

# Indian Judiciary and Custodial Torture

Urmi H Raval

Guide : Dr. Suja Naiyar

## Introduction,

It is a clear fact that crimes have been existing in human kind since a long time in its varied forms but in cases where violence is involved there have been various systems that are available to prevent it which may in form of religious teachings, philosophical ideas existing in society, communal norms or laws made by the society.<sup>1</sup> Today, generally what we

follow after the crime is committed is to put up a person in custody with police with idea that free movement of the person is not viable for the peace and harmony of society. The most fundamental question when dealing with a detainee is whether or not his human rights are being respected while he is in detention.

One of the worst breaches of human rights in the world is police brutality, or what is known as custodial torture or harassment in other parts of the globe. For any modern state to be considered civilised and democratic, with competent government in place and its population enjoying freedom, human rights protection must be at the top of its agenda. It is shocking, however, that police in all democratic societies often violate citizens' rights under the guise of keeping the calm and thwarting criminal activity.

In the case of *D.K. Basu v. State of West Bengal*, Hon'ble Judge Dr. A.S. Anand made the following observation: :

*"No other human rights violation has been the focus of as many Conventions and*

*Declarations as "torture," all of which seek to outlaw the practise entirely. Despite these efforts, however, torture is more common than ever before. To put it bluntly, "custodial torture" is a kind of torture that destroys a person's identity to a devastating degree. It's an intentional attack on people's pride, and everytime it is hurt, civilization takes a step back, thus the flag of humanity should be at half-staff whenever that happens."*<sup>2</sup>

Though police atrocities or custodial torture inflicts physical pain but more importantly the mental agony suffered by the person is the key concern and that greatly affects his psychology and creates a position where he is completely exhausted and find himself as destroyed.

Such effect on the mind remains till the last breath of the person and hence great efforts are being internationally to stop this gross violation of human rights.

The present paper is divided into various sections. The first section covers the basic provisions from the International Conventions and Declaration on the aspect of custodial violence and tortures. The second sections would discuss provisions which have been laid down in Constitution of India and third section of the paper discusses statutory provisions in India such as (IPC), (CrPC) and (IEA). Section four relates to landmark cases relating to the topic. The fifth section deals with the recommendations by author to curb custodial torture followed by conclusion.

## CHAPTER-1 CUSTODIAL TORTURE:

### INTERNATIONAL & INDIAN LEGAL FRAMEWORK

One of the disturbing aspects of custodial torture or atrocities by police is that it is crime of obedience. Generally the crimes are such which are opposed to authorities but this are such crimes which are done by specific instructions of authorities or under such environment which is politically motivated that sponsors such crimes or expects such crimes to be done and tolerates such acts from the authority.<sup>3</sup> It is also opined that the modern tortures by the state is goal orientated and has wider scope than just violence, confession or punishment.<sup>4</sup>

The problem of Custodial Violence has become prevalent in international arena and is one of biggest concerns and curbing it is a global challenge.<sup>5</sup> Therefore various articles in different convention have provided for preventing the cases of custodial violence and atrocities by police. Few of the important conventions are:

#### 1. UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (CAT) 1984:

Article 1(1) of this convention has defined 'torture' as:

*"Torture is the deliberate inflicting of extreme suffering or discomfort on another individual for the goal of obtaining intelligence, a confession, retribution for an act that victim has performed or is suspected of doing, coercion, intimidation, or any other motive founded on prejudice of any type. Any harm suffered as a direct consequence of lawful sanctions is not included."*<sup>6</sup>

By reading above definition we can see a

broader approach has been made here and this convention is also used for those soldiers who have been captured in war.

#### 2) The Universal Declaration of Human Rights (UDHR):

No one will be subjected to torture or other cruel, barbaric, or degrading treatment, as set down in this 1948 article, one of the most significant texts in the history of human rights protection. The relevance of this treaty's provisions has grown since it became part of customary international law. <sup>7</sup> It's worth noting that the Fifth United Nations Congress Declaration from 1975 shares this declaration's goal of securing a ban on torture. <sup>8</sup> This declaration, officially titled "The Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," was created to make sure that no one is ever tortured or subjected to other forms of cruel, inhumane, or demeaning punishment or treatment.

3) International Covenant on Civil And Political Rights (ICCPR), 1966: Although the aforementioned agreements all agree that no one should be punished with torture or other cruel, inhuman, or demeaning punishment or treatment, Article 7 of the ICCPR goes further by explicitly stating that this provision is non-derogatory and must be upheld even in times of national emergency. Therefore such efforts on international level brings a sense of confidence that the international community is willing that moral and physical integrity is preserved of all human beings.<sup>9</sup>

By such efforts being done from the time period since long it is amply clear that the international community and organization

are much vigilant for this special crime that has to be stopped as there is great loss to the victim and the most disturbing is that it being committed by those people who have duty to prevent such acts.

## CHAPTER-2 CONSTITUTIONAL PROVISIONS

Indian Police have been involved in custodial tortures since long and citizens are very well aware of such acts being performed. The biggest weaknesses of the justice system in India is that it does not provide any law that helps in prohibiting the misuse of power by police. In plethora of cases the Apex Court have given guidelines for the same but the implementation lacks. However there are

certain safeguards that aim to prevent such tortures.

Indian Constitution does not expressly prohibit the "torture" or has no definition but by various articles it aims to protect the victims of such crime and prevents accused from going through arbitrary procedures of arrests and convictions.

Article 20 provides that there should not be retrospective applicability of any penal laws. It also provides protection to person from the double jeopardy and self-incrimination. Often police in India have been resorting to violence for the purpose of confession and trying in harsh manners that accused self incriminates himself. Therefore in order to protect such scenarios the constitutional provision prevents the accused from such hardships. Further Article 21<sup>11</sup> of Indian Constitution provides that a due procedure of law has to be followed before the question of right to life or liberty is decided. Further in order to protect arbitrary arrest Article 22<sup>12</sup> of Indian Constitution provides the things to

be done when a person is detained or arrested. He has to be produced with 24 hours before the Magistrate and has to be informed the grounds which he is arrested and it provides right to be defended by advocate that he chooses.

Also, if a person's rights under Articles 32 or 226 are infringed, that person may file a complaint with the Supreme Court or High Court, both of which have the authority to issue writs.

In its seminal decision *D.K. Basu v. State of West Bengal*, the Supreme Court was happy to remark (at Paragraph no. 22) that: "*Death in custody is a heinous act in any lawful society. Articles 21 and 22(1) of the Constitution provide fundamental rights that must be fiercely guarded.*"

*The issue cannot be wished away. Article 21 of the Constitution prohibits any kind of torture or cruel, inhuman, or humiliating treatment at any time, including during investigations and interrogations. If government officials themselves breach the law, public distrust of authority figures will rise, lawlessness will spread, and anarchy will result as individuals seek to establish their own legal codes. Absolutely no civilised country could ever tolerate such a thing. Does an individual's right to life end the minute police take him into custody? When a person is arrested, is his right to life suspended? The answers to these issues go straight to the core of human rights law. Without a doubt, "No" must be the correct response. Article 21 of the Indian Constitution states, "The right granted by this Article must not be denied to any convict, under trial, detainee, or any prisoner in custody, save in accordance with the process provided by law, by establishing such reasonable limits as are permissible by law."*

So, it is clearly obvious that the constitutional courts of the nation are considerably active in limiting custodial brutality and torturing and protecting the basic rights of the citizen, as shown by the aforementioned verdict.

### CHAPTER-3 STATUTORY LAWS

In India there are other provisions that

touches upon the aspect of curbing the custodial tortures and violence.

Section 330 of Indian Penal Code provides for voluntary causing hurt to extort confession or to compel restoration of property.<sup>13</sup> This section has been provided in order to prosecute police officers that resort to violence that causes hurt to person for the purpose of getting any confession, information regarding the offences. Hence this provision creates deterrence for the police officers<sup>14</sup> but ultimately the police officers are not deterred today as they have no fear of prosecution as higher authorities and politicians support them. Further extorting information in such a manner is also considered be a violation of fundamental right that is provided under Article 20(3) of the Constitution that reflects the right against self-incrimination.<sup>15</sup>

Further Mathura Rape Case<sup>16</sup> had brought in light the worst form in which police could act and that lead to important amendment in the Indian Penal Code. Section 376(1)(b) <sup>17</sup> was added which penalized the custodial rapes committed by police officers. This was much applauded amendment as it provided for prosecution of police officers who were misusing authority and committing such grave offences.

The burden of proof for the offence of custodial rape is also shifted on accused by virtue of Section 114 A of Indian Evidence

Act.

Since custodial cruelty and violation were common during British rule in India, Section 25 of the Indian Evidence Act, 1872 states that no conviction made before a policeman may be utilized against the accused. Section 26 of the same act states that a testimony made while in police custody may not be used against by the accused unless the presence of the magistrate is required.

Indian Police Act, 1861 has also provides under Section 7<sup>20</sup> and 29<sup>21</sup> that a police officer can be dismissed or penalized or suspended if he is negligent in discharging his duties. Hence a police officer can be prosecuted under this act also for the purpose of custodial tortures.

As per the Code of Criminal Procedure, 1973 it has been provided under Section 54 that medical examination of the arrested person shall take place as soon as he is arrested. This ensures and safeguards the accused from any custodial torture that takes place. It has been observed many times that injury marks post the medical examination have been shown by the accused whenever they are produced before the magistrate that they have been subject to custodial tortures and in many decision the trial courts have taken on record. Further in order to safeguard the minors and women from any custodial torture and atrocities, section 160 of Code of Criminal Procedure provides that they cannot be summoned other than place of residence. Further with rise in custodial tortures and cases of custodial death increasing by the virtue of The Code of Criminal Procedure (Amendment) Act, 2005 section 176 of Code of Criminal Procedure is amended and the magistrate is now also required to inquire into “disappearance” of the accused from the

custody with death in custody. Hence this has greatly enlarged the scope and we can clearly see the efforts of governments wishing to curb the custodial violence.

#### **CHAPTER-4 INDIAN JUDICIARY AND CUSTODIAL TORTURE**

Judiciary has adopted very strict approach whenever the cases of custodial tortures have come before the bench for consideration. There are very few cases where the cases of custodial tortures are reported and one such case is of *State of Maharashtra v. Ravikant Patil* <sup>22</sup> where a murder had taken place of one Ganesh Kolekar. The police during investigation found out that the respondent was party to such crime. The police atrocity was written about in the newspaper as it stated that a parade or procession would take a prisoner who was being tried to different important city squares for an investigation. In this case, the prisoner on trial was the respondent, and it was found that his hands were put in handcuffs and his arms were tied with rope before he was taken out on the streets for the procession. So, to try to get money damages, filed for a petition. In this case, the High Court ruled that the judge can order the state or someone working for the state to pay compensation. As a result, the police inspector who was responsible for this atrocity was told to pay the recompense. This matter was brought before the Supreme Court, and based on the case *Rudul Sah v. State of Bihar* & Anr <sup>23</sup>, in which the State was asked to pay compensation for illegally holding someone, the Apex Court decided that in this case, too, a similar order needs to be made, and the State needs to pay compensation that will make justice fair. Also, in the *Bhagalpur Blinding Case* <sup>24</sup>, in

which the police blinded a number of prisoners who were awaiting trial, the Supreme Court ordered the victims to be compensated and said that if they weren't, it would mean that Article 21 of the Constitution is just a piece of rope. In this case, the Apex Court found three police officers guilty of doing such a horrible thing.

The Supreme Court held in *Kishore Singh v. State of Rajasthan* <sup>25</sup> that using excessive force is a violation of Article 21 and mandated that the state begin training police on human rights. The court said that such measures are ineffective in reducing crime and that hitting someone in police custody is the lowest of lows.

The Supreme Court accepted the article of the International Covenant on Civil and Political Rights, 1966 in the case of *Nilabati Behra v. State of Orissa*, <sup>26</sup> in which the petition was the father of the victim kid who was found dead alongside the railway track with numerous injuries that were unnatural because he had been in custody from two days before to the events. According to Article 9 of the International Covenant on Civil and Political Rights, the court awarded damages because it ruled that the death was caused by police violence (5).

(1) *Hence, the court always grants monetary compensation to victims in these cases, but never details how the police may effectively effect change and eliminate the flagrant breaches of human rights that are going place.*

(2) *The landmark decision in D.K. Basu v. State of West Bengal* <sup>27</sup> led to the enactment of a number of laws and policies to protect suspects from torture in police custody. These are the rules:

(3) *All law enforcement officers involved in the arrest and subsequent questioning of the detainee must clearly display their official titles and identity at all times. Details of all police officers who participate in the arrestee's questioning must be noted in a log.*

(4) *A person who was arrested and is currently being kept at police headquarters, an interrogating centre, or even other facility has the option to have someone, family, or someone having interest in the individual's welfare told, as quickly as practicable, that the person has been taken into custody.*

(5) *Someone should be informed, from family or friend, within 8-12 hours of arrest.*

(6) *The individual's entitlement to have a person told of his capture or incarceration shall be communicated to him as soon as possible after his arrest or detention.*

(7) *In the detention center's notebook, the arrestee's name, the name of his or her next of kin, and the names of the police authorities whose possession the detained person is to be noted.*

(9) *A medical check-up shall be performed on the suspect at the moment of arrest, whether or whether the suspect reports any injuries. The individual being arrested must be handed a copy of the "Inspection Note," which must be signed by the arresting officer and the suspect.*

(8) *At least once every 48 hours while*

*in custody, the arrested person must have a medical examination by a doctor who is on the list of authorised physicians designated by the Director, Health Services of the relevant State or Union Territory.*

(9) *The illaqa Magistrate should be provided with copies of the aforementioned materials, including the memorandum of arrest*

(10) *The suspect can meet with his solicitor during the interrogation, but not necessarily during the whole process.*

(11) *A police command center should be available at every state and district headquarters, and within 12 hours of making an arrest, the arresting officer must notify the police control room and post a notice in a prominent location detailing the arrestee's whereabouts in custody.<sup>28</sup>*

## **CHAPTER-5 RECOMMENDATIONS AND SUGGESTIONS**

With the gross violations of human rights taking place each day of several innocents and accused there is a need to stop this practice at any cost. Hence, these are some of the recommendations that help in prevention of custodial torture. The recommendations are:

1. At the time of selection of the police officers their personality and behavioral traits should be taken into account and the recruitment procedures should be based on scientific lines so that right kinds of candidates are selected.

2. In cases of police training, the trainers should be highly experienced and

motivated which provides required perfect training. The trainer should motivate the trainees that they perform their duty as per the prevailing rule of law and respect human rights. They should be taught special courses on human rights.

3. The major reason why such atrocities are committed is because the police is backed by the politics which ensures that no action is taken on the officer who involves in such tortures or politicians orders tortures on certain criminals. Hence, the police should be insulated from the political interference so that they do not get illegitimate protection from politics and also police is not motivated by politicians to act in such manner that leads to atrocities.

4. The level of human rights awareness in India is much lower in comparison to other countries and therefore due lack of awareness the people accept the treatments given by police that is in violation of their human rights. The people today are mentally prepared that they would be hit badly by the police and the torture would continue on them until they are in custody of police. Hence such awareness will change the mindset of people and in cases of police atrocities being committed the voices would be raised and the government would be pressurized and liable to take action against the officers as today government has maintained a lax attitude towards those police officers that have even been proved to be involved in custodial violence.

5. There is a need that torture victims are treated with much empathy and care. Today, after suffering such atrocities the victim has to knock the doors of the constitutional courts and wait for years

until his compensation is granted and the fate of such petition is also uncertain. Hence a compensation scheme has to be framed by the Central and State Government with mechanism that is independent from police departments and grants the compensation by fulfilling necessary enquiries.

6. The surprise visits to the police stations and the senior officials should increase units so that any atrocities by officers are detected as early as possible. The illegal detention of person and ill treatment to person would be hence reduced. If any violations are caught the officers should be prosecuted immediately.

7. India had signed UN Convention against Torture and in order to ratify such convention a bill was introduced in the Lok Sabha as The Prevention of Torture Bill, 2010. This bill provided punishments for torture that are meted out by the public servants or any person who by consent of such public servant inflicts such torture. However this was a good attempt but on consideration of definition provided in section 3 for torture, the definition does not provide for several aspects that are provided in the UN Convention under Article 1. The definition in this bill has not considered mental pain and suffering and also does not include acts that may be constituted as torture. Further it also creates a situation where the intension of the accused is to be proved. Hence in such cases the police officer's intention to inflict tortures can be hard to be proved in the court and they escape. Further the bill also requires that prior sanction from the government is required before the court takes cognizance of any offence that is complained of to be committed by public servant. Such sanctions are very difficult to be achieved and if politics support such

tortures and officers, the sanctions would never be granted. The Bill also does not provide for any mechanism by which the victim could claim compensation.

The Hon'ble Supreme Courts and High Courts have always granted compensations in cases of custodial torture and therefore such law against torture should have provision for compensation and also the UN convention provides for compensation.<sup>29</sup>

Therefore it is recommended that such bill with the above changes be passed by the parliament in order to curb the custodial violence and tortures.

## CONCLUSION

In order to create a security in the mind of the citizens and solving their grievances there is a need that conduct of police departments is honest, efficient and professional. The police force with such qualities does not exist in India. Therefore it is opined that large-scale police reforms are required in India. Such police reforms may include insulating police from the politics, setting up complaints mechanism where in citizen can file complain against police officials without sanctions of government. There is also requirement that government on getting information or suo moto start proceedings against those police officers who have been resorting to custodial tortures and criminally prosecute for such actions. Further awareness of human rights among the prisoners and police personnel is recommended to reduce the custodial tortures. The steps recommended are immediate in nature and should be implemented as soon as possible.

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<sup>10</sup> See Article 20, The Constitution of India, 1950.

<sup>11</sup> See Article 21, The Constitution of India, 1950.

<sup>12</sup> See Article 22, The Constitution of India, 1950

<sup>13</sup> Section 330, Indian Penal Code, 1860.

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