of making an anti- torture law or a statute against the same.

3.1.2 The Limits of Compensatory Constitutionalism: Why Monetary Remedy Cannot Substitute for Criminal Accountability

While Nilabati recognized custodial torture and the Court tried to compensate the family as best as it could but in the absence of a statute against custodial torture the Court could not hold the police authorities as responsible as they were. Compensating the family did acknowledge what happened but it was not enough to punish the wrongdoer and deter the police authorities from subjecting torture. Compensation is a remedy and not a substitute for accountability. Compensation is provided by the State and though it establishes a State responsibility in some way and provides some redress to the victim's family, it does not establish individual culpability through the criminal process and hence the victim and the victim's family never really gets justice.³⁰

Compensation based remedies often wear a cloak of accountability leaving the underlying systemic dynamics unaltered. State officials often go unpunished and untried protected by procedural obstacles. Custodial Torture is done intentionally and if it is not treated as a punishable

³⁰ Bhim Singh v State of Jammu and Kashmir, (1985) 4 SCC 677 (Supreme Court of India) (ordering compensation for unlawful detention of a member of the legislative assembly, underscoring that state deprivation of liberty in violation of fundamental rights attracts monetary remedy).

crime, the rate of custodial torture in India will only go up. With the expansion of Article 21, Courts have a right to award compensation for gross rights violations, but it does not take away the criminal liability.³¹ A Constitutional remedy can coexist with criminal liability and should not replace criminal liability.

3.2 The D.K. Basu Guidelines: Procedural Protection Without Criminal Sanction

The DK Basu guidelines were a major constitutional response to custodial abuse because they tried to make arrest transparent and introduced guidelines for the same, but the catch is that they are mainly procedural and not punitive. The guidelines do not make custodial violence a criminal offence but merely try to prevent it and the violation of these guidelines will not result in a criminal liability but will result in a procedural lapse or maybe a disciplinary concern. The guidelines act as a safeguard against custodial abuse. This is where the gap is noticeable because custodial torture is not just a procedural lapse but a serious crime, a violation of dignity and should be a criminal offence. Procedural guidelines will not alone deter State officials unless it is backed with a criminal liability.

3.2.1 Compliance Record: State Adherence to D.K. Basu Guidelines, 1997–2025

The guidelines laid down in DK Basu are mere procedurals and though the objective of the Court while introducing them was to prevent custodial violence, they somewhere failed to do so. They surely brought more transparency to the procedure, but custodial violence is still common and not only that, but the Police authorities also fail to comply with the guidelines as well- the relatives won't be informed, the arrest memo will not be properly prepared, and the medical checkups will be delayed. Courts have repeatedly emphasized that Police authorities need to adhere to the guidelines introduced in the DK Basu case, suggesting that there has been a recurring problem of poor implementation.³² It has been decades since the guidelines were introduced and the police still hasn't internalized it.

³¹ Rudul Sah v State of Bihar, (1983) 4 SCC 141 (Supreme Court of India) (recognising the Supreme Court's power under Article 32 to award monetary compensation for breach of fundamental rights by the state).

³² Joginder Kumar v State of Uttar Pradesh, (1994) 4 SCC 260 (Supreme Court of India) (laying down guidelines on the power of arrest to prevent unlawful and arbitrary detention by police).

The broader pattern from 1997 to 2025 is therefore one of partial procedural uptake but incomplete institutional transformation.³³ Some police authorities and state agencies have incorporated the guidelines into manuals, public notices, or training materials, but the persistence of custodial abuse shows that those measures have not consistently translated into real accountability. The result is that *D.K. Basu* remains highly influential as a standard, yet its protective force is limited by uneven observance and weak consequences for breach.

3.2.2 The Bharatiya Nagarik Suraksha Sanhita, 2023: Missed Opportunity for Reform

With the drafting of a new criminal and procedural law the Legislature had a big chance on either adding a statute for custodial torture or drafting an anti- torture law framework. While it improves some anti- arrest procedures like tighter controls on unnecessary arrest, written reasons in certain situations and stronger procedural scrutiny but the absence of protection from custodial torture is still noticeable.

The new law while modernizes arrest and detention procedure, the legislature still hasn't defined custodial torture and violence as an offence, and it again failed to hold police authorities accountable, and the gap still prevails. With how custodial torture is a recurring concern in India, the least the legislature could have done was define custodial torture because the recurring cases call for an explicit anti- torture framework and protection and not just a general procedure. Custodial Violence is not just an arrest defect but a rights violation that demands criminalization and independent scrutiny which the legislature fails to recognize even after the Court emphasizing the same for years.

This is especially significant because the constitutional and judicial framework already made clear that custody is a zone of heightened vulnerability. BNSS could have used that foundation to create mandatory video recording of key custodial stages, stronger medical access rules, independent complaint channels, or a dedicated anti-torture provision. Its failure to do so means that the reform remains incomplete, particularly when compared with the seriousness of the problem it was meant to address.

³³ National Crime Records Bureau, *Prison Statistics India 2022* (New Delhi: Ministry of Home Affairs, 2023) (recording custodial deaths, conditions of detention, and prison population data across Indian states and union territories).

4. THE LEGISLATIVE VOID: FROM THE PREVENTION OF TORTURE BILL, 2010 TO THE LAW COMMISSION'S 273RD REPORT (2017)

In 2010, The Prevention of Torture Bill was introduced in the Lok Sabha and passed recognizing the need for a specific law, but it ultimately lapsed.³⁴ The Bill was criticized because it was too weak and not properly drafted and formulated. They defined torture way narrower than the UNCAT standard and the complaints regime was time bound and also requires a prior government sanction before a court could entertain a complaint, this only protected the officials more and instead of strengthening the accountability, it diluted it by creating procedural obstacles that could discourage victims and shield officials from scrutiny. The Bill was formulated more to fulfill international obligations and not because they wanted to protect the detainees.

The Law Commission's 273rd Report in 2017 was an attempt to repair that failure. The Commission recommended implementation of UNCAT through legislation and circulated a new draft for Prevention of Torture Bill, 2017, recognizing that the India's existing law was inadequate and that the criminal law needs to be amended and it needs to include a torture- specific rule on compensation and burden of proof.³⁵ However, the 2017 draft was not passed as well and no law was formulated. India continued to have constitutional protections, judicial safeguards, and policy recommendations, but no standalone anti-torture statute in force. That means the legal system still lacks a clear criminal offence of torture, a tailor-made investigative framework, and a direct statutory answer to the impunity problem.

4.1 The Prevention of Torture Bill, 2010: Passage, Lapse, and Civil Society Critique

The Prevention of Torture Bill was introduced as a reform, but it was drafted in a way that it was state- protective. It defined torture but refused to confront the conditions that make accountability difficult. It defined torture narrowly, only grievous hurt or danger to life, limb, or health, was considered torture. Instead of treating torture as an abuse of state power in custody, it narrows the offence into a more familiar bodily- harm framework. The six- month limitation period and the prior sanction requirement together created a high procedural threshold for victims, even though

³⁴ Prevention of Torture Bill, 2010, Bill No. 92-C of 2010 (India), introduced in the Lok Sabha on 26 April 2010.

³⁵ Law Commission of India, *Implementation of "United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment" through Legislation*, Report No. 273 (New Delhi: Government of India, October 2017).

torture survivors are precisely the people most likely to face trauma, fear, delay and institutional pressure. Instead of helping the victims, the Bill centered the comfort of the state.

The lapse of the Bill after the dissolution of the 15th Lok Sabha suggests that the political will behind the reform was shallow and somewhere the only reason it was introduced was to fulfill international obligations. A serious anti- torture bill would require strong institutional backing and broader consensus.

The Rajya Sabha Select Committee that examined the 2010 Bill, chaired by the same Ashwani Kumar who would later petition the Supreme Court on this very issue, was itself critical of the government's draft. Noting that the Bill fixed no minimum punishment at all, the Committee recommended a minimum sentence of three years imprisonment together with a fine of at least one lakh rupees for anyone found guilty of torture, and also recommended enlarging the definition of public servant to capture employees of government companies and other institutions under state control.³⁶ That even a Parliamentary Select Committee examining the government's own Bill found it necessary to recommend a sentencing floor is a telling indication of how limited the original draft's ambitions were, and it foreshadows the more thorough critique that the Law Commission would develop in its 273rd Report seven years later.

4.1.1 Substantive Critique: Did the 2010 Bill Meet UNCAT Standards?

The 2010 Bill did not meet the standards of the UNCAT in several ways. The gap was structural, procedural and even in the remedies available. The definition in the bill was too narrow, while in UNCAT, torture covered severe physical or mental pain and suffering intentionally caused by a state official, the bill defined torture in terms of grievous hurt and did not include mental suffering, intimidation, coercion in its entirety. This creates a gap because it excludes forms of abuse that are central to custodial coercion, especially psychological pressure and threats. The Bill made it harder for the victims to seek redressal and created hurdles for them to go to the Court because of the limited time in which they can file a complaint and the fact that they'll first have to get a sanction. The Bill even failed to meet UNCAT's preventive and remedial logic. There was a lack of an independent investigative authority. UNCAT links the prohibition of torture with the duty to provide redress, including compensation and effective recourse. Yet the 2010 Bill contained no

³⁶ 'Law Commission's 273rd Report: Prevention of Custodial Torture' (India Legal, 4 November 2017) <<https://indialegallive.com/constitutional-law-news/special-report-news/law-commissions-273rd-report-prevention-of-custodial-torture/>>.

robust compensation framework and no clear victim-centered reparative structure. That omission is not minor: a torture law without a meaningful remedy risk becoming a punishment statute without a rights-protection function. Those features are hard to reconcile with the Convention's insistence on prompt, impartial investigation and real access to complaint mechanisms. Put differently, the Bill asked victims to overcome the very institutional barriers that anti-torture law is supposed to dismantle.

4.1.2 The Ashwani Kumar Petition and the Supreme Court's Direction to the Law Commission

Dr. Ashwani Kumar, former Law Minister, sought a strong legal framework against custodial torture so he filed a PIL under Article 32.³⁷ It argued that if we want to follow right to life and dignity and do justice to it, then we need to have a standalone law to define torture, punish the one subjecting it and provide specific enforcement mechanisms and not just general guidelines.

At first the anti- torture debate was a policy concern but after the Ashwani Kumar petition it turned to a constitutional question. It forced the Court and the Legislature to understand that if they just want Custodial Torture to be under Article 21 then they need to do right by it as well and the legal vacuum is not only the absence of an anti- torture framework. The gap is also there because there is no law to protect Article 21 as well.

The Supreme Court's response to this was that instead of drafting a law itself because that is beyond its scope, the Court sought the views of the NHRC and recognized that the issue was tied to Article 21 and the protection of human dignity. However, the Legislature cannot be directed to enact a law by the judiciary because it does not fall under the ambit of the judiciary and violate separation of powers. So the Court acknowledged the gravity of custodial torture but stopped short of judicially compelling statutory reform.

4.2 The Law Commission's 273rd Report and Draft Prevention of Torture Bill, 2017: An Assessment

The Law Commission's 273rd Report was the most serious attempt to bridge the anti- torture legislative gap. It recommended implementing UNCAT through domestic legislation and annexed

³⁷ Ashwani Kumar v Union of India, Writ Petition (Civil) No. 738 of 2016, Supreme Court of India.

a draft Prevention of Torture Bill, 2017. The bill introduced a standalone statute, amendments to criminal procedure and evidence law and a punishment structure. It treated torture as a criminal wrong and provided a definition, punishment and remedies. The 2017 Bill compared to the 2010 Bill was better drafted and covered some loopholes that were present in the 2010 Bill. The 2017 Bill was drafted by taking the UNCAT as the blueprint.

It treated torture as a separate criminal offence and not just hurt or assault. It recognized that there is a need for a proper definition with punishments and remedies to deter the authorities to participate and to provide justice to the victims by making the authorities accountable for their actions.

However, like any other torture bill it had limitations as well. The proposal was ambitious in principal and less in the institutional design. It lacked in the enforcement structure, independence of investigation and safeguards against official influence. The 273rd Report further after stating the limitations, instead of working on them decided to delay it and there still hasn't been any changes. The least they could have done was pass the Bill and then bring amendments when they would figure it out. While the State realized the need of an anti-torture law, the reform remained advisory and consequently there was no action on it.

4.2.1 The Rebuttable Presumption and Burden- Reversal: A Critical Innovation

The 273rd Report introduced a rebuttal presumption in torture prosecutions. The basic idea behind that was that if a person is injured while he is in custody or in police control, then it will be presumed that the injury was caused by the police authority and the burden of proof will be on them to prove that they in fact did not subject the arrestee to torture. The reasoning behind this is that it is next to impossible for the person in custody to prove and obtain evidence to prove that he was subjected to torture while he is isolated and around state officials. This was a notable feature because it recognized the evidentiary imbalance and tried to correct it. In custodial violence cases, the state has already access to the victim, records, the place of detention and the officers involved so a strict insistence that it is on the victim to prove that he was subjected to torture would make accountability impossible in practice. The 2017 bill recognized that torture is not just a substantive criminal problem but also an evidence problem. The presumption would have pushed the law toward transparency by requiring the state to account for injuries in custody rather than allowing denial to function as a shield.

4.2.2 What the 2017 Bill Failed to Address: Command Responsibility and Independent Monitoring

While the 2017 Bill brought a lot of changes and was an improved version of the 2010 Bill, it still had two structural problems. The two problems were command responsibility and independent monitoring. Custodial Torture is a chain of command, institutional tolerance and a setting in which abuse can happen.

The 2017 Bill mainly focused on the direct preparator subjecting torture and not the superior officers enabling the same. The Superior Officers were not made answerable to the Court on why they permitted, tolerated or knowingly ignore torture within their jurisdiction. Custodial Torture is a systemic crime and not treating it the same way creates a big gap and makes us question if victims subjected to Custodial Torture re actually given justice or not. Custodial Torture cannot be stopped or tried to be stopped by just punishing the direct perpetrator but the whole system needs to be punished. A law that stops at the bottom of the hierarchy risks punishing the visible actor while leaving the structure that produced the abuse intact.

The draft lacked a strong external body with power to inspect places of detention, review complaints and investigate allegations without police control. The aspect of Independent Monitoring was missing. Custodial Torture is so embedded and so internalized within police authorities that an internal system cannot be responsible and be trusted to investigate or prevent it because of institutional loyalty and also because in most cases, most of the jurisdiction are involved in the same. Without an independent monitor, a torture law may create an offence but still fail to expose the conditions that allow it to recur.

The 2017 Bill failed to structure the draft in a way that could prevent concealment, suppress collusion or expose supervisory complicity. A meaningful statute must reach upward to command responsibility and outward to independent oversight; otherwise, it risks criminalizing the symptom while preserving the structure.

5. ARCHITECTURE OF IMPUNITY: STRUCTURAL MECHANISMS THAT SHIELD CUSTODIAL TORTURERS

Custodial Torture is assumed to be an individual misconduct when in actuality it is a systemic problem which is protected by a structure that tends to protect the State Officials by making accountability hard to trigger. We'll be looking at three mechanism protecting the state officials

One major mechanism that protects public servants is the sanction barrier. Sanction Barrier basically requires the approval of the government to prosecute or investigate public servants which makes us dependent on the same executive machinery that has an institutional interest in protecting its officers; because of which there are a few cases where approval is provided.

A second mechanism is police- self investigation. In the absence of an external body to investigate the cases of custodial violence, it is investigated by the same police system that is accused of committing it, which makes us question the credibility of the investigation. This could lead to weak documentation, compromised witnesses, delayed medical examinations and narratives that minimize or deny abuse. The investigation becomes more of a formality than a real check.³⁸

The third mechanism is the failure of independent oversight. Judicial or magisterial inquiries can exist on paper, but they might not cover the truth if they are dependent on the police record. The same is true of detention monitoring systems that do not have real access, autonomy, or follow-through power. Torture thrives where secrecy is paired with weak supervision.³⁹

Reports normalise custodial violence especially if the victim is poor, marginalised or easier to discredit. Torture is not just about rights violations but also a method to exert control which is supported by unequal power balance.

This structural pattern has recently been confirmed by the United Nations human rights machinery itself. In February 2026, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on extrajudicial, summary or arbitrary executions jointly warned of a pervasive pattern of excessive and often lethal use of force by the police in India, particularly in Uttar Pradesh and Assam, including so called encounters and half encounters, alongside widespread custodial torture involving beatings, electric shocks, sexual violence, psychological humiliation and denial of medical care.⁴⁰ The experts noted that marginalised communities, including Muslims, Dalits and Adivasis, were disproportionately

³⁸ Sheela Barse v State of Maharashtra, (1983) 2 SCC 96 (Supreme Court of India) (issuing directions to protect female detainees from custodial abuse, including requirements for immediate medical examination and prohibition on holding women in police lock-ups without female constables).

³⁹ United Nations General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res. 70/175, UN Doc. A/RES/70/175 (17 December 2015) (establishing minimum standards for the treatment of prisoners and oversight of places of detention).

⁴⁰ OHCHR, 'India: UN Experts Warn of Systemic Policing Failures over Reports of Deaths and Torture in Custody' (OHCHR, 25 February 2026) <<https://www.ohchr.org/en/press-releases/2026/02/india-un-experts-warn-systemic-policing-failures-over-reports-deaths-and>>.

affected, a finding that lends empirical support to the observation above that custodial violence functions as an instrument of social control rather than a neutral tool of law enforcement.

5.1 The Prosecution Sanction Requirement: Section 218 BNSS as a Shield for Custodial Abusers

While the sanction requirement was meant to protect honest public servants from vexatious prosecution but it is being misused in a way to protect public servants from accountability. Section 218 of BNSS is to be applied only if they have reasonable reason to connect the alleged act and the official duty of the public servant.⁴¹ In practice, however, it is used to delay or block cases against police officers accused of custodial violence. The sanction stage becomes an obstacle to the investigation in the early stage because of which the prosecution is stalled and the evidence might get tampered with while the government decides whether to allow cognizance or not.

This shifts power from the victim back to the perpetrator because it is the duty of the executive to give the sanction but they often try to protect their own officers and are reluctant to authorize the prosecution of their own officers because of their conduct. The sanction work less as a filter against frivolous litigation and more as a filter against accountability.

Civil society and international experts have increasingly argued that the remedy lies not in reforming the sanction process but in removing custodial torture from its reach altogether. Commentators have pointed out that section 218 of the BNSS already excludes certain categories of offence, including sexual offences and disobedience of a lawful direction, from the sanction requirement, and have argued that there is no principled reason why custodial torture, which is at least as serious an abuse of official power, should not receive the same treatment.⁴² The Special Rapporteur on torture has echoed this concern at the international level, identifying the sanction requirement as a central mechanism of impunity in India precisely because authorisation to prosecute is, in practice, rarely granted.⁴³ The convergence of domestic legal commentary and international expert opinion on this single procedural device suggests that the sanction requirement is not a peripheral technicality but one of the principal load bearing structures of custodial impunity in India.

⁴¹ Bharatiya Nagarik Suraksha Sanhita, 2023, Act No. 46 of 2023 (India), s. 218.

⁴² 'A Case for Reforming the Law on Sanction for Prosecution' (The Leaflet, 6 June 2025) <<https://theleaflet.in/criminal-justice/a-case-for-reforming-the-law-on-sanction-for-prosecution>>.

⁴³ REDRESS (n 102).

5.1.2 Comparative Note: The Attorney-General Consent Requirement Under the UK Model and Its Different Function

The UK Model serves the sanction requirement for a different purpose. It functions as a prosecution- control mechanism for a limited category of serious or sensitive offences. The reasoning behind this is to ensure legal consistency, public interest assessment or protection of diplomatic and constitutional interests. The sanction model in the UK works as a tool for case management and prosecutorial control while the sanction model in India acts like a hurdle made to protect the state officials.

Under the Indian framework, the sanction requirement can delay or frustrate prosecution to protect the public servant because the violence is connected to the official duty and they are well aware that Custodial torture is so systemic that if one of the public servants is prosecuted, he will take more than him with him. In the UK, however, sanctions are required to regulate whether a particular prosecution should proceed at all for broader legal or policy reason and not to protect state violence as ‘part of the duty’.

Another difference is that the UK Prosecution system is structured in a way that the investigative and the prosecutorial functions are separated so the direct gatekeeping powers are not exactly in the hands of the executive branch over misconduct by line officers, in India, however, the sanction is granted or refused by the executive which also oversees the police hierarchy, creating a conflict of interest.

A narrowly tailored consent requirement in a mature prosecutorial system can preserve legal discipline without undermining accountability. But when the same idea is placed inside a context of weak oversight, hierarchical police culture, and poor custodial accountability, it can become a tool of impunity rather than a safeguard of fairness.

5.2 Police Self-Investigation: Structural Conflict and Evidence Suppression

Police Self- Investigation creates a conflict of interest because the institute accused of custodial torture is often responsible for collecting the facts, evidence and investigation which becomes very dangerous because the same people have the access to the record, witness, medical timing and narrative framing. Police has the ability to frame what counts as evidence and in what way. Officers

control when the medical examination happens and what goes in the inspection copy and has the evidence to prove custodial torture which they might destroy or at the very least weaken it.

This is why self-investigation often produces evidence suppression even without a formal order to suppress. A custodial case can collapse because the earliest and most crucial proof is under the control of the very officials whose conduct is under suspicion. If injuries are not photographed immediately, if the arrest memo is incomplete, if medical notes are vague, or if witnesses are effectively unavailable, the prosecution enters trial with a severe evidentiary disadvantage.⁴⁴

The police has the duty to investigate but that becomes an issue when it is the police authority and actions that needs to be investigated. Policing culture prioritizes institutional loyalty, efficiency and confession based case building whereas torture allegations call for external scrutiny. This is why custodial accountability fails repeatedly. The difficulty is not only to prove torture but also to obtain evidence.

5.2.1 The Magisterial Inquiry Mechanism: Nominal Oversight, Structural Ineffectiveness

The Magisterial inquiry is meant to examine custodial death and any related incidents to custodial violence.⁴⁵ However, in reality the Magistrate depend on the police generated material which doesn't bring to the table what it should and the same cycle is happening again- the police officials investigating themselves. The Magisterial inquiry therefore is not of any use and doesn't help to uncover abuse because the evidentiary record is already shaped by the police.

The Magisterial inquiry lacks an independent body because of which it does not have the investigative reach to test competing versions of events. Since, they don't have a properly trained investigating team, the family and the independent witness will not be properly interrogated and hence they might rely on the police material heavily. This creates a big accountability gap. A delayed, incomplete inquiry cannot be treated as a meaningful deterrent against custodial violence. The mechanism is too weak to overcome the institutional advantage of the police side in custodial cases. A system that relies on the magistrate to review a record already dominated by the police

⁴⁴ *Parmanand Katara v Union of India*, (1989) 4 SCC 286 (Supreme Court of India) (directing that every injured person, including an accused, has a right to immediate medical treatment and that no procedural formality can be allowed to cause delay).

⁴⁵ Code of Criminal Procedure, 1973, Act No. 2 of 1974 (India), s. 176 (as amended, requiring magisterial inquiry into custodial deaths); re-enacted as *Bharatiya Nagarik Suraksha Sanhita*, 2023, Act No. 46 of 2023, s. 196(2).

cannot fully correct the imbalance created at the scene of custody. That is why magisterial inquiry remains a necessary but insufficient safeguard.

5.2.2 NHRC Jurisdictional Limitations: Compensation Without Accountability

The NHRC did a really good job in recognizing custodial violence and in recommending compensation however it is a statutory body and has only limited powers.⁴⁶ It can recommend but cannot impose punishment and ensure criminal liability; that is on the legislature.⁴⁷ This creates a familiar pattern; it can provide compensation but not consequences. The victim's family might be awarded financial compensation but the issue of impunity remains unresolved.

Further, the Commission's jurisdiction cannot act as a full investigative substitute for the police and the courts. NHRC is more effective at recording patterns of abuse than at dismantling the institutions that produce those patterns. Its role is important, but it is still reactive rather than coercive.

A state may comply with an NHRC recommendation, pay money, and claim reform, while the officers involved remain unchanged or institutionally protected. That allows the system to display responsiveness without changing the incentives that permit custodial torture in the first place.

5.3 The "Zone of Legal Exception": Naming the Structural Condition

Legal protection in custody is often weakened and delayed because in practice the right to dignity and the police officer's being accountable for the protection of the detainees is fragile. Custodial Torture takes place because a protected space is turned into a space of abuse where in theory the detainees still have their rights but in reality they are not enforced.

Custody is called the Zone of Legal Exception because even the existing safeguards like Article 21, DK Basu guidelines, magisterial inquiry, and the NHRC oversights all exists but fails. The problem is not the absence of legal language; it is the creation of a custodial domain where legal constraints are softened by administrative power and institutional loyalty.

6. COMPARATIVE ARCHITECTURE: THE UK, SOUTH AFRICA, AND THE CAUTIONARY LESSON OF NEPAL

⁴⁶ Protection of Human Rights Act, 1993, Act No. 10 of 1994 (India) (establishing the National Human Rights Commission with jurisdiction to inquire into complaints of human rights violations).

⁴⁷ National Human Rights Commission, *Annual Report 2021–22* (New Delhi: NHRC, 2022) (documenting cases of custodial death and torture referred to the Commission and recommending compensation without power to compel criminal prosecution of the offending officials).

The UK anti- torture obligations can be absorbed into a legal culture of rights, detention safeguards and prosecutorial accountability. South Africa's law is more instructive and combines a strong constitutional commitment to dignity and bodily integrity with clearer institutional and statutory responses to abuse. Nepal however is a cautionary example, it demonstrates that if there is weak enforcement, procedural gaps and institutional resistance then even a well-recognized law cannot help.

6.1 The United Kingdom Model: Section 134, Criminal Justice Act 1988

Section 134 of the Criminal Justice Act treats torture as a separate offence and applies to public officials or any person acting in an official capacity, whether in the UK or elsewhere.⁴⁸ It does not consider torture to be a part of hurt or assault and removes the ambiguity that comes with a general law. It recognizes that custodial torture is a abuse of official power and not just physical violence. The statute extends to any public official or anyone acting with official involvement, regardless of nationality and location. It is relevant because it makes torture prosecutable without tying liability to territorial or bureaucratic barriers.⁴⁹

The Human Rights Act reinforces this by giving domestic legal force to Article 3 of European Convention on Human Rights prohibiting torture and inhuman or degrading treatment in absolute terms.⁵⁰ Article 3 cannot be overridden by public convenience, security arguments, or resource constraints. That absolute constitutional-style protection strengthens the statutory prohibition by making torture not just a crime, but a rights violation that public authorities must prevent, investigate, and respond to.⁵¹

The UK combines a specific offence with a human- rights framework that imposes duties of prevention and investigation on public authorities ensuring that it is not treated as an isolated criminal event but a state responsibility issue, which India needs.

⁴⁸ Criminal Justice Act 1988, c. 33, s. 134 (UK).

⁴⁹ European Court of Human Rights, *Selçuk and Asker v Turkey*, App. No. 23184/94, Judgment of 24 April 1998, ECHR 1998-II; see also *Selmouni v France*, App. No. 25803/94, Judgment of 28 July 1999, ECHR 1999-V (ECtHR) (establishing that the threshold for what constitutes "torture" under Article 3 ECHR evolves upwards over time, and that treatment previously classified as inhuman may now be classified as torture).

⁵⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, art. 3, as incorporated by *Human Rights Act 1998*, c. 42, sch. 1 (UK).

⁵¹ *Human Rights Act 1998*, c. 42, s. 6 (UK), imposing a duty on public authorities to act compatibly with Convention rights.

6.2 The South African Model: The Prevention and Combating of Torture of Persons Act, 2013

South Africa treats torture as crime and an institutional failure. The Prevention and Combating of Torture of Persons Act was enacted to ratify the UNCAT by South Africa and to create a specific offence of torture rather than treating it as a general assault case.⁵² It has a stronger accountability structure which India needs.

The inflictor is not the only one responsible for torture but also the enabler and the people who are silent. South Africa's approach treats torture as a systemic offence and holds accountable beyond the direct perpetrator. India reforms discussions stay focussed on the individual officer at the scene. This is a major gap, because a law that ignores the chain of command risks punishing the visible actor while leaving the structure that produced the abuse untouched.

South Africa has formed an Independent Police Investigative Directorate which is structurally separated from the police.⁵³ It has to follow a defined rules and has to investigate serious allegations like custodial deaths, torture, corruption, etc. Police officers have to notify and cooperate with it. That design matters because it avoids the central weakness of self-investigation: the same institution accused of abuse is not allowed to control the entire inquiry

6.3 Nepal: Ratification Without Implementation as a Cautionary Model

Nepal is the prime example of ratifying anti- torture norms are not enough if the enforcement is weak. Criminalizing torture has done no good to them because it is still being followed by weak investigations, low prosecution rates, limited remedies and persistent police reliance on coerced confessions.

In Nepal's case ratification and criminalisation is more symbolic because it is not matched by independent investigation, detention monitoring, and meaningful prosecution. The ICJ and partner organizations reported that nearly two years after the relevant Penal Code provisions came into force, not a single torture prosecution appeared to have been brought, while victims still faced barriers such as police refusal to register complaints and the lack of independent police

⁵² Prevention and Combating of Torture of Persons Act 13 of 2013 (South Africa).

⁵³ Independent Police Investigative Directorate Act 1 of 2011 (South Africa).

investigations. More recent reporting also suggests that official recommendations and compensation mechanisms have not translated into consistent accountability⁵⁴

It warns India that mere ratification and criminalization is not enough if it is accompanied with effective enforcement. The real test is not whether torture is outlawed on paper, but whether victims can report abuse safely, investigators are independent, prosecutions actually proceed, and remedies are delivered.

7. SYNTHESIS AND REFORM ROADMAP: FIVE MEASURES FOR A CONSTITUTIONAL DEMOCRACY

India's anti-torture problem is more than a policy gap. The failure of not complying to Article 21 and DK Basu guidelines and the attempts in drafting an anti-torture law but to no avail, is because they do not want to take accountability for the same and treat it as administrative excess.⁵⁵ Treating it as a legal wrong will not just mean holding one person accountable but it will take the whole system down with it, something that the Legislature is not ready to do.

We will discuss five reform measure that the Legislature should do to minimize custodial torture as much as we can.

7.1 First Measure: Ratification of UNCAT and the Optional Protocol

The Ratification of UNCAT and its optional protocol is where we need to start with, instead of treating it as a domestic policy concern we need to first realise and then treat it as a binding international legal commitment.

UNCAT provides the blueprint of how we need to draft an anti-torture law and also states that the State need to ensure prompt and impartial investigation. The Optional Protocol allows independent inspection of detention facilities which acts as a protective layer.⁵⁶ India still treats custodial torture as a peripheral issue and ratifying the UNCAT would create a stronger pressure for domestic

⁵⁴ International Commission of Jurists, "Nepal: Despite New Criminal Laws, Impunity for Acts of Torture Prevails," ICJ, 2019, <https://www.icj.org/nepal-despite-new-criminal-laws-impunity-for-acts-of-torture-prevails/>.

⁵⁵ REDRESS, *Torture Normalised: State Violence in India* (London: REDRESS, 2025), https://redress.org/storage/2025/06/01122025_Torture-Normalised-State-Violence-in-India_full-report.pdf.

⁵⁶ *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 18 December 2002, 2375 UNTS 237, entered into force 22 June 2006 (establishing the Subcommittee on Prevention of Torture and a system of independent inspection of places of detention).

reform and the government would have to align criminal law, procedure and oversight with the Convention requirements.

The absence of a National Preventive Mechanism is not a hypothetical gap. States that ratify the Optional Protocol are required to designate or establish an independent body empowered to conduct unannounced visits to any place where persons are deprived of liberty, a safeguard that speaks directly to the culture of self investigation and institutional secrecy identified earlier in this paper as central to India's architecture of impunity. Because India has ratified neither UNCAT nor the Optional Protocol, no such independent inspection mechanism exists in Indian law, and detention monitoring is left to bodies such as the NHRC and the state Human Rights Commissions, which themselves lack the power to conduct unannounced inspections or compel cooperation from the police.⁵⁷ Ratification would therefore not be a symbolic gesture of compliance alone; it would supply precisely the kind of external, unannounced and legally empowered oversight that the domestic mechanisms examined in Section 5 have consistently failed to provide.

Ratification is the necessary foundation but not the end point. It needs to be followed by proper procedure, i.e., legislation, independent monitoring and real prosecutorial reform if it is to produce change on the ground.

7.2 Second Measure: Enactment of a Standalone Anti-Torture Statute with Command Responsibility

For Custodial Torture to be treated as a criminal law, a standalone anti-torture statute needs to be drafted and passed, not just to define torture but also to define the punishment and to not treat it as ordinary, hurt, assault or a procedural irregularity. The statute should include command responsibility, meaning instead of holding one person accountable, the accountability should extend to the officer who ordered, permitted, ignored or failed to intervene to stop custodial torture. The Legislature should expand the 2017 Bill and make custodial torture a supervisory failure. Once command responsibility is built in, the law no longer treats torture as a rogue act by a single officer; it recognizes the organizational conditions that enable abuse. That is especially important in

⁵⁷ REDRESS, *Torture Normalised: State Violence in India* (REDRESS, June 2025) 12
<https://redress.org/storage/2025/06/Torture-Normalised_State-Violence-in-India-Report.pdf>.

policing systems where informal pressure silence, and protection from above often matter as much as direct violence.⁵⁸

7.3 Third Measure: Exclusion of Custodial Torture from the Prosecution Sanction Requirement

While Courts have repeatedly stated that torture, unlawful beating, illegal detention is not a part of investigation and interrogation; police officials tend to ignore them and consider that unofficially it is an official duty and to uncover the truth. However, with an anti-torture law, it will be established that custodial torture is nowhere acceptable and will remove the ambiguity.

This would have both doctrinal and practical value. Doctrinally, it would align the statute with the principle that a perpetrator will not be protected just because he is a public servant. Practically, it would remove early procedural barriers that blocks or slow cases before evidence is properly tested. That matters because custodial abuse already takes place in a setting where the state controls the evidence and the victim is usually at a severe disadvantage.

7.4 Fourth Measure: Establishment of an Independent Police Complaints Authority

Custodial Torture is subjected by police officials so investigation by the same institution will not be effective and would be impartial, therefore, there is a need of an Independent Police Complaints Authority, that selectively looks at cases involving police brutality, custodial violence or serious abuse of authority. An independent authority reduces the conflict by giving victims a forum outside the police chain of command that were involved in the case and reduces the chances of partial investigation.

Many states and UTs have constituted Police Complaints Authorities but for them to be effective, they need to have the investigative capacity, independence in composition and have the power to suggest actions rather than just record these complaints. It is not just supposed be a grievance desk but should also ensure accountability.

7.5 Fifth Measure: Mandatory Independent Judicial Inquiry into All Custodial Deaths

State has control over the person and the first version of facts and evidences if it is a custodial violence case and hence a mandatory independent judicial inquiry is essential. Under section 196

⁵⁸ Anshu Singh, "The Need for an Anti-Torture Law in India: Human Rights Still in Chains," *International Journal of Law* 11, no. 11 (2025): 50–52.

(2) of BNSS, a judicial magistrate must set an inquiry in cases of custodial death, alleged rape in custody, disappearance while in custody.⁵⁹ Police inquiries can be compromised when it comes to custodial cases because of institutional loyalty and creates a risk of delay, narrative control and evidence suppression. Therefore, judicial inquiries are essential and more credible.

The reform should be framed as mandatory, independent, and universal. It should apply to every custodial death, not only those where foul play is immediately suspected, because the line between “natural” and “unnatural” death in custody is often impossible to assess without a rigorous inquiry. If the system waits for obvious suspicion before conducting a meaningful inquiry, it risks missing precisely the cases where abuse has been hidden most effectively.⁶⁰

Conclusion

India’s failure to prevent custodial torture is systemic and structural. The expansion of Article 21 and the protection and guidelines introduced in Nilabati Behera and DK Basu though brought constitutional gains, there still hasn’t been any serious steps in turning it into a specific criminal offence and not a general criminal offence that comes under hurt or assault.

This is why the five- point roadmap becomes a legal necessity. India needs to ratify UNCAT and its Optional Protocol, draft and pass an anti- torture law and remove the requirement of the prior-sanction shield to prosecute public servants. These would make it harder for the public servants to conceal their action and easier to prosecute.

The urgency of this roadmap is confirmed by the most recent government data available. Figures placed before the Lok Sabha in March 2026 show that custodial deaths have not meaningfully declined in the years since the Law Commission’s 273rd Report: one hundred and seventy six deaths in police custody were recorded in 2021 to 2022, one hundred and sixty three in 2022 to 2023, one hundred and fifty seven in 2023 to 2024, one hundred and forty in 2024 to 2025, and one hundred and seventy again in 2025 to 2026, while only a single case of disciplinary action was reported in connection with custodial deaths across that entire five year period.⁶¹ These figures

⁵⁹ *Bharatiya Nagarik Suraksha Sanhita, 2023*, Act No. 46 of 2023 (India), s. 196(2) (mandating judicial magistrate inquiry into every custodial death, alleged rape in custody, and disappearance while in custody).

⁶⁰ Human Rights Watch, “*Bound by Brotherhood*”: *India’s Failure to End Killings in Police Custody* (New York: Human Rights Watch, 2016), <https://www.hrw.org/report/2016/12/19/bound-brotherhood/indias-failure-end-killings-police-custody>.

⁶¹ ‘Custodial Deaths at 170 This Year, Accountability Nearly Absent: Govt Data’ (The Wire, 25 March 2026) <<https://m.thewire.in/article/government/custodial-deaths-at-170-this-year-accountability-nearly-absent-govt-data>>.

confirm that the problem this paper addresses is not a historical artefact of the pre-BNSS era but an ongoing and current feature of Indian policing, one that has persisted through the very legislative reforms that were supposed to modernise criminal procedure.

Until those reforms are in place, the rule of law remains incomplete inside custody. A constitutional democracy cannot claim to respect liberty and dignity while leaving a zone where torture can survive through delay, secrecy, and institutional protection.



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