

Is Custodial Violence : A Mockery of Law

Abstract

Custodial violence is virtually a universal phenomenon imposed upon individuals regardless of age, sex, or state of health. In India custodial violence is a grave and alarming problem. Custodial violence is not limited to any particular section of society but it extends to the underprivileged and weaker community. Most of the torture victims are from economically poor background therefore judicial inquiries have to be done. In this research paper an attempt has been made by the researcher in dealing with the issue of tracing the history of Custodial Reforms and to get a clear perspective of what is Custodial Death with respect to Indian law. Police officers were considered as safeguard. Custodial violence and death have become so normal these days and is leading mistrust in our society towards police. To understand and trace out the history and present status of custodial violence, reference was made to several reports of national human right commission, law commission along with case laws, some IPC sections and other. And after analyzing all the issues, it discovered that maximum people were died from brutal assault, torture and violence in police custody. Further, the article will eventually conclude with final observation in which we would like to point out the issues faced by the victims and the how to get rid of the custodial torture which remained a preferred tool in the hands of law enforcing authorities for extracting and confessions or to oppress the marginalized sections of the society.

Introduction

The establishment of the police forces marked the promotion of its preventive and deterrent role to urban crime and disorder. Being an integral and therefore the most sought of a part of the justice system because of its investigative nature; the force implicated professionalized and technological bearings in itself as an effort towards advancement and public welfare. The stress was also placed on the training and professional qualifications of the new hires. Despite the attempts towards reforms most of those changes towards improvements go unrecognized due to reasons like highly autocratic leaders, rampant rate of corrupting role of police as a defender of codes of certain procedures and their role in flouting their mellifluous functioning. Here the cases from various newspaper sources and victim yet as societal reaction towards and undue advantage or misuse of authority by the officials at several occasions resulting to an absence of respect and co-operation from the community. The present paper focuses on threads it is observed closely and targeted because the concreted elements for this work.

Despite the elaborated legal provisions which is in detailed instructions given in the state police manuals which prohibits abuse of powers many police officers which develops a feeling that he can get away with custodial violence because it is difficult to substantiate such a charge. He also feels that his superiors and subordinates will rally round him and try to misleads.

Custodial deaths thus generate more heat than light. The National Police India Commission (1977) analysed complaints of police torture and custodial deaths in eight states and found that police were blamed in 11 out of 17 judicial inquiries, 37 out of 82 magisterial inquiries and 23 out of 430 inquiries by other agencies. The National Police Commission recommended that in all cases of custodial deaths there should be mandatory judicial inquiries.¹ This is also a fact that in all cases of custodial deaths are people coming from poor and backward sections with little political influence and financial powers to back them.

¹ https://www.svpnpa.gov.in/images/npa/pdfs/CompletedResearchProject/14_custodiandeaths.pdf

Problems and Perspective

Hon'ble Justice Krishna Iyer raised a really fundamental question before us— 'Who will police the police?', This realization is further strengthened when one looks at the info. In 2019, the number of custodial deaths averaged to five persons per day. Not only that, between 2001 and 2018, a complete of 1,727 people died in police custody. During this era, as a stark contrast, only 26 officers are convicted because they are on bail.

In order to know why, we'd like to undertake a deeper exploration of this issue. It requires us to ask and answer this question: What quite systems are created and institutionalised to guard life and liberty of citizens in India?

The State from the beginning was very clear about the type of power it wants in order to control. The framers of the Constitution didn't accept the 'due process of law', which mandates 'hear before condemning and judge after trial'. Article 21 of the Constitution provides the 'procedure established by law', which in practice has been reduced to whatever procedure the powerful are comfortable with. The Supreme Court's direction in *Menaka Gandhi's* case (1978)² that the procedure of law can't be anything but reasonable, fair and just has not cut ice with governments. Citizens aren't only consumers of law, but its masters. But this has been given the go-by in practice. Moreover, today those who fought against the arbitrary power of the state during the emergency have become masters.

The possibility of torture in police custody is recognized under various statutes just like the Evidence Act through provisions like Section 24, 25 and 26 – where even a confession made to a policeman is inadmissible within the court of law. General provisions of the Indian legal code, which apply just in case of any crime, also apply to crimes committed on detainees under arrest.

However, certain provisions which deal specifically with custodial crimes also are present within the IPC, like Section 330 (Voluntarily causing hurt to extort confession, or to compel restoration of property), Section 331 (Voluntarily causing grievous hurt to extort confession, or to compel restoration of property), 376(2) (Custodial Rape) and Section 348 (Wrongful confinement to extort confession, or compel restoration of property).

In India brutality in police and judicial custody has been discovered for many years. In 2019 consistent with a report by a rights group total 1,731 people in India died in custody consistent with the recent NHRC monthly report of June 2020, there's an inventory of approx. 136 cases registered during which 45 cases were disposed and these numbers include cases of custodial death in police and judicial custody and death during a police encounter.

The prior stand of Indian judiciary on the appliance of the supply of law of nations was that unless specifically incorporated by local laws, these international laws don't create rights in municipal law. The Supreme Court of India has altered the law during this regard now it's a settled principle that if international laws aren't onto Indian law then they're legitimately enforceable as a feature of right to life, freedom and due process of law provision of the Indian Constitution. The Supreme Court of India has perused the provisions of the UDHR into the part iii (fundamental rights) within the Constitution of India.

Abominations and torment by legislative offices notably police in India has continually been a subject matter of curiosity and interest. In perspective of Article 21 of the Constitution, any sort of torture or cruel, barbaric treatment is precluded. Torture isn't passable whether it happens amid examination, cross examination or something else and State is responsible if an individual in

² <https://www.deccanherald.com/opinion/why-it-won-t-be-easy-to-end-custodial-violence-in-india-855008.html>

custody of the police or others is bereft of his life except in accordance with the procedure established by law. The commitment forced by article 21 requires the State to require managerial and each single measures to guard the privilege to life and examine every single suspicious passing of the victims. Therefore, the State must guarantee preclusion of torment, brutal, barbaric and corrupting treatment to a person, especially on account of any State office or police drive. Notwithstanding the safety gave under the Constitution, the Protection of Human Rights Act, 1993, likewise accommodate assurance of all rights to every person.

The cycle that perpetuates custodial violence begins with cops sensational folks while not the mandatory work, in an exceedingly clear violation of the principles framed by the Hon'ble Supreme Court in DK Basu's case and so the following amendments at intervals the Code of Criminal Procedure.³

This 'unofficial' arrest means the need of production of the accused before a magistrate is automatically waived, and what happens in custody remains a secret within the fraternity of the Police.

Custodial Deaths in India

26th June is the day which is celebrated as International Day in Support of Victims of Torture which is organised by United Nations which is an international level NGO. According to their recent reports in 2019 it was formed that in India. According to their report which states that 1,731 persons died in custody in the year 2019 alone, estimating 5 deaths every day of the year. The total number of deaths in judicial custody were 1,606 and 117 deaths in police custody in total.

During the time of pre independence India, Under the regulation which was originated in 1916 police officers were authorized under all revenue functionaries which were routinely involved with the revenue collectors for extortion of the revenue and delay in the payment of taxes. The Affidavit and attestation of torture were so many as they were discussed in the British house of commons as well, thus establishing the Torture Commission of 1855. It was conclusively found in that "personal violence practiced by the native revenue and police officials generally prevails throughout the Presidency, both in the collection of revenue and in police cases." They also held that the law-and-order administration in the province was in a bad shape. The remedies they suggested included a "moral agency" (European) at appropriate levels, separation of the judiciary from the chief and, more importantly, that of the police from the revenue. The commission went on to suggest major reforms within the organisation of the police as an agency. These reforms were the primary of its kind on the topic.

The Law Commission Report of 1985 cited the case of *State of U.P v. Ram Sagar Yadav* [AIR 1985 S.C. 416] whereby a farmer, incorrectly suspect of cattle trespass by his neighbour over a dispute, was allegedly vulnerable for bribes by the involved law officer, who then, at first, relented on the other hand reported this incident to the police headquarters that as a response appointed another officer to treat the farmer's allegation against the officer. The law officer to blame of the inquiry in remission the farmer and tortured him severely, at intervals 6 hours of the registering of the initial case the farmer then succumbed to his injuries and died.⁴

This matter was then haunted to the Apex court which then acknowledged the arrival of custodial death and torture also because the indemnity enjoyed by police officials, saying, "Police officers alone and none else can give evidence regarding the circumstances during which an individual in

³ <https://www.barandbench.com/apprentice-lawyer/the-enshrinement-of-custodial-violence-in-india>

⁴ <http://www.uncat.org/in-media/custodial-death-torture-a-human-rights-abuse-indian-and-international-perspective-latest-laws/>

their custody involves receive injuries. Bound by the ties of brotherhood, they often like better to remain silent in such situations and once they prefer to speak, they put their own gloss upon facts and pervert the truth”.

We'd like to draw out some more case laws to know more practically about custodial violence cases

In this case *Nilabati Bahera Vs State of Orissa*, The Supreme Court has taken the *sou moto* cognizance and reshaped it into writ petition under Article 32 of the Indian Constitution for Nilabati Behera, whose son was died in the police custody while under investigation for the offence of theft. His body was found dead on the railway track with deep wounds which indicates towards an unnatural death. Smt. Nilabati wrote letter to court claiming for compensation for her son's violated fundamental right to guaranteed under Article 21.

After going through all the evidences and proceedings the Apex court remarked that “every prisoner and arrestees are having their own fundamental rights according to Article 21 of The Indian Constitution. They have the equal rights to enjoy all the basics of the fundamental rights and the police are bound to obey the and to protect their fundamental right and the police are bound to obey the law and to protect their fundamental rights and police are bound to obey the law and to protect their fundamental rights by ensuring that the citizen in custody is not deprived from his right to life.” Nilabati was compensated with the Article 9(5) of the international covenants of the civil and political rights which states that rights of the compensation should be taken into consideration of a victim of unlawful torture in custody.⁵

In this case of *Harbans Kaur Vs Union of India*, the family of the victim filed a writ petition of Habeas Corpus and for compensation in the court alleging the police officers for the unlawful custody of victim in police station and no one knows what had happened during custody. The Supreme Court opined that will set up an enquiry to find whether the person died because of being beaten or something else, the High Court stated that an attempt has been made by the police officers to destroy the evidences. The High Court cited that there will be proper investigation of police station's record and the officer found guilty will be punished.

Custodial torture can be defined as the degree of punishment which ranges from various types of assault to death by police officer in custody. This word “TORTURE” came from Latin word “TORTOUS” which means to twist or to torment. Prevalence of torture with third-degree on person in unlawful detention and police custody casts an aspersion on a very superior administration. With respect to current scenario, torture can be defined as an act of intentionally causing severe harm to a person as a punishment. Torture can be both mentally and physically. Investigators' frame of mind for accused is to torture them so that they may confess easily. Being a liberal democracy and having so many provisions and legislation against torture which are being monitored constantly, torture still exist in India.⁶

For instances, case of *Gufran Ansari Vs State of Bihar*, the victims Gufran Ansari and Taslim Ansari were hammered by nails in sole and thighs. They were caught for the offence of bike theft. They were extremely injured and died. Another recent case of custodial killing reported from Kashmir where Rizwan Asad, a school principal of local school of Kashmir was kept under custody and was brutally tortured and his legs were burnt. He was in custody because police found some of his links with militancy case. Interrogation centres in India were made for interrogating the accused but now the centres are converted into murder point. Let's look on to the case of *Gyanesh Rai and Another vs State of U.P. And Others* is a landmark case custodial torture where an I.T.B.P aspirant was called up by police to the police station for interrogation and died. His father Ganga Rai accused police officers for torturing and giving electric shock to his son Gyanesh Rai. In Nilabati Bahera case the

⁵ Counseldelhi.com The case of Nilabati Bahera vs State of Orissa

⁶ <https://lexauxilium.com/2020/12/04/study-on-custodial-deaths-in-india/>

victim was harassed died by the police officers. There are many other forms of inhuman treatment like forced oral sex, beating while being hand cuffed, urinating in mouth and hitting private parts.

Right of the Person in Custody

Our Indian Constitution is based on some adoring pillars of fundamental rights which are prized above all, and one of them is Dignity. No person shall deprive of their basic rights to live with dignity and liberty whether they are detained or not. And every detained person has right to know the reason of the arrest. For this the *RIGHT TO KNOW THE GROUND OF ARREST* is entitled to every person in the custody. As per Section 50, 50(A), 55 and 75 of the CrPC, any authorized person or police who has to arrest a person must inform the arrested person about the offence and the grounds of arrest. The police officer must inform the family or relative of person arrested as soon as he put him in custody. If the subordinate is appointed to arrest the person without warrant, he needs to inform the person in written about the grounds and offence of arrest and it is the duty of the police officer to show the arrest warrant to the person if needed.

There are some general guidelines which were enumerated by the Indian legislature for the arrest and these are directed by the Supreme Court. According to the guidelines which were enumerated by the guidelines the officer appointed for the arrest must wear clear identity card with name tags at the time of the arrest along with arrest memo comprising date and time of arrest. The memo must be signed by any of the family member or respectable person of locality where the person is arrested. The person arrested have the right to inform his family and friend about his arrest and the place of custody. At the time of detention, the entry must be made in a written format as the date and time of arrest and name of the detained person with informed relative.⁷ Inspection Memo should be signed by the detainee. Inspection Memo consists details of physical check-up of arrestee if any minor and major injury is there should be recorded. The person arrested must go through the medical examination in every 48 hours of detention. According to the Right to free legal aid an arrestee has right to meet the lawyer while interrogation and can also concern with the lawyer.

Article 21 is luminary provision of *RIGHT TO BAIL* which states that no person shall be detained for under-trial in jail custody for uncertain period of time. We live in a country where a victim has to wait for days and months in a hope that one day he will present to judge or his case will be taken to the court. For this problem *RIGHT TO BE TAKEN BEFORE THE MAGISTRATE WITHOUT ANY DELAY* is recognized in Indian Constitution. As the contents mentioned in Section 56 and 76 of CrPC, as soon as the police officer arrested the offender with or without warrant, he has to take him to the magistrate within 24 hours of arrest, till then police have to keep that person in police station only. But some designer politicians and officers ply power and politics game. They don't let someone to against them. If a person tries to veil of their illegal action, then he is pressurized by the politician and their saviours that is police. They are compelled to shut their mouth and if they do not do so then a person is put behind the bars illegally. All their fundamental rights are infringed in jail. Their *RIGHT TO FREE LEGAL AID* is also being violated by the authorities. This is a guaranteed fundamental right under Article 21 of the Indian Constitution. A person from SC/ST, women or child, a person with disability, an industrial workman, a person under circumstances of undeserved want, or a person in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government. These all are entitled with right of free legal service under Section 12 of the Legal Services Authorities Act, 1987. Custodial Torture is worst then the terrorism because the state is behind it and this is a barbaric form of human abuse. Custodial Torture is strictly forbidden by the Constitution of India, the National Human Rights Commission (NHRC), the Supreme Court and the United Nations. To overcome this inhuman treatment by police in custody *RIGHT AGAINST THE INHUMAN TREATMENT BY POLICE* is stated under Article 21 of the Indian Constitution.

⁷ <https://lexforti.com/legal-news/custodial-death-in-india/>

The latest and the dreadful incident of custodial violence is the Jayaram and Benix case, this case of custodial death took place in the lockdown period when opening of essential item shop was limited to a specific time prescribed by the government. But Jayaram and his son Benix opened their shop for more than permitted hours. They were taken to the police station and tortured brutally. They died after two days. The court held the officer involved was murderer. This incident is not just an incident but a scorn to the authorities and legislation.⁸ To prohibit the constant occurrence of these cruel actions, we have some constitutional and legal regime which pertains the offence of custodial violence in India. As per *INDIAN PENAL CODE 1860* section 302 IPC any police officer who commits murder of an offender in custody will be punished for the offence of murder and can also be punished for SECTION 304 IPC culpable homicide. SECTION 306 IPC states that if victim commits suicide in custody and is proved that it happened due to the compulsion of officer on duty then the officer would be liable to punishment under this section and punishment for hurt and grievous hurt in custodial death is mentioned under *SECTION 330 AND 331 OF IPC*. According to the Indian evidence act with respect to the police custody, confession in front of police is irrelevant and if it is made in any kind of threat and assault then this would not be an actual confession and cannot be proved against the suspect.

Prevention of Torture Bill – One of the forgotten laws

In 2020, the question to tackle the menace of the custodial torture has been raised five times over three sessions in the Parliament. On the questions about police custody and prison reforms, on the same line which has been asked many more times.

The Ministry of Home Affairs (MHA) has in consideration with the UN Convention has said that *“The UN Convention against torture and cruel, inhuman or degrading treatment or punishment prescribes that each state shall take effective legislative, administrative and judicial measures to prevent acts of torture. The offences of causing hurt or grievous hurt to extort confession are punishable under sections 330 and 331 of the Indian Penal Code.”*

The main objective of the **Prevention of Torture Bill** is to “provide punishments for the torture inflicted by public servants or any person who suffered from the torture with the consent or acquiescence of any public servant. This bill establishes that India is the signatory of the United Nations Convention against the Custodial Torture and other cruel, inhuman or other degrading treatment or Punishments. This Prevention of torture bill has defined the torture caused by a public servant or by a person with acquiescence of a public servant, causes grievous hurt or danger to life, limb or health.

This bill was introduced in the year 2010 and was first presented in Lok Sabha to give effect to the provisions of the convention. The bill was first passed on 6th of May, 2010. Then Rajya Sabha referred the bill to a selection committee which had proposed the amendments to the Bill to make it more compliant with the torture convention. However, the bill lapsed with the cessation of the 15th Lok Sabha. After seven years in 2017 this bill was introduced as a private member bill in Rajya Sabha and then again in 2018 the bill was introduced in the same form (as a private bill) in Lok Sabha. The bill later has lapsed due to dissolution of the 16th Lok Sabha.

UNO and Amnesty International on Custodial Deaths and their Prevention

On 10th December 1984 the United Nations General Assembly adopted the convention against the

⁸ <https://blog.ipleaders.in/rights-of-an-arrested-person/>

torture and inhuman treatment with the resolution 39/46 and it came into force on 27th June 1987. As reported by article 2(1) of the convention every state party must have judicial, legislative and governmental measures to deal with the prevention of custodial torture. As stated in the paragraph 2 and 3 of article 2, any acts of torture and inhuman treatment are not permissible and justifiable in law by any exceptional circumstances. Such acts are not justifiable by an order of superior officer or an authority. The provision mentioned in the convention deal with the all types of torture, inhuman treatment, punishment and mental agony. As obligations contained in *Article 3 to 16* of the convention, every State party should take instant action on the case of torture reported and also on impartial investigation where one can easily belied that torture has been done. The convention keep eye on the state parties whether they are following the measures properly or not. The text of article 1 defines what is 'TORTURE' as an act of harming intentionally with severe pain whether mentally or physically. Whereas *Article 2* says that every act of torture is not justifiable with no exceptional circumstances (war, threat, and public emergency) and State shall take of all measures made for the prevention of torture. Text of *Article 3* reported that no person should sent or return to that state where he has danger of being tortured. According to *Article 4*, each state shall ensure that all act of torture should come under criminal offence and this also applied on the person who commits the torture and will punished under this article. *Article 5* of the convention states that all measures for the prevention of custodial torture are applicable if commits within a national territory or on ship/cruise, aircraft registered with the nation. *Article 10* says that that the education of torture comprising methods and prevention for the same should give to people of armed forces, police personnel and law officers. *Article 11* reported that each part should keep an eye on how the system is working on curbing torture. There should be systematic management of rule and regulations. The system must have all the details of arrest, interrogation and detained. *Article 13* ensures that if a person alleges to be tortured within the territory of the same jurisdiction can file a case on the officers who tortured him. And the court will take all the necessary steps for the justice to the victim. And with the reference of article 13, *Article 14* provides all fair rights to the victim for demanding compensation for his physical, mental and social loss.

AMNESTY International constantly been vehement shrieking on the violation human rights. Torture, custodial violence, custodial death, gang rape in custody and fake encounters are some of the ways of violation of human rights Here is the relevant portion from the AMNESTY report. Torture is very common nowadays. Victims of torture are those in relation with criminal investigation. In order to get information and confession, police officer tortured the accused. Some are arrested to save their friend and relative who are actually accused and this is done within the umbrella of political powers, leaders of ruling state party and businessman. The most common. methods of custodial torture are beating, ejecting chilli and thick stick in rectum, hanging upside down and burning and stabbing by sharp instruments. Those who expose the violation of human rights are also being detained and tortured. According to AMNESTY, people from underprivileged and weaker section of India are mostly fall prey to custodial torture. They are suppressed by the political leaders and local mafias, because it is much easy to trap poor people by blackmailing them and their families. These people do not have any rich or powerful backgrounds. And once they are trapped in the vicious circle of the society their life gets ruined. Once they put behind the bars, they became the victims of torture and due their poor background there are little chances of getting redressal and compensation.

AMNESTY observed that it is mandatory for a magistrate to set up an inquiry on a person's death in police custody. But in India only 42 out of 415 cases of custodial deaths are inspected by the magistrate. Indian System do not provide compensation for the wrongdoing of their officers instead they argued that they are not responsible or liable for the doings of their subordinates and agents. However, government proposed that victim can file complaints under civil suit but the procedure for the same is very expensive and a normal layman can't afford these expenses. AMNESTY remarked the reason behind the constant practice of torture in India. The reason is that the police think that

they are the superior one. They can dominate anyone. They can punish anyone they can punish and torture the accuse in way they want to. They are well known of the fact that they won't be held liable for killing and encountering of accused. No one will question them because they have their powers and support of ruling party. Some other internal factors are lack of education to police about their working conditions, lack of knowledge of laws and their limits of working within laws and the involvement of political parties in every activity of the department. IN order to curb out custodial torture in India⁹ AMNESTY made some programmes based on the research are adopting an official policy to protect human rights, investigate impartial all allegations of torture, Investigating the cause and ways of torture, providing medical treatment to the detainee and compensation to the victims.

Conclusion

It is hard to rely on a fact that this crime is done by our saviours. This crime is done by those who are appointed for our safety, who are appointed for the protection of laws and rights, who are appointed for bringing out all the illegal things and person behind those illegal actions, who are appointed for punishing the wrongdoer. The term custody indicates the protection and guardianship of person whether detained or not. But here in custody means that the "saviours" torture the people who are yet not proven guilty. It is excruciating fact that the police use lousy ways of torture like mental torture, rape and other harsh punishments.

Suggestions

In order to eradicate this criminal practise from our nation, it is very essential for victims and layman to raise voice against this malfeasance. We need to unite, we need to prove the golden words of our constitution "WE THE PEOPLE", here it comprises media, legislature, judiciary and the common man. We need to make police realise that they are our rescuer not executioner.

Based on the above study, some suggestions are made such as no importance should be given to the pre-trial confession. There should be involvement of magistrate and judiciary to prevent inhuman treatment and torture in custody. The officers must follow the laws. If they fail to do so, they must be punished. It is very important to provide proper training education to the police. Especial trainings must be there on how to intact with the arrestees and how to deal with the accused without infringing their human rights. Very well-maintained interrogation room with trained and gentle officers can eradicate custodial torture and Women detainee be interrogated by women officers only.

Till date there is no anti torture bill in India. It is very essential to frame anti torture bill in India, which contains definition of torture, punishment for all the wrongdoer and compensation for the victims. Authorities can set up an independent inspection committee in every police station premises to check upon torture. This committee consist of member from outside such as retired strict officers, social workers and advocates. We must inculcate the quality of being vigilant in us. With this quality we can easily pre determine the upcoming danger to the society. This will help us to fight with atrocities and injustice around us. If an accused fall ill, must provide with all medical facilities. All the implements for suicide must be removed from the cell, if he tries to commit suicide and therapy session should be arranged for him. No compulsions be made on doctors for giving false post mortem report of victim of custodial violence. There should be new formulation of laws which follows equal laws for all the people who are in police custody or for the persons who are under a judicial proceeding.

⁹ <http://www.legalservicesindia.com/article/297/Custodial-Torture.html>