



Custodial Violence: A Growing Abuse of Human Rights in India

Smt. Supriya M.Swami*

B.A.LL.B.,LL.M.(NET)

If I can love myself despite of my infinite faults, how can I hate others at the glimpse of few faults?

Alexander.

I. Introduction :

Today, Human Rights not only enjoy positive recognition at the national level but international recognition as well. In fact, Human rights have become a yardstick in determining the status of a country's civilization. In determining a nation's rank in the political civilization no test can be so decisive than the degree in which human rights as defined by law is actually realized. It is not uncommon that every problem of today has been infested with some human rights dimensioned in one way or other. Criminal Justice system is not an exception to this general rule¹.

Any treatment meted to an accused while he is in custody which causes humiliation and mental trauma corrodes the concept of human dignity. The majesty of law protects the dignity of a citizen in a society governed by law. It cannot be forgotten that the welfare state is governed by rule of law. Which has paramountcy².

Custodial violence violates the inherent dignity of a person. It not only humiliates the victim but reduces him to a sub-human level. It ruins the victim both physically and mentally. They remain in a state of perpetual fear and horror whenever they remember the atrocities they survived in the custody of police. Custodial violence, including torture and death in the lock-ups, strikes a heavy blow at the rule of law which demands that the powers of the executive should not only be derived from law but also that they should be limited by law. These violations are committed under the shields of 'uniform and authority' between the four walls of a Police station and lock-

*Assistant Professor, KLE Society's B.V.Bellad Law College, Belagavi.

¹ D.K. S. K. Saini., "Victims of custodial violence in Human Rights Metamorphosis", Vol.VI, Vidyasthali Law Journal. Vidyasthali Law College, Rajasthan, Jaipur 2000..p.69.

² Dr. S. P. Sathe., "Liability of a Police Officer for custodial death: A Note" Vol.4. Issue1, Central India Law quarterly, Central India Law Institute, Jabalpur.2003, P.431.

up, where the victims are totally helpless. It is further aggravated by the fact that persons who are supposed to be protectors of citizens, themselves commit violations of human rights by practicing custodial violence³.

Human beings have been aware of their security, liberty and other essential conditions ever since the dawn of human civilization. Hence; Police must do what Lord Krishna preached in Bhagawatgeeta, that “I take incarnations to destroy the wicked and protect the innocent”. But a different situation we see today in our societies It is a reflection of a social system⁴.

Justice Krishna Iyer Observed:

“The first half of century made India free; the second half of our century must make Indians free; do you feel the weight of the iron on your heels when your brothers and sisters are in chains? One of the blessings of the bourgeoisie is that their moral fiber is vaccinated against fellow feeling. The long research to discover ourselves is the long march to invest human dignity, political dignity, economic dignity and social dignity on those humiliated hundreds of thousands who today are distanced far from a life enlivened by fundamental freedoms. The change is grave and demands proof”⁵.

II Meaning of Custodial Violence

The word ‘custody’ implies guardianship and protective care. It Implies protection even when a person is in custody or confinement, it does not carry any sinister symptoms of violence during custody. The custody contemplated may either be police custody in police lockup or judicial custody in prisons⁶.

However, the word ‘custodial violence’ has not been defined in the constitution or in other penal laws of India. The custodial violence by police over the victim is essentially an instrument to impose the will of the ‘strong’ over the ‘weak’ by suffering. It is a serious violation of human dignity which can destroy, to a very large extent the personality of any individual⁷.

Custodial violence is understood in a wider sense as meaning either 2.1) custodial Torture 2.2) custodial sexual harassment and Rape or 2.3) custodial death.

2.1 Custodial Torture

In *D. K. Basu v/s. State of W.B.*⁸, the Supreme Court discussing the meaning of custodial torture it observed:

³ B. N. Malik., *Police: A Philosophical Analysis*, 1ed, Prabhat Prakashan New Delhi, 1991, P.25.

⁴ Dr.B.D.Rawat, “Human rights and police torture in India”, *Journal of Minorities Rights*, Vol.2. Issue No.2 , A.K. New Law Academy, Pune. July 2011., P.28.

⁵ Justice V. R. Krishna Iyer., *Human Rights and Inhuman wrong*, 1ed., B.R. Publishing Corporation, Delhi. 1990. P.86.

⁶ Balvinder Kaur., “Torture & death in police custody a violation of right to life”, *National Capital Law Journal Vol.II*, Faculty of law university of Delhi, New Delhi, 1997., P.107.

⁷ B. N. Malik., *Supra Note 3*, P.31

⁸ AIR 1997 SC 610.

“Torture” has not been defined in the constitution or in other penal laws. “Torture” of a human being by another human being is essentially an instrument to impose the will of the “Strong” over the “Weak” by suffering. The word torture today has become synonymous with the darker side of human civilization.

Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone, paralyzing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself.

- Adriana P. Bartow.

Custodial torture is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilization takes a step backward, flag of humanity must one each such occasion fly half-mast⁹.

In all custodial crimes what is of real concern is not only infliction of body pain but the mental agony which a person undergoes within the four walls of police station or lockup. Whether it is physical assault or rape in police custody the extent of trauma, a person experiences is beyond the purview of law.

2.2 Custodial Sexual Harassment and Rape.

Sexually abusive behavior of police officer towards the prisoners is a matter of deep concern. They think female prisoners are subject to satisfy their physical desire. Rape by police including custodial rape is very common. A higher incident of abuse appeared credible, given other evidence of abusive behavior by police and the likelihood that many rapes were unreported due to a sense of shame and fear of retribution among victims. Though we have so many provisions of law like, Section 376(2), 376 C of Indian Penal Code 1860, Section 46(1) & 46(4) Code of criminal procedure, 1973 and Sections 114A & 146, Indian Evidence Act, 1872 to protect the victims but still these proved to be insufficient in controlling the violence at police custody¹⁰.

2.3 Custodial Death:

It is not possible to precisely define ‘custodial death’ generally custodial death means the death of a person while in custody of a detaining authority. Every defense is entitled to certain safeguards during the period of his detention and if death takes place due to the lack of these safeguards it may be treated as custodial death¹¹.

Custodial death, perhaps one of the worst crimes in a civilized Society. It is a matter of concern for many reasons. The incidents of custodial death as well as other atrocities affect the law & order, peace, tranquility and the life pattern of the main stream population. Police crimes associated with violence dampen the common man’s feeling regarding safety & security of the society¹².

⁹ Ibid. p.612

¹⁰ Dr. Pawan Kumar Mishra., “Custodial Death; A crude action of Human Rights violation”, Indian Human Rights Law Review., Vol.1., Comb ray & Co. Private Ltd. Calcutta., 2010, P.49.

¹¹ Syed Mohammad Afzal Quadri., “Custodial deaths: An analysis”, KULR, Vol.No.5, University of Kashmir, Srinagar, 1998, P.46.

¹² R.S. Verma., *Law relating to custodial and Human Rights*, Verma Publication, Delhi. 1998, P.3.

2.4 Causes of Custodial Death:

- 1). Negligence by the concerned authorities. This includes safety provided to the arrestee, medical aid to be provided to the detainees.
- 2). Torture and misconduct on behalf of the authorities.
- 3). Unlawful detention of a person more than the stipulated time.
- 4). Duress resulting to the person taking his own life to avoid the authorities or punishment.

One of the main causes of custodial death is the awful pressure on the police to detect cases whenever there is a surge in crime and particularly heinous crime. It is the police who singled out for blame. Unfortunately, many officers opt for rough and ready method for quick results. Third degree is generally believed to be a short-cut method of investigation by the police. Inability to cope with the rising crime rate and hierarchical pressures from above to produce quick result often force police to practice third degree methods. Those subjected to such violent methods often breakdown and confess the crimes, they may not have committed. Thus, police use torture to extract confessions for extortions or just to settle personal scores. Custodial death often occurs not because of an intention to kill the victims but as a result of excessive torture or when quite unknowingly, the officer injures some weak organ of the victim¹³. The toll of custodial deaths is on a rise according to the figures prescribed by the National Human Rights Commissions annual reports, which recommends for the need of strict & stringent law which controls these aspects of custodial violence.

III. Custodial Crimes in India: A Historical Perspective

The Phenomenon of custodial crime is not a new in India we had reference of torture and violence with the police in India, even since the Vedic age. The Police Commission, 1860 recommended the abolition of the military police as a separate organization and the constitution of a single homogenous force of civil constabulary under proposed Police Act, 1861. It is noteworthy to mention that present police system in the country is based on Police Act, 1861. After Independence, several police commissions were appointed by union and state governments to look into the performance and methods of working of the state police during 1950's, 1960's, of the early 1970 and 1980's¹⁴. The Government of India, having visualized the long felt need to replace the Police Act, 1861, setup a police Act Drafting Committee (PADC) in 2005 to draft a new police Act. The Act provides for social responsibilities of the police and emphasizes that the police will be governed by principles of impartiality and human rights norms, with special attention to protection of weaker sections of the society including minorities most recently many commissions¹⁵, emphasized that custodial violence needs to look upon very seriously and dealt with seriously and with promptitude with a view to eliminating this malaise from the system.

¹³ Dr.P.C. Jain., "Judicial Control of police in the accusatorial system", Kerala University Journal of legal studies' vol.IV, Department of Law University Press, Kerala. 2011. P.35

¹⁴ Assam Police Commission 1971, Bihar(1961), Delhi(1966-68), Kerala(1959), MP(1965), MAHA(1964), Punjab(1960), Raj(1973), T.N(1971), U.P.(1970), WB(1960) etc.

¹⁵ Reports of Administrative Reforms Commission on Public Order 2007 and Reforms of National Policy on Criminal Justice System 2007.

IV. Constitutional and Statutory Rights of Prisoners.

“Custodial Violence” is not only peculiar in India, but it is widespread. It has been the concern of international community because the problem is universal and the challenge is almost global. Some of the complex issues such as causes, consequences and prevention of torture as well as reparation, restitution and rehabilitation of victims of torture lead to global movement against torture led by United Nations.

4.1 International Framework:

The United Nations has played a key role in prevention of custodial violence including torture and to secure custodial justice. The United Nations since its formation has been providing standards and practices by introducing various international instruments such as Universal Declaration of Human Rights (UDHR 1948), International Covenant on Civil and Political Rights (ICCPR 1966), the UN convention against torture and other cruel, Inhuman and degrading treatment, the United Nations optional protocol of convention against torture and other cruel, Inhuman and degrading treatment and punishment (OPCAT 2006) and International convention for the procession of Act persons from enforced Disappearances (ICEPED 2001) etc. Article 5 in the Universal Declaration of Human Rights 1948 stipulates that, no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. International Covenant on Civil and Political Rights provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person¹⁶. Further, the accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted¹⁷. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent independent and impartial tribunal established by law¹⁸.

4.2 Indian Scenario:

4.2.1. The constitution of India 1950.

Our constitution has guaranteed certain rights and safeguards which the state should uphold for every citizens of the sovereign India. Some basic rights reads as under out of which Article 21 of the constitution is most luminary provision in the constitution and is a part of the scheme for fundamental rights, occupies a place of pride in the constitution. Right to speedy trial, right against handcuffing, right against inhuman treatment are some of the rights which come under the purview of the Article 21 related to prisoners.

Article 21 of the constitution which reads that; no person should be deprived of his life or personal liberty except according to procedure established by law. This procedure not only refers to the enacted law but also extends to the principles of natural justice¹⁹. The link between custodial violence and compensation is direct and set at rest any question regarding the compensation to be paid for violation of rights in Art 21 of the constitution of India²⁰. It should be made sure that the rights of the arrestees are restricted, which do not connote to violence of one's rights.

¹⁶ The ICCPR, 1966; Article 10(1).

¹⁷ Ibid. Article 10(2)(i).

¹⁸ Ibid.

¹⁹ D.D. Basu., *Constitution of India*, 18th ed., Lexis nexis publications, Gurgaon. 1999, P.168

²⁰ See Nilabati Behera V/s. State of Orissa (1993) 2 SCC 373; Ruddal shah V/s. State of Bihar (1983)4 SCC 141.

The protection of the Article 21 extends to all persons not merely citizens and it should also include even persons under imprisonment, many a times these principles have been vastly ignored by authorities meant to safeguard these rights. It is a duty of the state and its officials to look after every persons by offering immediate medical aid to every patient, regardless of the question whether he is an innocent or a guilty person but these have been greatly ignored by officials especially the police in general. Almost all the offenders brought in the custody of the police have been denied of their right to get the necessary medical aid that they should be getting and that is because of the fact that they are under trials, convicts and prisoners and are according to a majority of the society, not deemed fit to be a part of the society as they generally are looked down by the society²¹. There are numerous provisions in the constitution of India²² and also in other laws, but unfortunately most of the provisions have remained only on papers. It is generally the poor, disadvantaged and weaker sections of the society who are victims of custodial crimes because there is no one to care for them and to protect them. Unless the law of the land is upheld against the guilty law enforcement personnel, custodial violence will continue to rise.

4.2.2. The Code of Criminal Procedure 1973

Chapter V of Code of Criminal Procedure, 1973 deals with the powers of arrest of a person and safeguards which are required to be followed by the police to protect the interest of the arrested person. Under Section 49 the police is not permitted to use more restraint than is necessary to prevent the escape of the person. Section 50 enjoins every police officer arresting any person without warrant to communicate to him the full particulars of the offence for which he is arrested and the grounds for such arrest. Section 56 contains a mandatory provision requiring this police officer making an arrest without warrant to produce the arrested person before a magistrate without unnecessary delay and Section 57 echoes clause(2) of Article 22 of the constitution of India. There are some other provisions also like Section 53, 54 and 167 which are aimed at affording procedural safe guards to a person arrested by the police. Wherever, a person dies in custody of the police, Section 167 requires the magistrate to hold and enquiry into the cause of death²³.

In *Joginder Kumar v/s. state*²⁴, the Hon`ble Supreme Court observed, no arrest can be made because it is lawful for the police officer to do so. The existence of the power of arrest is one thing. The justification for the exercise of it, is quite another. No arrest should be made without a reasonable satisfaction reached after some investigation about the genuineness and bonafide of a complaint and reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person his liberty is a serious matter, any form of torture or cruel, inhuman or degrading treatment would fall within the ambit of Article 21 of the constitution. Whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto him thereby leading to anarchy. No civilized nation can permit that to happen, for a citizen does not shed off his fundamental right to life, the moment a policeman arrests him. The right to life of a citizen cannot be put in abeyance on his arrest. The precious right guaranteed by Article 21 of the constitution of India 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 are permitted by law²⁵.

²¹ Niranjana Man Singh & Prashant Roy., "Violation of Rights of Persons in Custody; with special reference to custodial death" The Journal of Legal Awareness, vol.1. Issue 2, Vidhigya Publications, Ghaziabad. 2006.p.45.

²² Article 19(1)(a), Article 20(1)(2)&(3), Article 22, Article 39(A) etc.

²³ D.K. Basu v/s. State of W.B.(1997)(1) SCC 416.

²⁴ AIR 1994 SC 1349.

²⁵ Supra Note 23, P.610.

To ensure Justice to the oppressed, the High Court in the case of *Mariayappan v/s. State of Tamilnadu*²⁶, directed to initiate criminal proceeding against the police officials and ordered state to pay compensation to the family. Further section 176(1) provides that²⁷, where any person dies while in the custody of the police replaced with a new sub-section(1A) where (a) any person dies or disappears, or (b) rape is alleged to have been committed on any women while such person or women is in the custody of police or in any other custody authorized by the magistrate or the court, under this code in addition to the inquiry or investigation held by the police, an inquiry shall be held by the judicial Magistrate or the Metropolitan Magistrate as case may be, within whose local jurisdiction the offence has been committed.

The Code of Criminal Procedure (Amendment) Act, 2008 was recently passed by parliament and has provided custodial safeguards for arrestee persons in police custody. The salient features of the Act are as follows:

- 1). Curbing the power of arrest
- 2). Protection of women in custody
- 3). Victims and witness protection and
- 4). Victims compensation

4.2.3 The Indian Penal Code 1860

Some punitive provisions are contained in the Indian Penal Code, 1860 which seek to punish violence of right to life.

Section 220 of IPC punishes a person who having authority commits for trial or confines any person knowing that in doing so, he is acting contrary to law.

Section 330 of IPC punishes voluntarily causing hurt for extorting confession or any information which may lead to the detention of an offence.

Section 331 punishes voluntarily causing grievous hurt to make a statement or a confession having reference to an offence to give any information which may lead to the detention of an offence.

Section 348 of IPC punishes wrongful confinement to extort confession.

Section 376(2) punishes rape committed in police custody.

4.2.4 The Indian Evidence Act, 1872

Section 25 of the Indian Evidence Act states that the confession made to a police officer shall be proved as against a person accused of an offence.

Section 26 of the Act states that no confession made by any person which he is in the custody of police officers unless it be made in the immediate presence of a Magistrate shall be proved as against such person.

These provision were enacted keeping in view discouraging the malpractices by police officials in extorting confession.

Police plays a vital in safeguarding the life, liberty and freedom of people. Thus everyone expects that police will be a protector of the rights of every citizen. But in fact, nobody approaches the police in case of violation of their rights or freedoms as they have a bad image of police in their eyes.

²⁶ 2000 Cri.L.J. 4459.

²⁷ The amendment through code of criminal procedure (Amendment) Act, 2005 which amended Section 176 of Cr.P.C., 1973 and inserted sub-sec (1A) to this section.

V. Role of Judiciary in prevention of Custodial Crimes:

Judiciary through various pronouncements played pivotal role in dealing with custodial crimes in police custody.

In *state of Maharashtra v/s. Prabhakar Pandurang Sanjgiri*²⁸, aid of Article 21 was made available perhaps for the first time to a prisoner while dealing with the question of his right of reading and writing books in jail. Article 21 of the constitution guarantees the right of personal liberty and thereby prohibits any inhuman, cruel or degrading treatment to any person whether he is a national or a foreigner. Any violation of this right attracts Article 14, which enshrines right to equality and equal protection of laws.

In *Hussainara Khatoon v/s. State of Bihar*²⁹, many under trial prisoners in different jails in the State of Bihar who were in jail for periods long than the maximum terms for which they would have been sentenced, if convicted. The Hon`ble Supreme Court made following thought provoking observation in para 6 of the judgment;

This unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programmes, but so far these cries do not seem to have evoked any response. We do not think it is possible to reach the benefits of the legal process to the poor to protect them against injustice and to secure them their constitutional and statutory rights unless there is a nation-wide legal service Programme to provide free legal service to them.

In the historic judgment in *D.K. Basu v/s. State of W.B.*³⁰, the Hon`ble Supreme Court initiated the development of 'Custodial Jurisprudence' including torture to arrestee, infringement of fundamental rights, citizens entitled to receive compensation from State, quantum of compensation would depend on peculiar fact of each case and punishment under section 330 of penal code is inadequate to repair the wrong done to citizen.

Since police custodial death deprives the deceased of his fundamental right to life guaranteed under Article 21 of the constitution. Compensation has been considered an appropriate relief in such cases this opinion has been expressed by Supreme Court in *Nilabati Behera v/s. State of Orissa*³¹. In this case the letter of the petitioner was treated as writ petition under Article 32 of the constitution, wherein she had claimed compensation for death of her son in police custody. The court while awarding compensation made it clear that there can be no question of availability of the defense of sovereign immunity in case of constitutional remedy. It further said that the court has very wide powers under article 32 of the constitution which enables it to award compensation in appropriate cases where this is the only mode of redress available for contravention of fundamental rights.

The opinion of the Supreme Court derives its support from its earlier decision in *Kasturilal v/s. State of U.P.*³², where in it was held that the states plea of sovereign immunity for its servant had no application in the constitutional scheme. In fact it enables the award of compensation for contravention of fundamental rights when it is the only mode of their enforcement. Further in *Rahul Shah v/s. State of Punjab*³³, held that in exercise of its Jurisdiction under Article 32 it can pass an order for payment of money in the nature of compensation consequential upon deprivation of fundamental right to life and liberty of the petitioner.

²⁸ AIR 1966 SC 424.

²⁹ AIR 1979 SC 1371.

³⁰ AIR 1997 SC 610.

³¹ AIR 1993 SC 1960.

³² AIR 1965 SC 1039.

³³ AIR 1983 SC 1086.

In *R.D. Upadhyay v/s. State of A.P.*,³⁴ is a case which points out the sad state of affairs concerning the human rights of prisoners. The Hon`ble Supreme Court expressing its anguish pointed out that the authority are required to act according to law. In this case the official broke the law considering the under trials mental and physical health and the fact that he had no known relatives either the Supreme Court, as an interim measure, directed that a sum of rupees two lakhs shall be paid by the State by way of donation to the missionaries of charity, where he was accommodated for the time being. The Hon`ble Supreme Court rightly expressed the inadequacy of the monetary remedy.

Though the judiciary consoles the victims by awarding monetary compensation but money award cannot however, renew a physical frame that has been battered and shattered due to hardened attitude of others. All that the courts can award such sums of money, which may appear to be giving of some reasonable compensation, assessed with moderation, to express the courts condemnation of the tortuous act committed by the state.

VI. Conclusion:

The Indian constitution recognizes it to be fundamental in the governance of the country that the state shall direct its policy to secure conditions of freedom and dignity and insulates against all forms of cruelty against mind and body and their freedom to grow fearlessly. All custodial safeguards in the constitution and other laws are meant to protect human dignity and shun barbaric approaches.

The increasing number of custodial torture and death proves that the governments are not enforcing the directions of the Supreme Court and National Human Rights Commission properly. Part of the problem is the refusal of the police to shed its colonial mindset. Most policeman behave like beats in khaki and adopt questionable methods-often crude and obsolete during interrogation. A reading of the morning newspaper almost every day carrying reports of dehumanizing torture, assault, rape and death in custody of police is indeed depressing. The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the credibility of the Rule of Law and administration of criminal Justice system. In spite of having so many constitutional and legal provisions, enactment. The Indian Government has failed to check or abuse of powers by police officials to curb the violence and to protect the constitutional rights of prisoners.

³⁴ AIR 2001(1) SCC 437.