



Custodial Violence And Human Rights: Constitutional Perspective

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Abstract

If history stands as a testament to anything, it's the fact that abuse of power leads to the gravest of human rights violations. When power is left unchecked in the hands of those unfit to yield it, it creates an unfair power dynamic allowing said people to abuse that power. Violence in police custody fits within the realm of unchecked power. This paper traces the history of custodial violence all the way back to the British era and how after more than 70 years we are yet to tackle this problem effectively. This paper aims to give the reader a comprehensive understanding of just how nuanced this problem of custodial violence is, how the constitution attempts to safeguard you and what is the judicial perspective on this.

Key words: torture, violence, brutality, judiciary, constitution

Introduction

In the year 1980, Hon'ble Justice Krishna Iyer posed a very fundamental question before us- "Who will police the police?", unfortunately, this question still remains unanswered. When custodial violence, torture or fake encounter is equated with justice, it's the Constitution that is the ultimate victim. Every living being is born with the Right to Life and Right to Personal Liberty. The Constitution of India enshrined the Right to Life and personal Liberty to all persons living within the physical boundaries of India. The Constitution of India and also the Universal Declaration of Human Rights prescribes that, even if a person is detained on one or the other pretext, he/she cannot be denied the lawful rights on the grounds that he/she has been detained.

Custodial torment has turned out to be so basic nowadays that the police and administration as well as even individuals underestimate it as a normal police routine and custodial brutality, torment and custodial passing are going on. The term Custodial violence can be defined to include the incidents of deaths, rape, torture both mental as well as physical, illegal arrest and detention, false implication, disappearance from police custody, fake encounter and other police atrocities (Parveen and Siddique,2021) The growing incidents of Custodial violence has put the issue of Police reforms on a fast track and much needed necessity of the present times. Except for circumstances where the same can be exceptionally justified, police reforms have always been a "red herring" for the policymakers. (Desai, 2009)

India has a history where the people of India have always stood and supported the parliamentary democracy which gives them access to a fairly free press, elected representative controlled military, and judiciary which acts in an impartial and independent manner without the pressures of the elected representatives and vibrant political and pro active civil organizations. Despite all these facts, brutality in police custody by the agents of law is widespread throughout the country. Torture, including rape and ill-treatment continues to be blot on the face of the parliamentary democracy and today has attained a stage where we may call it even endemic that has spread through the length and breadth of the country. Hundreds of people were reported to have died in police custody. Although the problem of police brutality is largely ignored by the media as well as the people, it is well known that it occurs frequently and openly in India.(Amnesty, 1999). The present paper attempts to coherently analyse and critically review the use of physical violence in police custody against detainees.

Custodial Violence: Meaning of

Custodial violence and blatant misuse of police power by the law enforcement agencies themselves has emerged as a major issue of human rights concern and obstacle to parliamentary democracy and development of human well being in modern societies. Physical or mental torture caused when the person is in police custody has irreversible impact on the mental or physical well being as well as the overall functioning of individuals, children, family or even the entire society that is affected. Physiologically, it becomes very difficult for the victims to forget the agony, humiliation, hatred, trauma they had faced during their custody and they remain in a state of perpetual fear and horror for a long time and find it difficult to lead a normal life in many parts of the world.

The menace of custodial violence assumes difficult and more complex proportions in a developing country like India. The truth is also the fact that a majority of such cases of brutality are not because of an aberration by an individual but rather due to compulsions of systemic nature.

The practice of Police Brutality was more widespread during the British days when the citizens of India were subjected to all forms of police brutality, humiliation and torture. These acts of police brutality have gone unchecked since British days and are being practiced as a worthy legacy even in modern times even though at times there is no tacit support of senior police officials, bureaucrats, politicians and judiciary. The evil of police brutality also stems from a mistaken belief and support of the general public to the fact that it is necessary for effective maintenance of law and order (Marwah,2003).

In the legal language, the term “Custody” is defined as any point in time when an individual’s freedom of movement has been denied by law enforcement agencies, or

during arrests, prosecution, sentencing, and correctional confinement (Gill, , Koelmeyer,2009). The term Custodial violence was coined to describe the violence committed against a person in custody by a police authority. Thus, custodial violence can be defined as an inhuman act that originates from a belief/desire to cause suffering even though the person in custody has no means to retaliate. It can also be simply reflection of physical prowess and superiority over the helpless. As the Law Commission of India defines it, custodial violence is crime by a public servant as against a detained or an arrested person. It may include various means as torture, namely, use of force not sanctioned by law, harassment, third degree violence or even instances of rape. Other methods may include use of in dignifying language, prolonged illegal detention, sleep deprivation, not allowing necessities such as food, water and not allowing access to family or lawful legal counsel.

However, across the globe, the physical torture generally called third degree is the most common and prominent form of custodial violence by the police. The issue is amplified by the fact that it is committed under the garb of 'uniform and authority' within the confines of law enforcement. Also, it is looked at as heinous offence because it is undertaken by the very authority that is deemed as the guardian of the society and citizens.

custodial violence and abuse of power by the police is a cause of concern; to protect the human rights of prisoners. Custodial violence stems from the act of abuse of power by the police is a cause of concern to not only the affected person but also to the society at large. It is one of the most serious offenses which are often left unreported. There is an urgent need to take up this issue on a war footing so that one knows the rights which are given by our Constitution and also under Universal declaration of Human Rights. By repeatedly practicing such excesses, the law enforcers are only creating a congenial atmosphere for fostering terrorism.

No civilized society in a modern world will support the transformation of law enforcer into a beastly animal committing the act of custodial violence. There have been instances where the police image in the estimation of the public has suffered irreparable damage on account of the prevalence of this practice in varying degrees over the past several years. Denying a person of his liberty is a serious matter. (Joginder Kumar v. State of Uttar Pradesh, 1994) It is more heinous than a game-keeper becoming a poacher. (Bhagwan Singh and another v. State of Punjab, 1992) Torturing a person who is both helpless and in No position to retaliate with the goal of extracting information is a rather reprehensible manner of investigation and crude way of detecting crime. Law enforcement should be responsible for both, obeying the law and continuing investigation. To any matter, the means are equally as important as the end itself. (Public Prosecutor v. Shaik Ibrahim, 1964) To avoid the situation of a 'police-raj' the issues of custodial death and otherwise that of custodial violence must be dealt with

sternly, even if need be, with a heavy hand to curb it. (Gauri shanker Sharma v. State of Uttar Pradesh, 1990) Police cannot be allowed to accomplish behind closed doors what the general public order and the law forbids. Using medieval and methods that are contrary to law, even barbaric at times such as torture and third degree should not be allowed. (Bhagwan Singh and another v. State of Punjab, 1992)

Though today there are multiple awareness campaigns against custodial torture and violence, still there is a slight tendency on part of certain higher ranks in law enforcement that see this as a tool to achieve quick result. However, in a society, the law is the absolute paramount and, in the event, when there is rather no indication to suggest that a person will resist the police from arresting him, no force whatever could be justified in the process of taking him into custody. It has been generally observed that frequent instances of human right violations take place in an attempt to gather evidence or adduce confession. Persons detained in custody have as much right to life as any other ordinary citizen. The purpose of interrogation does not entail infliction of injuries but the purpose should be that of an effective investigation. The authorities must try not to exceed the powers which have been given to them to perform their duties well and in a proper manner. If they fail to perform, they must be held accountable for the same. Rarely we have seen the evidence of complexity of police personnel's in cases of custodial violence or custodial deaths. Many a times due to ties of brotherhood they prefer remaining silent or more often than not even pervert the truth to save their colleagues then to report the matter for departmental inquiry or register a first information report and investigate the matter so that guilty may be punished.

Data from National Campaign Against Torture (NCAT), Annual Report on Torture 2020 shows the grim reality. A total of 1,569 deaths as per records in judicial custody and 111 deaths directly under the custody of police. 74.4% of these deaths in police custody was allegedly due to mental and physical torture by the law enforcement. Further, the year 2020 saw 55 deaths by suicide in lieu of impending custodial torture.

Custodial Violence: National Perspective

Custodial violence and abuse of power of law by the enforcing machineries like police is not only peculiar but it is unfortunately rather widespread in the democratic country. The challenge is global and universal, that is why the concern for the same is seen by quarters of all international community.

Torture, the colonial British rulers while drafting our criminal laws sought to deem confessions made to the police authority as inadmissible in the Courts of law. The decision stems from how it was even then observed that there was an inherent tendency to extract confessions by any means. However, even after our Independence and the Constitutional tenets of life, liberty and law in the society there are still instances of Custodial Violence that disrupts the moral fabric of our society and reduces

the public trust in law enforcement. In the past decade, such horrific instances have drawn the attention of Media, Judiciary, Legislature, common public and institutions such as National Human Rights Commission alike.

Nevertheless, public awareness about one's fundamental rights, a pro active judicial activisms, vibrant media covering cases of custodial excesses, initiatives taken by National Human Rights Commission as well as Civil Society Intervention have taken up the challenge for combating torture in custody and upholding human dignity. However, such crimes in custody have not only just increased multi fold but are also increasingly becoming a routine interrogation practice nowadays.

As any other country in the world, India also has a history of police brutality and custodial torture which often results in the death of the victims. The police practices in the garb of so-called interrogative measures and indulges in physical and mental torture of the victims in an attempt to acquire evidence and confessions from the suspects. Custodial torture whilst under police custody is universally agreed upon as one of the most heinous form of human rights abuse. The Constitution of India via rights protecting arrested person and eminent institutions such as the Supreme Court, NHRC have in past categorically forbade the use of such tools in investigation and interrogation. The Universal Declaration of Human Rights adopted by the United Nations on December 10, 1948 also provides against torture, cruel, inhuman or degrading punishment to any individual. Even India is a signatory to this statute, but the police authorities do not seem to care for these institutions and their guidelines. By reading article 1 of the UDHC, it can be concluded that all human beings have equal rights and should be treated equally before the law regardless of whether they have committed a crime or not. International Covenant On Civil and Political Rights, 1966 also states in a similar way. India has already ratified the aforesaid declaration and covenant. Despite such ratification, the custodial crimes continue unabated.

The worrisome issue of such cases brought in public domain is not only the physical injuries and bodily pain but rather the mental agony and suffering the person goes through within the confines of a lock up. The reasoning can be understood a little by the Status of Policing in India Report 2019 (Common Cause with Centre of Developing Societies). It reflects how around 2 out of 5 police persons who were surveyed in Bihar, and 1 out of 5 in the other six States that were surveyed were not provided with human rights training at any time.

A recent example of violation of human rights and use of excessive force by police is a case of an encounter at Hyderabad where four accused were taken to the crime spot by the police early in the morning in order to recreate the sequence of event as a part of investigation. All four accused were shot dead by the Hyderabad police officers. The contentions raised by the police were that amongst the accused persons, two snatched

their weapons and opened fire on the police itself. In the attempt to contain them all of the accused were subsequently shot dead by the police.

Another case that shook the societal conscience was the case of P. Jayaraj and J. Bennicks in Tamil Nadu. The persons were taken into custody on June 19, 2020 for allegedly opening their shops during the phase of lockdown and thereby violating the Covid-19 protocol of that time. However, in the following days there were several reports of the two being physically and sexually assaulted and brutally tortured while in custody. Both the persons eventually succumbed to their injuries. This is unfortunately just one of several instances that have been witnessed where the police have been accused of abusing their powers and physically harassing or torturing common citizens in the pretext of Covid-19 safety protocols. The brunt is borne most by the most vulnerable of the society such as groceries vendors, small shopkeepers or everyday people stepping out for necessities. Reports and instances of police hitting people with 'lathis' as means to enforce the lockdown phase are much present. In some cases, even the 'covid warriors' and the ones undertaking essential service work were not spared. What is harrowing is how such instances are not isolated to regions, or States but were evident from around the Country which reflects the deep rooted and pervasive practice of continued physical violence by the law enforcement as means to their duty.

In the present scenario, police authorities seem to be more accountable to the political parties in power than to the civilians or the court of law. Tiresome and lengthy procedure in taking legal course against police officers has made people disregard the idea of taking any legal recourse against these atrocities. People are often reluctant to even speak up against the police due to the fear of being constantly harassed and tortured even more by them. Even after one initiate legal action against police personnel, the police themselves act very disinterestedly and lacklustre in their attempt to investigate the said matter against their own peers. All these factors leave all the atrocities committed by the police unaccounted for and it feeds their false security and false image of power that they have bestowed upon themselves. The Supreme Court took cognizance of the fact that there is no independent body for such complaints against the Police directed the States to set up a Police Complaint Authority (PCA) in 2006. Even after such directions from the supreme court, many states failed to comply with them.

To address the police brutality National Human Rights Commission was established by a Presidential Ordinance (Kapoor, 2000). The NHRC found the police wanting in their response to instructions issued by the Law Commission of India. In order to inculcate in the police, the habit of acting in accordance with the laws of the land, the NHRC organized several workshops and seminars across the country. The NHRC has urged police personnel to cultivate humanity and discipline. Furthermore, the NHRC has emphasized the need for human rights to be taught as a separate subject in police

training institutions. "Custodial deaths are among the worst of crimes attributed to the police. Despite the relentless efforts of the NHRC, instances of police brutality and custodial deaths are on the rise" (Kapoor, 2000). The fact is, the powers of the National Human Rights Commission are limited due to several facts. First, the Commission is deficient in having its own independent investigative machinery. The Commission has to rely on investigative staff provided by the central or state government who operate under the supervision of the Director General of Police. Second, the Commission's mandate is limited to asking for a report from the Government of India on the reported incidents of torture, ill-treatment, and custodial deaths. The worst fact is - there is no obligation on the part of the government to proceed with any recommendation which the Commission may make (Raghavan, 1999).

Constitutional Protection against Custodial Violence

The Indian Constitution has recognized the rights and dignity of prisoners that they are entitled to as citizens. Supreme Court has also repeatedly held in several cases that prison does not deprive a person of basic human rights and a person in prison does not become a 'non-person' and human dignity should not be degraded. The rights of an arrested person are not shed off. The use of third-degree and other torturing techniques is the biggest threat to the administration of justice. The abuse of power by police officials needs to be curbed. The custodial violence results in sheer violation of Human Rights. The use of excessive force should be prohibited. The rights provided under Indian Constitution are as follows:

Article 14: It imposes a duty on the state to provide equality before law and equal protection of law to every person including arrested or detained person

Article 20(1): It provides that criminal penalty cannot be imposed with retrospective effect and a person can only be convicted of offence which violates the law in force at that time of commission of offence.

Article 20(2): It provides that if a person has been prosecuted and punished once then for the same offence he can be prosecuted and punished again.

Article 20(3): It provides that accused person cannot be compelled to be a witness against himself.

Article 21 It provides that a person can be deprived of life and liberty only according to procedure established by law. Life under this article includes everything which is required to live with human dignity so it includes protection against custodial violence also.

Article 22(1): It imposes a duty to inform the grounds of arrest to arrested person immediately after arrest and also provide a right to arrested person that he can consult with the lawyer of his choice.

Article 22(2): It provides that arrested and detained person has to be produced before the nearest magistrate within 24 hours of arrest and no person can be detained in custody beyond 24 hours unless permission for that has been given by magistrate.

Judiciary on Custodial Violence

The Supreme Court of India and various State High Courts have condemned custodial violence and spoken strongly against atrocities committed by police personnel against detainees in police custody. They have recommended stringent sanctions for custodial violence. The Supreme Court has observed - "The police, with their wide powers are apt to overstep their zeal to detect crimes and are tempted to use the strong arm against those who happen to fall under their secluded jurisdiction. That tendency and temptation must in the larger interest of justice, be nipped in the bud" (Subramanian, 1997).

Hence, ideally, it is clear that custodial violence (in terms of torture, rape, and custodial death/ killing) committed by law enforcement personnel is illegal and those personnel (who are supposed to uphold the law) cannot indulge themselves in unlawful behaviour. It undermines human dignity; brutalizes the police system; forfeits the trust of the people and the judiciary, and also affects the image of law enforcement as a whole.

Physical torture of the detainees in police custody has been quite pervasive for several decades in India. The detainees in police custody in India includes undertrials (individuals who have been accused of committing crimes) as well as political prisoners. The fact of the matter is, neither of these two types of detainees are spared from physical torture inflicted by the police in their own custody. A cursory review of brutality in police custody in India indicates that various forms of physical tortures are carried out by the police, including rape. Most of all, physical torture in police custody results in custodial deaths of hundreds of detainees. The nationwide phenomenon of custodial deaths continues to surface with disturbing frequency (Sudipto,1991))

Supreme Court felt the urgency of situation and need of machinery responsible for arresting a person. Supreme Court in D.K Basu v. State of West Bengal (1997) said that need more transparency and accountability in the system is required and laid down following guidelines to be followed by the law enforcement agencies at the time of arrest a person:

i)The police officer should carry an accurate and clear identification of that person and also all particulars of that police person who is handling the investigation.

ii) A memo of arrest is to be prepared at the time of arrest by police officer and shall be signed by one witness who can be a family member of arrestee or any locality person and also signed by arrested person with date and time on it.

iii) The person who has been arrested, detained in custody of police or in lock up shall be entitle to inform his family member, relatives, friends as soon as possible.

iv) If member of family and friend of arrestee lives outside of town or district, they shall be informed through Legal Aid Organisation in district or police station within 8 to 12 hours after arrest.

v) The arrestee shall be aware of his right and reason of his arrest.

vi) A diary of entries should be maintained in which the name of next friend of arrested person along with details of police officials taking person in custody are to be mentioned

vii) After every 48 hours during the arrest, arrestee must be medically examined by a certified doctor appointed by Director Health Services of State or Union.

viii) The arrestee shall entitle to meet his lawyer but not throughout the interrogation.

ix) Police central room should have at all District level and State headquarters. The information regarding arrest and place of custody should be given.

The Constitution has attached significance to the role of magistrate by requiring the accused to be produced before him within 24 hours of the arrest.

The Supreme Court in *Manubhai Ratilal Patel v. State of Gujrat (2013)* stated that “the act of directing remand of an accused is fundamentally a judicial function. It is obligatory on the part of the Magistrate to apply his mind and not to pass an order of remand automatically or in a mechanical manner.”

The truth is that the rights that are available to detainees while under the police custody have no true meaning unless there are independent agencies to enforce them, and provide avenue for remedies. Both, the Judiciary and the law enforcement must work together to put an end to the menace of custodial violence. Senior officers can lead by example and ensure no person is being detained unlawfully and that he/she is not subjected to brutality in police custody. They must educate the investigating officers about proper and scientific methods of interrogation. The policemen need to be reminded that in the event of custodial deaths, rape, and torture, they have to face prosecution (Kapoor, 2000). The Supreme Court directives on interrogation and custody of detainees in police lock-ups, issued to prevent human rights violations, must be followed meticulously. Accountability should start from the supervisory levels. Each supervisor must be made accountable for physical violence inflicted on detainees by

police personnel. Magisterial inquiries into police excesses followed by legal action when a prima facie case is made is necessary. Custodial torture, rape, and death must be investigated by impartial agencies like the state Criminal Investigation Departments and the Central Bureau of Investigation as well. The police cannot become a law unto themselves

Conclusion and Suggestions

To sum up, custodial violence is the cold blooded and inhuman act of law enforcement on prisoners, under trials and detainees which include heinous acts such as physical and sexual assault, psychological torture, and in the extreme cases, fake encounters. The growing instances of custodial violence poses a challenge to the ethos of our welfare state as propounded by the Constitution and virtues such as guarantee of life and personal liberty. The increasing trend on the graph needs to be examined and looked at, with corrective measures to be enforced with all stakeholders concerned.

Some serious steps are needed to be taken to ensure the accountability of police towards civilians and norms should be established to curb their brutal and inhumane methodology of working. Police Complaint Authorities must be established in every district and state which should hold the power to investigate and penalise police personnel for their illegal activities and human rights violations. Special focus should be given to the training methods that the police personnel goes through and changes should be made in order to accommodate their handling of civilians and suspects alike. A properly trained and accountable police system is extremely important to uphold and implement the law in any country. And if India is to achieve this euphoria, and restore the faith of the common public in the police authorities, immediate reforms are needed.

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