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International Law Approach to Police Brutality through the lens of European Convention on Human Rights

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ABSTRACT

In this Paper, initially I would be discussing the meaning and the history of police brutality which date back to the mid-nineteenth century. The point shall be further developed by highlighting the key causes for police brutality which would take into consideration the psychological reasons, use of excessive force, racial profiling and many more. The powers that are envisaged with the police officers are so unique and enormous that it could disproportionately be exercised against the citizens depriving them of their freedom and hence, resulting in grave violation of human rights of all individuals. Therefore, it is the duty of the law enforcement officials to not only carefully exercise and comply with the international human rights standards as it is binding on all states and their agents² but also to “respect and protect human dignity and maintain and uphold the human rights of all persons”.

Thereafter, I would predominantly be focusing on the scope of the European Convention on Human Rights on police brutality which would further be substantiated by the case laws hence, underlining the nexus between the two. Lastly, I would conclude by highlighting the rights of the police officers and the challenges faced in achieving an ideal balance between police powers and individual liberty as police officers are meant to be the peacekeepers of the society.

I. INTRODUCTION

The problem of police abuse or brutality is not a new phenomenon. It has been a central concern for many decades and is prevalent in almost every country especially in U.S. Despite being illegal, it is still being performed right under the nose of law and order resulting in the gravest of human rights violation with almost little to no remedy at all. Police brutality is the

¹ Author is a student at O P Jindal Global University, India.

² ‘United Nations (ed), Human Rights and Law Enforcement: A Trainer’s Guide on Human Rights for the Police (United Nations 2002)’ <<https://www.ohchr.org/Documents/Publications/training5Add2en.pdf>> accessed on 25th July, 2020

abuse of authority by the officials over the civilians by using excessive force which could be inflicted upon in the form of emotional, physical and psychological violence.³ Statistics show that “in a given year, 4,224 people are killed by police brutality in Brazil (2016), 1,147 in the U.S. (2017), and 11 in Germany (2016). In England and Wales, only 55 people have been shot in the past 24 years.”⁴

II. HISTORY OF POLICE BRUTALITY

The 1870s and the Industrial Revolution is commonly accepted as the start of police brutality as law enforcement would intentionally, physically harm workers who called for strike. The Civil Rights Movement in the 1960s had the most coverage on police brutality in recent memory with officers using water hoses and dogs to tackle protesters.⁵ Historically, police brutality was considered as a tool to oppress and arrest the socially marginalised group and lower income group levels without any proper justification further fuelled by racial stereotyping⁶.

Marquette Frye was arrested on August 11, 1965 for drunk driving. In the aftermath, it was suggested that the police had misbehaved with Frye and kicked a pregnant woman; situation escalated into a riot. Those who tried to quell the riots were shot or arrested. All in all, in riots that stretched to six days, thirty-four people were killed and over a thousand were injured.⁷

Oakland saw the creation of the Black Panther Party for Self-defence for challenging police brutality against blacks. The movement spread. The aim of the movement was to arm black men in neighbourhoods and observe police behaviour. The party and its popularity peaked in 1970.⁸

Perhaps one of the most pertinent incidents in recent history was the beating of Rodney King by the **Los Angeles Police Department** (LAPD). The videotape was shown worldwide and showed LAPD engage in excessive force against King. Four police officers were indicted. Upon appeal, however, they were acquitted. This led to massive riots in Los Angeles –

³ ‘The Law Dictionary Featuring Black’s Law Dictionary Free Online Legal Dictionary 2nd Ed’ <<https://thelawdictionary.org/article/what-is-police-brutality/>> accessed on 25th July, 2020

⁴ CANESSA, Stella, ‘Police Brutality: A Global Incentive Analysis of Killer Cops’ (25th June, 2018) <<http://brownpoliticalreview.org/2018/06/police-brutality-global-incentive-analysis-killer-cops/>> accessed on 25th July, 2020

⁵ ‘The Law Dictionary Featuring Black’s Law Dictionary Free Online Legal Dictionary 2nd Ed’ <<https://thelawdictionary.org/article/what-is-police-brutality/>> accessed on 25th July, 2020

⁶ ‘The History of Police Brutality, and What it Means for You’ <<https://www.hg.org/legal-articles/the-history-of-police-brutality-and-what-it-means-for-you-40344>> accessed on 25th July, 2020

⁷ ‘LONG HISTORY OF POLICE BRUTALITY’ (17th November, 2015) <<http://court.rchp.com/long-history-of-police-brutality/>> accessed on 26th July, 2020

⁸ Ibid

resulting in nearly 2,000 injuries.⁹

Another problem is the pretext that Harlem, a black dominated area is a criminal area. People of Harlem feel that the police have a free hand over the Harlem community. The police forces are usually construed as a force that is present to prosecute them, rather than protect them. And this creates a hatred towards the force; a preconceived notion that the police will be meant to discriminate against them.¹⁰

III. KEY CAUSES FOR POLICE BRUTALITY

The powers vested with the law enforcement officials could be exercised disproportionately without having a proper justification for the which includes the powers of search and seizure subsequently leading to abuse and corruption. This could be due to psychological influence as the police officers has to deal with all the gruesome crimes ranging from rape, drug-dealing to murderers. This instils an image of constant negativity in the minds of the officials while dealing with such incidents. One of the contributing factors for behaving in an aggressive manner could be the fear of their own lives as many are killed in the line of duty. Also, an element of implicit bias as said by David M. Corey a police psychologist, could prove to be detrimental to society as it could affect the decision-making powers and behaviour of the police officers in the real world.¹¹ He said, “*Yes, implicit bias can affect us. The more important questions are, which persons are affected, and under what conditions?*”¹²

Another important aspect that we need to take into consideration is the justification of the use of force which is a debatable topic. There is a broad range of force that can be exercised depending on the situation. However, in the Texas Code of Criminal Procedure it is stated that “*in making an arrest, all reasonable means are permitted to be used to affect it. No greater force, however, shall be resorted to than is necessary to secure the arrest and detention of the accused*”¹³ Therefore, it could be deduced that the amount of force deployed should not be more than necessary as deemed by a reasonable person. Nevertheless, it is difficult not only for the police officers but also for the jury to justify or determine the degree of reasonableness. Although, the degree of use of force is not consistent globally, it differs from place to place. For instance, the rate of force is excessively high in the departments of

⁹ Ibid

¹⁰ Ibid

¹¹ Weir, Kirsten, ‘Policing in black & white’ (December 2016, Vol 47, No. 11, page 36) <<https://www.apa.org/monitor/2016/12/cover-policing>> accessed on 26th July, 2020

¹² Ibid

¹³ Wittie Curtis, Mark, ‘Police Use of Force’ <https://www.wtamu.edu/webres/File/Academics/College%20of%20Education%20and%20Social%20Sciences/Department%20of%20Political%20Science%20and%20Criminal%20Justice/PBJ/2011/2n2_03Wittie.pdf> accessed on 26th July, 2020

New York and Cleveland as investigated by the U.S. department of Justice as compared to the Los Angeles Police Department where it is relatively low.¹⁴

IV. ARTICLE 3 AND ITS POSITIVE OBLIGATION

A comprehensive framework has been set out by the European Convention on Human Rights in order to govern and supervise the services of the police officers. This can be substantiated by Article 3 of the convention which highlights the most fundamental values of democratic societies which conclusively states that no individual would be subjected to torture or inhuman or degrading treatment or punishment.¹⁵ This makes the article non-derogable which would also mean that it cannot be superseded and would still be operational in situations of emergencies such as fight against terrorism or the life of the nation is under threat. A parallel can be drawn with respect to Article 7 of **International Covenant on Civil and Political Rights** (ICCPR)¹⁶ which enshrines the same values as enumerated under Article 3 of European Convention on Human Rights. In addition to this, the human rights committee in its general comment no. 20 draws attention to the fact that “no justification or extenuating circumstances may be invoked to excuse a violation of Article 7”¹⁷.

To fall within the scope of Article 3, the force used must maintain a minimum level of severity. This is a very factual understanding and depends on a case to case basis. This includes the use of torture and/or ill-treatment. *Aksoy v. Turkey*¹⁸ dealt with the subject of ‘torture’. The European Court of Human Rights took cognizance of the matter in which the applicant had been stripped by the police and suspended by his arms as they were forcefully tied to his back. This resulted in severe pain and eventual paralysis in both of his arms. Any individual taken in custody by the police and is evidently hurt or injured upon his release makes it incumbent on the state to give a plausible explanation regarding the treatment of the individual during his time in custody. Failing this, a clear case arises under Article 3 of the Convention.

¹⁴ Roithmayr, Daria (2016), ‘The Dynamics of Excessive Force’ (Vol.2016, Article 10) <<https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1572&context=uclf>> accessed on 26th July, 2020

¹⁵ ‘European Convention on Human Rights’ <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed on 28th July, 2020

¹⁶ ‘International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966’ <<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>> accessed on 28th July, 2020

¹⁷ ‘Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994)’ <<http://hrlibrary.umn.edu/gencomm/hrcom20.htm>> accessed on 28th July, 2020

¹⁸ Murdoch, Jim and Roche, Ralph, ‘THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND POLICING’ (Page no.36) <https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf> accessed on 29th July, 2020

The European Court of Human Rights, in *Korobov v. Ukraine*¹⁹, held that Articles 3 (prohibition of torture) and 6 (right to a fair hearing), had been violated. It was alleged that the applicant had been beaten and tortured using electric shocks in custody. Despite medical evidence of torture and a formal complaint, the prosecutor refused to start formal proceedings for a period of five years and the court eventually upheld the decision to end the proceedings after learning that he had gained injuries while resisting arrest. In *Musialek and Baczyński v. Poland*²⁰, there was a violation of Article 3 with respect to detention of the applicant. The prisons of Wolow and Wroclaw were not in adequate conditions and the applicants suffered from major health issues due to lack of appropriate medical care and the major reason for such inadequate conditions as per the applicants were due to overcrowding of prisoners.

Article 3 places a positive obligation on the police to take steps to prevent torture and ill-treatment by individual persons and groups. In any event that the police have any information about a person who is perhaps being subjected to treatment in violation of Article 3 – relevant steps must be taken within its power to prevent this. For example, there is a positive obligation on law enforcement to investigate all allegations of rape, according to Strasbourg court. The obligation on the state is to have a sound legal framework that can allow for the protection and investigation of all allegations and acts of sexual violence.²¹

V. ARTICLE 2 AND ITS POSITIVE OBLIGATION:

Police brutality is governed mainly by Articles 2 and 3 of the Convention. Article 2 prohibits the use of lethal force to a very narrow set of scenarios (in essence, those which require protection of life).²² The purpose of the convention can only be upheld once all credible allegations of violations and excessive force are acted upon with a proper investigation. Article 2 discusses the use of force that may result in deprivation of life, rather than instances where it is permitted to take life.

In *McCann and Others v. The United Kingdom*²³, it was held in Strasbourg that upheld the

¹⁹ Lecker, Carmi, 'ECHR DECISIONS IN TORTURE CASES (ARTICLE 3) : JULY 2011' (23rd August, 2011) <<https://ijrcenter.org/2011/08/23/echr-decisions-in-torture-cases-article-3-july-2011/>> accessed on 29th July, 2020

²⁰ Ibid

²¹ Murdoch, Jim and Roche, Ralph, 'THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND POLICING' (Page no.39) <https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf> accessed on 29th July, 2020

²² 'European Convention on Human Rights' <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed on 29th July, 2020

²³ Murdoch, Jim and Roche, Ralph, 'THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND POLICING' (Page no.28) <https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf> accessed on 29th July, 2020

interpretation of Article 2 that is eluded to above. In *Simsek v. Turkey*²⁴, Strasbourg held that the fact that police did not have access to relevant equipment to tackle the disorder was ‘unacceptable’. Lack of equipment meant that the use of lethal force was the only recourse available to the police – resulting in deaths.

Police has an active obligation to protect life under the right to life doctrine. However, this does not impose an obligation on the state to protect all life without exception. The obligation has certain conditions for its use: (1) the uncertainty of human behaviour and (2) the police acting within the permissible ambit of Article 5 and Article 6 of the Convention (right to a fair trial).²⁵ Any death resulting out of police force/brutality must be investigated by an investigative agency independent of the police and hence immune to bias. This is a must to ensure public confidence in state agencies and their use of force.²⁶

VI. ARTICLE 5 AND ITS POSITIVE OBLIGATION

Article 5 of the convention talks about the right to liberty and security and that under no circumstances an individual should be deprived of liberty unless prescribed by law.²⁷ However, on the other hand it acknowledges the circumstances under which the police have the right to arrest and detain but that depends on the facts and circumstances of each case. There is a very fine line between liberty and detention and therefore, in order to invoke article 5 there must have been an actual ‘deprivation of liberty’.

A 10-year-old girl had been taken by the police with two of her friends for questioning regarding a theft, in the case of *X v. Federal Republic of Germany*²⁸. They spent two hours, part of which had been spent in an unlocked cell. It was held that the purpose of the police was to simply obtain information and not to deprive the girl of her liberty. It is of vital importance to note that the grounds for detention needs to be lawful to avoid the arbitrary application of the law. The grounds for lawful arrest or detention are enumerated from Article 5(1)(a) to Article 5(1)(f). In another case, *Vasileva v Denmark*²⁹, the police detained an elderly woman for over 13 hours when she refused to disclose her identity to the ticket inspector during a quarrel about the validity of the ticket. This act was considered as

²⁴ Ibid

²⁵ Ibid (Page no.31)

²⁶ Ibid (Page no.32)

²⁷ ‘European Convention on Human Rights’ <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed on 29th July, 2020

²⁸ Murdoch, Jim and Roche, Ralph, ‘THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND POLICING’ (Page no.48) <https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf> accessed on 29th July, 2020

²⁹ Ibid (Page no.54)

disproportionate by the police. Nonetheless, Article 5(2) and 5(3), puts a positive obligation on the police officers not only to convey the reason to the party who is under detention but also to bring them before the judge as they are entitled to fair hearing.³⁰

VII. ARTICLE 10 AND 11 AND THE JUSTIFICATION FOR INTERFERENCES

The Strasbourg court has described Article 10 as one that protects right to freedom of expression and a provision that is an essential cog of a democratic society and a basic condition for the progression of democracy and each individual's quest for self-fulfilment.³¹ The provision applies favourably not only to popular ideas, but also ideas that may offend certain sections of society. An example of a political demonstration may be the case of *Chorherr v Austria*.³² The applicant was carrying a placard at a public assembly with some political opinions and this case fell within the ambit of Article 10. The message offended certain people. He was adamant in his demonstration and refused to withdraw his demonstration as ordered by the police on grounds that it was disturbing public order. Subsequently, he was arrested and fine and the Strasbourg court saw no violation of Article 10.

Right to peaceful assembly and association is guaranteed under Article 11.³³ This article extends to peaceful gatherings, marches, parades, demonstrations. However, limitations are applicable to Article 11 and there are specific provisions that apply on these restrictions on freedom of association and certain other groups.³⁴ Police may also have a positive obligation to protect certain groups from coming under attack from others, including individual persons. Article 11, however, does not propagate violent assembly. The police should focus on the violent elements in the case of a violent assembly. In *Tatar and Faber v Hungary*³⁵, the perpetrators hung dirty clothes around the fence of the Hungarian parliament for around thirteen minutes. They did this to demonstrate their dissatisfaction with the political situation at the time and were soon convicted for holding an unnotified assembly. The court held that this does not constitute an assembly as there was no intentional gathering of participants.

³⁰ 'European Convention on Human Rights' <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed on 29th July, 2020

³¹ Murdoch, Jim and Roche, Ralph, 'THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND POLICING' (Page no.97) <https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf> accessed on 30th July, 2020

³² Ibid (Page no.98)

³³ European Convention on Human Rights' <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed on 30th July, 2020

³⁴ Murdoch, Jim and Roche, Ralph, 'THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND POLICING' (Page no.98) <https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf> accessed on 30th July, 2020

³⁵ Ibid (Page no.99)

However, the actions of the police can be justified for interfering with Article 10 and 11 of the convention on the following grounds (1) **In accordance with the law** (2) **Claim of necessity** (3) **Proportionality**.³⁶ As long as the law enforcement officials are in compliance with the law it would not be difficult for them to pursue the legitimate aim. However, in order to claim the defence of necessity the officer is under an obligation to show that the issue at hand needs to be resolved at the earliest otherwise it would lead to a chaotic situation resulting in grave violation of human rights. While resolving such disputes the actions of the officials needs to be exercised proportionately otherwise, they would be held accountable for abuse of power.

VIII. LATEST INCIDENT OF POLICE BRUTALITY

George Floyd, a 46-year-old African American man was killed in-custody by a police officer for allegedly using a counterfeit twenty dollar note at a shop. The police officer Derek Chauvin, restrained Floyd and killed the man by placing his knee between the head and neck leading to suffocation and ultimately death which triggered the widespread rallies against racism and police brutality in the United States³⁷. The protests turned chaotic leading to extensive looting and destruction of property over dozens of U.S. cities. Thousands of people condemned the act and stand in solidarity and marched on the streets chanting ‘**black lives matter**’. The police officer was later charged with second-degree murder and the other three police officials faced with aiding and abetting murder³⁸.

Rights of Police officers:

Police officers also have some certain basic rights while serving in the line of duty. They also enjoy political and civil rights as the rest of the citizens. Certain restrictions on these rights only occur when they are performing their duties, in accordance with the law. Having said that, police officers also must enjoy civil, social and economic to their fullest.

Police Officers and Freedom of Association:

Police officers also have the right to form trade unions and other unions to represent their interests. Interference on these rights must be based on some reasonable grounds/justifications. European nations prevent their police forces from taking active

³⁶ Ibid (Page no.101)

³⁷ Graves, Chris, “The killing of George Floyd: What we know” (1 June 2020) <<https://www.mprnews.org/story/2020/06/01/the-killing-of-george-floyd-what-we-know>> accessed on 30th July, 2020

³⁸ ‘George Floyd death: New charges for all four sacked officers’ (3rd June 2020) <<https://www.bbc.com/news/world-us-canada-52915019>> accessed on 30th July, 2020

participation in politics to ensure that they are politically neutral.³⁹

Protecting the Police Officer during Criminal Trials:

Police witnesses should be protected to criminal trials. Anonymity of a witness must be justified on reasonable grounds. A police officer is often the first person on the crime scene and his initial instincts can be fundamental for a case. Therefore, being important to a case, his anonymity must be justified to ensure he does not face the flak of the opposing party.⁴⁰

Right to Decent Working Conditions:

Like every other citizen, police officers are also entitled to proper working conditions. This is a basic right across all jurisdictions. This is important so that society can respect the work of the police. Decent working conditions may also include decent remuneration, and decent remuneration may considerably reduce corruption that has become synonymous with police work.⁴¹

IX. CONCLUSION

Even though police officers are heavily trained in their use of force, certain scenarios exist wherein they must protect themselves or the lives of others and hence, the training holds little or no value. In an ideal world, police brutality is wrong however, liberty of individuals is important. But when one faces a mob, the scenario changes completely. It is a situation of life and death and the use of force by the police becomes a necessity than a civil wrong. Society is expected to balance police brutality with control. Riots, unlawful assemblies, and unions are challenges that the police face every day. Whether the use of force in these situations is acceptable or not is debatable; it is a subjective argument. We can only imagine the situation where a thousand plus mob is facing you in the narrow streets of a city. Any excess use of force used by police authorities must be weighed up against the circumstances prevalent at the time. Proportionality must be considered before holding anyone against unlawful use of force, in my opinion. Hence, it is difficult to achieve an ideal balance between the police powers and the liberty of an individual.

³⁹ Murdoch, Jim and Roche, Ralph, 'THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND POLICING' (Page no.113) < https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf> accessed on 30th July, 2020

⁴⁰ Ibid (Page no.115)

⁴¹ Ibid (Page no.116)