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Judiciary: A Crusader against Custodial Torture

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ABSTRACT

Torture is as old as humanity is. Custodial torture including death of the accused is not a new phenomenon it has been practice from ages. Judiciary is the third pillar of democracy. It plays a major role in protecting the fundamental right as well as human right of the citizen in India. The Supreme Court of India has passed number of judgments in which the sufferer of custodial violence has been protected. The apex court is vigilant against any kind of malpractice or violence inflicted upon the victim of torture by the public officers i.e., police while in custody. In fact, Indian judiciary even applies the general norms of international law and treaties which are universal for the protection of right of the victim of custodial violence. It is a well settled law that if any norms of international law or any international law if not contrary to Indian law can be enforced in India legally. Under the umbrella of Article 21 Constitution of India, 1950 any form of torture or cruel, inhuman or degrading treatment is prohibited. Torture is not permissible by law either it occurs during investigation, interrogation or otherwise. The state is responsible if a person in custody of the police or other is deprived of his life except in accordance with the procedure established by law. However, when the matter comes to the court, it has to maintain the balance in protection of fundamental right of the individual and duty of police and only remedy given is compensation.

In this paper, we will see how Supreme Court extended his hand for the protection of victims of custodial torture in police custody and judicial custody and custodial torture against women and children.

Keywords: *Torture, Police, Violation, Court and Compensation*

I. INTRODUCTION

The evil of custodial torture has been increasing day by day and police officer consider it as a daily routine as a part of an investigation. The act of custodial torture, custodial rape, custodial death and inhuman treatment to the person in custody is barbaric and violation of basic human right. The State instrumentalities itself become the violator of law. This act of the police has

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hit the conscience of the people in the society and they fear in helping with the investigation to any police officer regarding any information or any crime committed unless it is of their importance. Judiciary plays a vital role in protecting the fundamental right as well as human right of citizen of India. The Supreme Court has passed number of judgments in which the suffer of custodial violence has granted compensation along with necessary action to whom who has violated law. Supreme Court refers Article 21 Constitution of India, 1950 for protection of constitutional right to every citizen that they have right to life and personal liberty and not mere animal existence. Torture is against the basic constitution right. The Supreme Court of India from time to time has given the reference of provisions of Universal Declaration on Human Right and International Covenant on Civil and Political Right into the fundamental rights chapter in the Indian Constitution and has given judgement on that basis.² Latin maxim *salus populi est supreme lex* - the safety of the people is supreme law; and *salus reipublicae supreme lex* - safety of the state is the supreme law, co-exist. However, the doctrine of welfare of an individual must yield to that of the community.

Torture and custodial death both have always been condemned by this Country. The **Law Commission of India in its 113th report** recommend amendment to the Indian Evidence Act, 1872 to provide that when an act alleged to have cause death or any bodily injury to any person in custody, the court may presume that the injury is caused by the police officer having custody of that person during that period. The onus to prove contrary is upon the police authorities.³

There is another aspect of protection of right of accused person in custody is the exaction of admission or confession by the police through scientific tests. These scientific tests are chemical induced truth test of suspect and affect the health of the accused either physically or mentally. The court held that involuntary admission of scientific test such as narco-analysis, polygraph examination and BEAP for the purpose of improving investigation efforts in a criminal case violates Article 20 (3) of Constitution of India, 1950. The court has widened the scope of compulsion and held that compelled testimony is evidently procured not merely by the physical threats or torture or violence but also by the psychic torture, atmospheric pressure, and intimidating methods etc.⁴

² *ADM v. Shivakant Shukla*, (1976) 2 SCC 521; *Francis Coralie Mullin v. Administrator, UT of Delhi*, (1981) 1 SCC 608; *Charan Lal Sahu v. Union of India*, (1990)1 SCC 613; *Sheela Barse v. Secretary, Children's Aid Society*, (1987) 3 SCC 50; *Nilabati Behra v. State of Orissa*, (1993) 2 SCC 746; *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241; *People's Union for Civil Liberties v. Union of India*, (1997) 3 SCC 433; *Chairman, Railway Board v. Chandrima Das*, (2000) 2 SCC 465; *Bachan Singh v. State*, (1982) 3 SCC 24; *Sunil Batra v. Delhi Administration*, (1980) 3 SCC 488.

³ 113th Law Commission Report (1985) p 5

⁴ *Selvi v. State of Karnataka* (2010) 7 SCC 263

II. VIOLENCE IN POLICE CUSTODY

Article 21 is luminary provision in the Constitution of India, 1950 and it enumerate that no person shall be deprived of his life and personal liberty except in accordance with the procedure established by law life and liberty include a right to live with dignity. This is an inherent guarantee against torture or assault by the state machineries. Chapter V of Code of Criminal Procedure, 1973 deals with the power of arrest of a person and safeguard related to it to be followed by the police to protect the interest of arrested person. Article 23 and 22 Constitution of India further provide constitutional protection which is extended to every citizen and which guarantees that life is meaningful not a mere animal existence. The torture and the custodial violence is alarming situation which put question to the administration of criminal justice system and about its credibility.

In a famous case of *Khatri (II) v. State of Bihar*,⁵ (Bhagalpur blinding case) it was alleged that the police officer has blinded certain prisoners in their custody. The Supreme Court answers in the affirmative the question of granting compensation to the victim. The Justice P N Bhagwati in this case said that "*if the compensation was not granted to the victim then article 21 of the Constitution of India would be mere rope of sand.*"⁶ Finally the 3 police officials were found guilty due to their involvement in the blinding of under trials.

In *Gauri Shankar v. State of UP, AIR*,⁷ three police personnel their charge with the offence death was caused of one Ram Dhiraj Tiwari in police custody. The Supreme Court of India held that death in police custody must be seriously viewed otherwise will in age of or under the direction of police raj. The punishment should be such that the police officer would deter from indulging in such behavior and there is no room for mercy for the police officer who practice torture in custody.

In yet another case of custodial death named as *Nilabati Behera v. State of Orissa*,⁸ where the deceased was taken into the police custody and the next day his body was found on the railway track with multiple injuries. The Supreme Court stated that in the case of violation of fundamental right by the state instrumentalities or servants the court can direct the state to pay compensation to the victim or his heirs by way of monetary amends and redressal. The principle of sovereign immunity shall be inapplicable in such cases. The state was directed to pay Rs. 1, 50,000 rupees as compensation to the deceased mother.

⁵ 1981 SCC (1) 627

⁶ Ibid, p 504

⁷ 1990 SC 709

⁸ (1993) 2 SCC 746

In *D K Basu v. State of West Bengal*,⁹ the Supreme Court has initiated the development of custodial jurisprudence from this particular case. In this case the Chief Justice of India's notice was drawn to news published in "*The Telegraph*" regarding the death of persons in police custody and in judicial custody in the state of West Bengal. The court has outline following requirements which should be followed in all cases of arrest and detention as a preventive measure and to prevent custodial torture.

1. The police personnel carrying out the rest and handling of the interrogation of the arrestee should bear visible and clear identification and name tag with their designation.
2. The police personnel carrying out the arrest of the arrestee shall have to prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness who may either a family member of the arrestee or a respectable person from locality where the arrest has been made.
3. Any person who has been arrested or detained in the custody in a police station or interrogation center or any other lockups it shall be entitled to have informed about his arrest and detention at a particular place by the police to his family member or any friend or any person having interest in his welfare.
4. The time, place of arrest and the venue of custody of an arrestee must be notified by the police.
5. The person arrested must have made aware about his right to have informed of his arrest and detention as his put under arrest all is detained.
6. Arrestee should be examined at the time of arrest and major and minor injuries on his or her body.
7. The arrestee should be subject to medical examination by a trained doctor every 48 hours during detention in custody by a doctor appointed by concerned State or Union Territory.
8. The copies of the entire document including the memo of arrest, referred to above, should be sent to the Magistrate for his record.
9. The arrestee must be permitted to meet his lawyer during interrogation, though not throughout the investigation.
10. UP police control room should be provided to all the district and state headquarters their information regarding the arrest and place of custody of the arrestee shall be communicated by

⁹ AIR 1997 SSC 3017

the officer causing the arrest.

*Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble*¹⁰, the deceased was taken into police custody in reference to the allegation of grievous hurt to person named Vishnu Sone Bhuwas. The police personal along with constable beat deceased brutally with hockey stick in front of his wife and other person. The District Court and High court both acquitted the accused person and it was evident that the entire State machinery is involved to protect the police personal. The Supreme Court said that “*The Court is not merely to act as tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth, and oblivious to the active role to be played for which there is not only ample scope but sufficient powers conferred under the Code of Criminal Procedure.*” The Supreme Court directs the State Government to pay compensation of Rs.1,00,000 to the mother and the children of the deceased. And the court did not grant any compensation to the widow because she appears to have re-married. A sum of Rs.25,000 be given to the mother and balance to the children. The court further direct that an enquiry be conducted by the Head of the Police force of the State under the direct control of the Chief Secretary of the State, to find out as to who were the persons responsible for the injuries on the body of the deceased. Action will also be taken against the officials who did not register the FIR and the authorities who were requested to conduct the crime branch enquiry but yet do not appear to have done anything in the matter.¹¹

Munshi Singh Gautam and others v. State of MP,¹² the Hon’ble Court the cases of custodial torture must be looked from a different prospect that of the ordinary criminal case, for the reason that in case where the person is alleged to have died in police custody it is difficult to get any kind of evidence. The court observed that it is very rare to find direct evidence in case of police torture or custodial death, which can only explain about the circumstances in which a person in custody has died. The police personnel try to show the ties of brotherhood and remain silent and hide truth to save their colleagues. And this cause a grave miscarriage of justice and makes justice delivery system vulnerable as the violators of law are free due to lack of evidence. Therefore, the court must deal such cases in realistic manner and with great sensitivity so that the common man did not lose faith in the efficacy of judicial system, which if happens will be a sad day.

The Supreme Court of India is the Crusader of custodial torture and light in the darkness. Under article 32 of Constitution of India, Supreme Court has the power to issue writs for the

¹⁰ (2003) 7 SCC 749

¹¹ Ibid

¹² AIR 2005 SC 402

enforcement of fundamental rights the supreme court is does. The protector as well as director of our constitutional fundamental rights, right to life and personal liberty, to live with human dignity being one of the most important among them. In fact, the Supreme Court treat the ordinary letters of inmate as a writ petition and issued notice to the concerned government, police, jail authorities and any detaining authority to arrest detain and interrogate and accused under any charge of any offence.

III. VIOLENCE IN JUDICIAL CUSTODY

The right guarantee by the Constitution of India under Article 21 cannot be denied to convicts, under trials or other prisoner in custody except according to procedure established by law. There is a great responsibility on the police and the prison authority to ensure that the citizen is in custody is not depriving of his right to life. If any wrong has been done by the police officer while in custody then the wrongdoer is accountable and the state is responsible as the person is in the custody is deprived of his life and personal liberty.

Prem Shankar Shukla v. Delhi Administration,¹³ in this case a telegram sent by the under-trial prisoners was treated as writ petition in this case so he sent a telegram to the court. Supreme Court said that it is violative of article 5 Universal Declaration on Human Rights and Article 10 of Covenant on Civil and Political Right and held that handcuffing and chaining of under trial prisoners is impermissible and would amount to torture and violative of Article 21 Constitution of India.

Sunil Batra (II) v. Delhi administration,¹⁴ in this case a letter written by Sunil Batra to one of the judges of the Supreme Court was treated as a petition. It was alleged that a warden in Tihar Jail has caused bleeding injury to a convict named Prem chand by forcing a stick into his anus. Justice Krishna Iyer said that *"of course new legislation is the best solution but when lawmakers take for too long for social patients to suffer, as in this very case of prison reform, quotes have to make do with interpretation and car on wood and script on stones ready at hand and not waited for marble artitecture."* The court held that Prem chand the prisoner has been tortured illegally and the Superintendent cannot excuse themselves from the liability and responsibility even though he may not be directly a party lack of business is also a limited guilt. The court directed the superintendent to ensure that no corporal punishment for personal violation on Prem chand shall be inflicted and no iron shall be forced on the person in wind

¹³ AIR 1980 SC 1535

¹⁴ AIR 1980 SC 1579

active spirit.¹⁵

*Rudal Saha v. State of Bihar*¹⁶, in this case the petitioner was detained in prison for over for 14 years after his acquittal and he has filed *Habeous Corpus* petition under Article 32 of Constitution of India praying for his release on the ground that is detention in the jail was unlawful. The court said that “*Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct it’s a violator in the payment of monetary compensation. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield.*”¹⁷ The court held that the petitioner was illegally detained in prison even after his acquittal and orders the authority for his release. The court further held that the state must pay compensation to the petitioner a sum of 30,000 rupees in addition to the sum of 5000 rupees already paid by it.

In the case of *C. Ramkonda Reddy v. State*,¹⁸ the suit for compensation against State will be maintainable as said by the Supreme Court as an undertrial prisoner lost his life in jail due to the ignorance of jail authorities. The Court pointed that Article 21 Constitution of India is the only remedy which can be enforced against the perpetrator of Custodial torture.

Supreme Court said that “*Law in the books and in the courts is of no help unless it reaches the prisoner in understandable language and available form. There is therefore need to get ready a Prisoners' Handbook in the regional language and make them freely available to the inmates. To know the law is the first steps to be free from fear of unlaw.*”¹⁹ When prisoner know their right, they can complaint about the torture or inhuman treatment done to them while in judicial custody. The violators of the Law who is actually vested with the right to perform sate function would be in the clutches of law for their wrong act. This is the possible thing which can be done to prevent the evil of torture in custody.

IV. CUSTODIAL TORTURE AGAINST WOMEN AND CHILDREN

There is no express provision in the Constitution of India for the grant of compensation for the violation of fundamental rights to life under Article 21 Constitution of India, 1950. But

¹⁵ Ibid

¹⁶ AIR 1983 SC 1086

¹⁷ Ibid, p 513

¹⁸ AIR 1989 AP 235

¹⁹ *Sunil Batra v. Delhi Administration*, (1980) 3 SCC 488

Supreme Court of India has judicially evolved a right to compensation in the cases where there is unconstitutionally deprivation of personal life and liberty of persons.

Award of compensation as a public law remedy for the violation of the fundamental rights in rest in article 21 of the Constitution of India in addition to the private law remedy under the law of torts was evolved in the last three decades.²⁰ Article 9(5) of International Covenant on Civil and Political Rights, 1966 provides that anyone who is the victim of unlawful arrest or detention shall have right to compensation. And the court on the basis of this provide compensation to the victims also maintain sanctity of fundamental right under constitution of India. *Article 9(5) of International Covenant on Civil and Political Rights, 1966 which indicate that an enforceable right to compensation is not alien to the concept of enforcement of guaranteed right.*²¹

In *Tukaram v. State of Maharashtra*,²² which is also known as Mathura rape case, was an incident of custodial rape in India on 26th March 1972 where in Mathura a young tribal girl list to rape by two policemen of the compound of Desaiganj police station Maharashtra but she neither raise any alarm nor does she resist the act. The Session Court acquitted the accused on the ground that there was decent consent. The Bombay High Court reversed the judgement and said that there is distinguish between consent and passive submission. The Supreme Court however reversed the judgement of High Court and observed that the prosecutrix was not subjected to any fear of death or hurt which may lead her to submit her body. The Supreme Court therefore acquitted the accused.

After the verdict of *Mathura Rape Case*²³, there was widespread protest and demonstration for the review of the verdict. Afterwards an amendment was brought about in Section 376 of the Indian Penal Code, 1860 by Criminal Law (Second Amendment) Act 1983. Section 376(2) (a) of Indian Penal Code, 1860 penalizes police officer who committed rape on women while in officer's custody. The punishment provided for the same is rigorous imprisonment for a term which shall not be less than 10 years, but which may extend to life imprisonment and shall also be liable to fine. By 1983 Amendment a statutory provision was made in the face of Section 114 A of the Evidence Act made on 25 December 1983, which states that if the victim says that she did not consent to the sexual intercourse, the Court shall presume that she did not consent as a rebuttable presumption.

²⁰ Saphaia, Ruchi: 'The Problem of Custodial Violence in India: A Critical Study', *Shodhganga* (2015), p 244

²¹ *Nilabati Behra v. State of Orissa*, AIR 1993 SC 1960

²² (1979) 2 SCC 143

²³ *Ibid*

Arvind Singh Bagga v. State of UP,²⁴ in this case the police officer subjected married women to physical mental and psychological torture and police officer wants her to create a fear and to make her submit the demand of the police and abandon her legal marriage. Her husband and family members where are also tortured. The Supreme Court took serious note of human right violation and directed the state to launch prosecution and pay compensation of 10,000 to victim woman and her husband and rupees 5000 to each of the other victims. The Court pointed out that upon such payment it will be open to the state to recover the amount of compensation from the police officer concerned.²⁵ It can be a better option if the Supreme Court made obligatory to the State Government for recovery of amount of compensation from the guilty police officer.

In *People's Union for civil liberties v. Union of India and Anr.*²⁶ the court consider a pathetic case of a natural death of a poor woman in police custody and directed the state government to pay compensation of 3 lakh rupees including 1 lakh already awarded by the order of state government to the family of victims.

In *Sheela Barse v. State of Maharashtra*,²⁷ a letter from Sheela Barse a journalist, complaining of custodial violence to the women prisoners while confined in the police lockup in the city of Mumbai was treated as a writ petition. The court in this case issued various directions to the State of Maharashtra conferring protection to the women prisoners in police lockup. The relevant guidelines are as follows: -

1. There should be a separate police lockup for male and female. No female suspect should be kept in in police lockups in which male suspect are detained.
2. The interrogation of a female suspect should be carried out only in the presence of female police officer or female constable.
3. Some police lockup should be reasonably in good locality where only female suspect should be kept and they should be guarded by female police officer along with female constable.
4. Period visit to the police lockup in the city to provide arrested person and opportunity to hear their grievances and ascertain the condition of police lockup.
5. The Magistrate before whom an arrested person is produced shall enquire from the arrested person whether he has any complaint of torture or maltreatment in police

²⁴ (1994) 6 SCC 642

²⁵ Ibid

²⁶ AIR 2005 SC 2419

²⁷ AIR 1983 SC 378

custody.

In *Nandini Sathpathy v. State of Orissa*,²⁸ in this case Ms. Satpathy was the former Chief Minister of Odisha the accused was a suspect and not an accused was examined at the police station in connection with investigation into the charges of corruption against her. On her refusal to answer the question put to her, she was charged under offence section 179 IPC. It was argued that the refusal to answer police interrogation was justified on the ground of article 23 of the constitution and section 161(2) Code of Criminal Procedure. The Supreme Court while speaking through Justice Krishna Iyer said that the area covered by Article 20(3) and section 161(2) Code of Criminal Procedure is substantially the same. The court held that *"relevant replies which furnished a real and clear link in the chain of evidence indeed to bind down the accused with the crime become incriminatory and offended Article 20(3) Constitution of India if elicited by pressure from the mouth of the accused."*²⁹ Therefore the accused can refuse to answer that question which tends to incriminate him.

In *Saheli, A Woman's Resources Centre v. Commissioner of Police, Delhi*³⁰ a 9-year-old child died due to the assault and beating by the police officer in custody. The Supreme Court held that this state is liable to pay compensation in the case of police atrocities and accordingly it directs the state government to pay compensation of 75,000 as compensation to the mother of victim. The Supreme Court once again considered the question of granting compensation in the case of police atrocity.

It is evident from the above cases that how police exercise excessive power when an accused person is taken in custody merely on complaint. Police officer exercise their power for extorting confession in the form of custodial torture and it is not justified by law. Police officer did not spare anyone who is accused of an offence even children are also included in that custodial torture.

V. CONCLUSION

Indian judiciary has to play a powerful role against violence and torture and extrajudicial killings by the law enforcement personnel among others. The Supreme Court in fact treated the ordinary letter of inmates as a writ petition and issued notice to the concerned government, police authorities and any retaining authority to arrest detain and integrate and accused under any charge of offence. It is often said that

²⁸ AIR 1978 SC 1025

²⁹ Singh Mahendra Pal; *V N Shukla's Constitution of India* (12th ed 2013) , p 203

³⁰ (1990)1 SCC 422

"Justice delayed is Justice denied, Justice hurried is Justice buried."

The court has to strike a balance between these two extremes so that the justice is actually done and Justice should not only do but it seems to be done. The grey area of law is that it provides compensation to the victim of custodial Torture but the violator of the law is still out of the clutches of the law due to lack of direct evidences. Justice will actually be done when the police officer practicing torture will be punished in accordance with the law. *"The court also observed that the custodial violence required to be taken from the two ends i.e., by taking measures that are remedial and preventive and efforts should be made to remove the cause of such occurrences."*³¹ Therefore, the court has to suffice and take a serious note on any violation of human rights during the period when the persons are in custody.

³¹ Rabia @ Mamta and Anr v. NCT of Delhi and Ors, W.P (CRL) 2349 of 2015, Date of judgement 20th November 2015