



Issue of custodial violence and Indian judiciary

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Abstract

Torture in custody flouts the basic rights of the citizens recognized by the Indian Constitution. It is generally difficult in cases of deaths in police custody to secure evidence against the policemen responsible for resorting to third degree methods since they are in charge of police station records which they do not find difficult to manipulate as in this case. The guidelines given under various cases by the Supreme Court provide protection from such violence such as the person arrested must be immediately informed about the grounds for arrest, right to bail, right to nominate a person to be informed of the arrest and place of detention etc. Despite all these initiatives, torture and ill treatment continues to be endemic throughout India and continues to deny human dignity to thousands of individuals.

Keywords: custodial violence, human dignity, Indian judiciary

1. Introduction

Custodial violence, which includes torture, death and other excesses in police custody or prison, is not a new phenomenon. It has been in the world for ages. The law enforcement agencies had been practicing this on prisoners, criminals and the wrongdoers. Even in ancient Indian history, we find ruler like 'Nanad' Mahapadam in Mauryan era who had put the entire family of 'Chandra Gupta Maurya' into prisons and only as much food was provided to entire family which was sufficient for survival of one person only. Kautilya in Arthashastra, speaks about various kinds of torture such as burning of limbs, tearing by wild animals, trampling to death by elephant and bulls, cutting of limbs and mutilation etc. During the Gupta period (A.D. 320-500 A.D.) trial by ordeal was common. In the post Gupta period, torture of prisoners became a method of punishment. In the Mohammedan period the Shariat, law was applied to crimes; a thief hands to be cut off, life for life, tooth for tooth was the basic principle of Muslim criminal Jurisprudence which is still followed in Islamic country. The British Raj was also notorious for using violence in police custody. Men, women and children were caught, beaten and tortured to make them confess to crimes, which they did not commit. During this period political workers were picked up for questioning and if they did not provide the desired reply they were subjected to torture. The naked lying on ice, the denial of food or insufficient quantity of food, excess physical work and physical beatings were some of the methods employed during British Rule to punish law breakers mostly political prisoners and workers. One important point which needs to be mentioned is that the perpetrators of atrocities and immoral acts were the servant of the foreign Government. Their judiciary, police, jails and all the laws were made for their own benefit and convenience. But we in independent India follow the same model and the same penal code without many

amendments. Our police system is same which was prevalent during British system. It was introduced by Britishers; in the year 1861 primarily to enable their administration to have at their disposal a force at a cheap cost to help them rule the country by suppressing anti governmental forces and guided by such an objective the police became the symbol of colonial repression and were for obvious reason hated by the masses. The "Prison Act", which was passed in 1894, has also remained unchanged. The Act gives vast power to jail officials to punish prisoners if they break jail rule. Probably mind set of peoples as well as police and rulers i.e. executives both political and bureaucracy has remained same only power has been transformed from foreign ruler to our native ruler. The phenomenon of custodial crime is not new in India. We had reference of Torture and violence with the police in India, even since the Vedic age (2000-1400 B.C.). The ordeals of fire, water and single combat were used. In the Epic period (1400-800 B.C.) torture was practiced on prisoners by the police. Torture in various forms was widely prevalent in age of laws and philosophy (800 B.C. -320 B.C.). Kautilya's Arthashastra speaks about various kinds of torture such as burning of limbs, tearing by wild animals, trampling to death by elephants and bulls, cutting of limbs and mutilation etc. Manu, the law giver of this age emphasized the necessity of torture to protect the society from the hands of the criminals. The Buddhist period (B.C. 300-300 A.D) was an age of great humanitarianism and administration of justice had become correspondingly imbued with the humanitarian ideals. Torture in any form was strictly forbidden and special favours were shown to prisoners, who happened to be women, aged or who had many dependents. In Gupta Period (A.D. 320-500) if the facts against prisoners were not clearly established by evidence, recourse was to be held to the four kinds of ordeals, trial by ordeal fairly common. Under the Mughals, no criminal or civil code existed. Torture to extort confession was widely

spread (Ghosh and Rustomji 1993).

2. Custodial Violence and Indian Judiciary

The prior stand of Indian judiciary on the application of the provision of international law was that unless specifically incorporated by local laws, these international laws do not create rights in municipal law. The Supreme Court of India has altered the law in this regard now it is a settled principle that if international laws are not in opposition to Indian law then they are legitimately enforceable as a feature of right to life, freedom and due process provision of the Indian Constitution. The Supreme Court of India has perused the provisions of the UDHR into the part iii (fundamental rights) in the Constitution of India. Abominations and torment by legislative offices particularly police in India has always been a topic of curiosity and interest. In perspective of Article 21 of the Constitution, any type of torture or cruel, barbaric treatment is precluded^[1]. Torture is not passable whether it happens amid examination, cross examination or something else and State is responsible if a person in custody of the police or others is deprived of his life except in accordance with the procedure established by law. The commitment forced by article 21 requires the State to take managerial and every single measures to protect 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 any individual, especially on account of any State office or police drive^[2]. Notwithstanding the security gave under the Constitution, the Protection of Human Rights Act, 1993, likewise accommodate assurance of all rights to each person.

3. Concept of Custody

Section 167 of the Code of Criminal Procedure talk around two sort of custody i.e. police custody and judicial custody. According to the area of section 167(1) of Cr.P.C., the judicial officer to whom a blamed person is sent, may whether he has or not has jurisdiction to try the case, every once in a while, approve the confinement of the charged person in such authority as he may think fit. Given that the judicial officer may approved the confinement of the charged individual, generally than in the authority of the police, passed the time of 15 days in this event if he is satisfied that sufficient ground exist for doing so. So according to area of section 167 (1) of Cr. Pc. 'police authority' can be allowed for greatest time of fifteen days just' Police force basically means police remand with the end goal of interrogation or cross examination of the charged person. In law actually a police officer has two event to keep a person in its custody firstly, from the period when he capture a man till the production of the said person in the court i.e. first 24 hours of the arrest of accuse. Secondly, when police gets, remand from court after producing the accuse in the court which can be extend up to a maximum period fifteen days, thereafter, a person is sent in judicial custody which in general terms means jail or prison, where an accuse remain in

custody till he gets bail or if convicted and sentenced to jail till the completion of sentence. According to law, 'custody' of a person start when the police capture him. Other kind of custody as specified before is legal custody 'which implies sending a person in jail. According to section 3 (1) of The Prison Act, 1894 "Prison" means any jail or place used permanently or temporarily under the general or special order of a State Government for the detention of prisoners and include all land and building appurtenant thereto, but does not include:-

- a. Any place for the confinement of prisoners who are exclusively in the custody of police; or
- b. Any place specially appointed by State Government under section 541 of the old Criminal Procedure Code, 1882.
- c. Any place, which has been declared by the State Government by general or special order to be subsidiary jail.

Enactments Facilitating Custodial Violence: There is group of Indian law, which is responsible to an extent for encouraging torture or abuse. Specifically the powers to preventively confine the charge person provided for in the Indian Constitution involve the suspension of important legal and Constitutional Safeguards and thereby facilitate torture and cruel, remorseless and degrading treatment of detainees. Clause 3 (b) of Article 22 of the Indian Constitution reject those kept under preventive detention legislation from the privilege to know the grounds of capture "as soon as may be", the right to consult and be defended by a legal practitioner of their choice and to be delivered before a magistrate within 24 hours as assured under Article 22.

4. TADA, POTA and Custodial Violence

Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA), which slipped by 1995, was found to have encourage the widespread use of torture by law authorities and also pulling back the protection under article 22 of the Constitution for those suspected of broadly defined offences of "disruptive activities" and "Terrorist Act" it additionally defends and there by encourage the use of torture. Under Sections 25 and 26 of Indian Evidence Act, is made to cops are not admitted as evidence. These provisions recognize the threat in depending upon such "confessions" in perspective of the proceeding with doubt that they will be acquired by the Police resorting to illegal practices including torture. Proof of the proceeded with utilization of torment to extricate admission, notwithstanding this clear defend fortifies the requirement for its proceeding with presence and thorough application However, Section 15 (1) of TADA suspended this shield and influenced confessions to a police officer of the rank of Superintendent of Police and above admissible in evidence.

Area 32 of the Prevention of Terrorism Act (POTA), 2000 is like Section 15 of TADA. Before going of this Act, NHRC communicated its feeling, that, "this would expand the likelihood of intimidation and torture in securing admissions and along these lines be conflicting with Article 14 (3) of the International Covenant on Civil and Political rights." Its worries seem to have been acknowledged practically

¹ ADM v. Shivakant Shukla, (1976)2 SCC 521, SunilBatra v. Delhi Administration, (1980)3 SCC 488.

² ADM v. Shivakant Shukla, (1976)2 SCC 521, SunilBatra v. Delhi Administration, (1980)3 SCC 488.

speaking. In Gujarat there have been a few assertions made by prisoners in Court that admissions have been extricated coercively from them and additionally specifically encouraging torture by suspending shields for prisoners.

Sections 45 and 197 of the Cr. P.C provide insurance of protection from prosecution to members of the Armed Forces and public servants for anything done or purported to be done by them in discharge of their official duties except after obtaining the consent of the Government. The insusceptibility gave in Sections of the Cr. P.C. is reflected in state enactment administering Police activities, frequently in the appearance of restriction of time for bringing activity.

5. Dimensions of Custodial Violence

The occurrence of custodial death and its expansion in numbers has thrown up larger inquiry on the infringement of law and misuse of powers by the police or custodian of law during the conduct of investigation. Police as a law-enforcing body it is their obligation to shield the general public and person. To get information from relatives and near and dear about the suspected, at times these near and dears are grabbed for questioning and cases are not known where people are captured by the police yet no passage of capture has been made in the enroll and it is just when the police chooses to deliver the individual captured and got before the Magistrate they make a section of capture in the enlist, making records demonstrating that they have agreed to prerequisite of creation inside 24 hours as indicated by the law. Under such circumstance question of individual freedom and government managed savings or security of society must be adjusted ^[3]. To any enlightened society, there can be no characteristics more imperative than the life and individual freedom of its part and this is clear from the vital position given by Courts to Article 21 of the Constitution ^[4].

The court in State of Bihar V. Kameshwar Prasad ^[5] states that that no individual from the official can meddle with the freedom of a subject except on the condition that he can support the legality of his action before a court of justice and it is the rule of British justice that judges ought not evade from choosing such issues in the face of the executive. It is the same jurisprudence, which has been adopted in this country on the basis of which the courts of this country exercise jurisdiction, though our Constitution is very jealous of the concept of personal liberty.

The individual freedom of a person as articulated by the Supreme Court of India on account of Mohamad Karim @ Mohd. Subrati V. State of W. Bengal ^[6] is secured by our Constitution, but this liberty is not absolute. The privilege of the general public overall is from its extremely nature, of considerably more prominent significance than that of an individual ^[7]. In Prabhu Dayal Deorath etc. V. The District Magistrate of Kamarupand other ^[8] emphasis was given to the protection of life and personal liberty as stated in the Article

³ Rameshwarlal V. State of Bihar, AIR 1968 SC 1303

⁴ Kehar Singh V. UOI AIR 1989 SC 653

⁵ AIR 1965 SC 575

⁶ AIR 1973 SC 207

⁷ Mohamed Karim V. State of W. Bengal: AIR 1973 SC 207

⁸ AIR 1974 SC 183

21 of the Constitution of India wherein it has expressed that no individual might be denied of his life or individual freedom with the exception of as indicated by methodology set up by law.

In Raghbir Singh v. State of Haryana ^[9], while dealing with torture in police custody, the court observed: "We are deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of the law gore human rights to death. The powerlessness of human rights expect a horrible, agonizing impact when the rough infringement is executed by the police arm of the State whose capacity is to secure the resident and not to confer grisly offenses against them as has occurred for this situation. Police lock-ups, if reports in newspapers have a streak of credence, are becoming more and more gruesome cells. This development is terrible to our human rights awareness and humanist constitutional order."

In another case of Gauri Shanker Sharma etc. v. State of U.P. ^[10], the Court held: it is generally difficult in cases of deaths in police custody to secure evidence against the policemen responsible for resorting to third degree methods since they are in charge of police station records which they do not find difficult to manipulate as in this case. The offence is of a serious nature aggravated by the fact that it was committed by a person who is supposed to protect the citizens and not misuse his uniform and authority to brutally assault them while in his custody. Death in police custody must be seriously viewed for otherwise we will help take a stride in the direction of police raj. It must be curbed with a heavy hand. The punishment should be such as would deter others from indulging in such behavior. There can be no space for mercy.

In Munshi Singh Gautam and other v. State of M.P ^[11] the honorable court held that particular sort of cases must be taken differently from that used for ordinary criminal cases for the reason that in a case where the person is alleged to have died in police custody, it is difficult to get any kind of evidence. The Court observed: "Rarely in cases of police torture or custodial passing of a person, direct visual evidence is available about the complicity of the police personnel, who alone can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of fellowship, it isn't obscure that police faculty want to stay noiseless and as a general rule even deviant reality to spare their associate. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case often results in miscarriage of justice and makes the justice-delivery system suspect and vulnerable. In the ultimate analysis society suffers and a criminal gets encouraged. The courts must not dismiss the way that passing in police custody is maybe one of the most noticeably bad sorts of wrongdoing in a humanized society administered by the lead of law and represents a genuine danger to a deliberate

⁹ AIR 1980 SC 1087

¹⁰ AIR 1990 SC 709

¹¹ AIR 2005 SC 402

edified society. Torture in custody flouts the basic rights of the citizens recognized by the Indian Constitution and is an attack on human respect. The excess use of power by police and the maltreatment of detainees/under trial prisoners or suspects create a image in any nation that the men in "khaki" is to consider themselves to be above the law and sometimes even to become a law unto themselves. Unless stern measures are taken to check the malady of the very fence eating the crop, the foundations of the criminal justice- delivery system would be shaken and civilization itself would risk the consequence of heading towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually lose faith in the efficacy of the system of the judiciary itself, which if it happens, will be a sad day, for anyone to reckon with.

In yet another instance of Nilabati Behera alias Lalit v. State of Orissa and ors ^[12], recognizing the 'public law' nature of the right to reparation, the court held: When the court molds the relief of compensation in proceedings under Article 32 and 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizens. The payment of compensation in such cases is not to be understood as a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/ and prosecute the offender under the penal law.

In case of Inderjeet v. State of Uttar Pradesh ^[13] the Apex Court hold the view that prison restrictions amounting to torture, pressure or infliction and going beyond what the court authorize, are unconstitutional further it expanded that an under-trial or sentenced detainee cannot be subjected to physical or mental restraint, which is not justified by the punishment awarded by the Court, or which amount to human degradation.

In D.K.Basu v. State of West Bengal ^[14], after enumerating the rights of an accused/detenuue and on the aspect of dealing with custodial death, the Supreme Court held as follows:

"Custodial passing is maybe one of the most exceedingly awful violations in an enlightened society administered by the lead of law. The rights characteristic in Articles 21 and 22(1) of the Constitution require to be desirously and carefully ensured. We can't wish away the issue. Any type of torment or brutal, barbaric or corrupting treatment would fall inside the hindrance of Article 21 of the Constitution, regardless of

whether it happens amid examination, cross examination or something else. In the event that the functionaries of the Government move toward becoming crooks, it will undoubtedly breed scorn for law and would energize disorder and each man would tend to end up law unto himself along these lines prompting anarchanism. No acculturated country can allow that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These inquiries touch the spinal string of human rights' statute. The answer, indeed, has to be an emphatic "No". The appropriate response, for sure, must be a determined "No". The valuable right ensured by Article 21 of the Constitution of India can't be denied to convicts, under trials, detenus and different detainees in care, aside from as indicated by the technique built up by law by setting such sensible confinements as are allowed by law. Torture of a human being by another human being is essentially an instrument to impose the will of the strong over the weak by suffering. The word torture today has become synonymous with the darker side of human civilization. In every custodial wrongdoing what is of genuine concern isn't just punishment of body torment however the psychological desolation which a man experiences inside the four dividers of police headquarters or lock-up. Whether it is physical assault or rape in police custody, the extent of trauma a person experiences is beyond the purview of law. Custodial torment is an exposed infringement of human nobility and debasement which crushes, to an expansive degree, the individual identity. It is a calculated assault on human dignity and whenever human dignity is wounded, civilization takes a step backward. The expression "life or personal liberty" in Article 21 includes the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries. The valuable right guaranteed by Article 21 cannot be denied to convicts, under- trials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

The guidelines given under this case and the Criminal procedure code provide some safeguards against custodial abuse:

1. While making a capture, the cops must distinguish themselves and must bear clear recognizable proof of their names and designations.
2. The person arrested must be immediately informed about the following:
 - a. Grounds for arrest
 - b. Right to bail (in aailable offence)
 - c. Right to nominate a person to be informed of the arrest and place of detention, who shall be informed without delay and whose details should be entered in a diary kept in the police station.
3. A capture notice ought to be set up at the season of capture containing the time and date of capture, marked by a free witness and countersigned by the prisoner. The captured individual should be taken before the justice or officer accountable for police headquarters immediately.
4. In the event the offence isailable, the detainee should be released immediately upon furnishing bail.

¹² AIR 1993 SC 2366

¹³ AIR 1980SCR(1)255

¹⁴ AIR 1997 SC 610.

5. Even if the offence is non-bailable, the police officer should endeavor to complete investigation within 24 hours and must have sufficient justification for seeking custody beyond 24 hours.
 6. At the time of arrest, there should be a physical examination of the detainee and any injuries found should be noted in an inspection memo to be signed by the detainee and the officer effecting the arrest.
 7. Every 48 hours, the detainee should be examined by a doctor from an approved panel of doctors; copies of all the aforesaid documents should be sent to the concerned magistrates. The NHRC has also suggested that at the time of release from police custody, there must be a medical certificate indicating the state of the prisoner with a record of injuries, if any.
 8. All captures made without a legal warrant should be accounted for to the District Magistrate by the officer responsible for each police headquarters, alongside data whether safeguard has been conceded.
5. <http://www.voiceofresearch.org>. 2018.
 6. <http://www.lawyersclubindia.com>. 2018.
 7. <http://www.scribd.com>, 2018.

6. Conclusion

Custodial violence and custodial deaths is not a new phenomenon. It is prevailing in our society from the ages. Despite several initiatives in recent years, torture and ill treatment continues to be endemic throughout India and continues to deny human dignity to thousands of individuals. Custodial torture has become so common these days that not only the police and bureaucracy but even people take it for granted as a routine police practice of interrogation. The result is that the news of such outrageous conduct causes nothing more than a momentary shock in the society. When a custodial death occurs, there is a public uproar, which either dies down with time or at the most subsided by constituting an enquiring committee. The law in all countries authorizes the police to use force under certain circumstances. This authority is in fact, basic to its role and cannot be questioned. It is a part of policeman's legal mandate. Despite of legislations, which secures the life and liberty of a human being, despite of so many reports given by so different committees time to time, why there is still custodial violence, torture and custodial deaths are happening. We do accept that police works under so much of pressure and other disturbances, than work is also there, but the police certainly has no right to inflict brutality on a helpless person under its custody ignoring the canons of law'. In a democratic country like India, it's the people and not the police who are the real masters as the sovereign power is rested with them. The police are simply the agent of the government which is ultimately accountable to the people. The police have to protect the society from the acts of murderers, armed robbers, habitual criminals, and terrorists and make it a safe place to live in.

7. References

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