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# **JUDICIAL APPROACH AND REFORMATION IN THE LAW REGARDING CUSTODIAL VIOLENCE IN INDIA**

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## **ABSTRACT**

The article provides an overview over the law pertaining to custodial violence. The term unfortunately is yet to be defined, however the provisions pertaining to custodial torture and rape do find its way in different legislations. Therefore, the onus to define this vast term ultimately fell on the judiciary. The article also looks at the judiciary's role in tackling the problem of custodial violence. We look at the judicial precedents in this matter and understand the standing of the judiciary in these matters. The author concludes the paper by providing legislative measures to be taken at the earliest to cover the cracks which have been highlighted by the judiciary.

## I. INTRODUCTION

*“Any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an in-road into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with the procedure prescribed by law” - Justice P.N Bhagwati.<sup>1</sup>*

India is built on the bedrock of respect for the law. The sanctity of our democracy hinges upon the conferment of equal rights to all, and each instance of custodial violence is a black mark on the country. The police are considered agents of the State, and the teeth to the law, however, in India, they are increasingly acting as an entity unto themselves. The unfettered power vested in the police system builds up a superiority complex that manifests in the police acting as the masters of the sovereign law, instead of its servants.

Custodial violence is a problem that has plagued the world for centuries, and is a symptom of a lack of empathy for the lives of individuals, and the prioritisation of displays of power over the rule of law.

## II. CUSTODY IN LAW

Custody is the apprehension of an individual to be kept under protective care. Sections 57 and 167 of the Code of Criminal Procedure(CrPC), concern themselves with the procedure to be followed while placing a person under custody, and also differentiates between the types of custody. Under Section 57, a person cannot be detained by the police for longer than 24 hours without an order from the magistrate as under Section 167, CrPC, who determines whether there are sufficient grounds to order a remand of the suspect, either into judicial or police custody.<sup>2</sup>

The period of police custody begins when the person is apprehended by the police, and interrogation is allowed only during police custody, and not in judicial custody, unless under exceptional circumstances.

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<sup>1</sup> *Francis Corali Mullin v Union Territory of Delhi, 1981 AIR 746.*

<sup>2</sup> *Raj Pal Singh v. State of U.P (1983) CrL.L.J. 109.*

## ***CUSTODIAL VIOLENCE MANIFESTED***

J.Krishna Iyer observed:“Nothing is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts a deeper wound on our constitutional culture than a State official running berserk regardless of human rights.”<sup>3</sup>

Custodial violence, encompassing all forms of violence including torture, rape, and other physical and mental abuses of power, is usually carried out by the police, inflicted upon a person in their custody. The elements which constitute custodial violence are firstly, the infliction of severe mental or physical pain or suffering with the consent of the state authorities, and secondly for a specific purpose, such as to gain information, to punish, or to intimidate the target. However, the term custodial violence is not explicitly defined under any statute.<sup>4</sup>

One could turn to the judiciary to understand the meaning of the term. In the case of *D.K Basu v. State of West Bengal*, Justice Dr. A.S Anand provides a definition for custodial torture as, “a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality.<sup>5</sup> It is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward-flag of humanity must on each such occasion fly half-mast.” This was later relied on in the case of *Mehmood Nayyar Azam v. State of Chandigarh*.<sup>6</sup>however this is merely an analysis of custodial torture, which is one of the various types of custodial violence. For obvious reasons, the police doesn’t use the word torture, and instead calls it “sustained interrogation”, “questioning” and “examining”.<sup>7</sup> However, it does not detract from the severity of the problems that plague the justice system.

It is the legitimate right of any police officer to interrogate or arrest any suspect on some credible material, but it is their duty that such an arrest must be in accordance with the law, and that interrogation does not mean inflicting injuries.<sup>8</sup> The Police, through their brutality

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<sup>3</sup> *Kishore Singh v State of Rajasthan AIR 1981 SC 625.*

<sup>4</sup> *D.K Basu v. State of West Bengal (1997) 1 SCC 416.*

<sup>5</sup> *Id.*

<sup>6</sup> *Mehmood Nayyar Azam v. State of Chandigarh(2012) 8 SCC 1.*

<sup>7</sup> R.S Saini, *Custodial Torture in Law and Practice with Reference to India*, 36 Journal of the Indian Law Institute 167, 166-192(1994).

<sup>8</sup> *Bhagwan Singh v. State of Punjab, (1992) .1 sec 249; JT 1992(3) SC 216.*

towards persons in their custody, commits behind closed doors precisely what the tenets of our legal order forbid.

Custodial violence represents the worst form of excesses by public servants entrusted with the duty of law enforcement.<sup>9</sup> The perpetration of custodial violence only diminishes the respectability of the law in the eyes of the public, and makes the administration of justice harder. In India, the instances of custodial violence are only a manifestation of the underlying institutional issues that pervade our society and the perception of the role of the police.

The state's sponsorship of custodial torture is India's worst kept secret, with politicians, policemen, and bureaucrats terming it as a necessary evil to curb the crime rate. Ingrained mindsets in the public regarding the role of the police as the ultimate protector, leads to the justification, and even glorification of police brutality and custodial violence. There is a significant amount of pressure that is placed to solve high profile cases, which leads to the police resorting to violence to extract information. In such cases, the guilt of the accused is already established by the media and the public, much before the courts pronounce the judgement, which thus allows the police to torture and even murder the accused, and portray a "big brother" image to the public.

The lack of comprehensive anti-torture laws, and the immunity afforded to police forces, culminates in a zero accountability policy. Institutional challenges also include the lack of urgency to reform the opaque and corrupt prison system, which imposes barriers for the enforcement of the rights of prisoners.

The police forces are an extension of the State, and as such, must carry out their conduct within the realms of the rule of law. In its capacity as an institution which helps punish criminal offenders, it is hypocritical if the police force itself illegally tortures an individual in custody. The democratic nature of India is such that no individual is above the rule of law, especially those who enforce it.

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<sup>9</sup> National Human Rights Commission, *Annual Report 2016-17*, 39.

### III. JURISPRUDENCE SURROUNDING CUSTODIAL VIOLENCE

Laws are written primarily for the protection of life and liberty of a person. The Constitution of India ensures the same in Article 21, which is considered an integral part of the fundamental rights in the constitution and holds a certain place of pride.<sup>10</sup> This includes the right to live with dignity as well, and interpretations of constitutional courts provide human rights a priority in the situation of custodial violence.<sup>11</sup> The judiciary has interpreted the article to increase its scope from mere existence to living with dignity and all that it entails.<sup>12</sup> Article 20(3) as well as Article 22 strengthens this extension to include living with dignity.<sup>13</sup>

The Constitution serves as the basis for the prevention of these crimes, however it is important to look at certain provisions under various statutes that identify custodial crimes. In the Indian Penal Code, provisions such as Section 330 (voluntary hurt in order to extort confession), 331 (voluntary causing grievous hurt to extort confession), 376(2) (custodial rape), 348 (wrongful confinement).<sup>14</sup> Chapter V of the Code of Criminal Procedure lays down the safeguards required to be followed by the police in order to protect the interests of the arrested persons.<sup>15</sup> Confessions gained from interrogation by police are utilised in court, hence the Evidence Act provides for confessions gained through coercion, inducement etc. to be made irrelevant to the proceedings.<sup>16</sup> It is also impossible to use confessions made to a police officer against a person,<sup>17</sup> and allows confessions by the accused only if done in the presence of a Magistrate.<sup>18</sup>

The judiciary plays a major role in the provision of justice, as an interpreter of the law. Custodial violence is a manifestation of the imbalance between the liberty of an individual and the power of the state, and the judiciary acts as an equaliser between the two.<sup>19</sup> With the

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<sup>10</sup> A.G Noorani, *Access to Prisons and Custodial Torture*, Economic and Political Weekly, Vol.40, 4497, 4497-4498 (2005).

<sup>11</sup> K.I Vibhute, *Right to Human Dignity of Convict under Shadow of Death 'and Freedoms Behind the Bars In India: A Reflective Perception*, 58 Journal of Indian Law Institute, 21, 15-54 (2016).

<sup>12</sup> *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, AIR 1981 SC 746.

<sup>13</sup> *Supra* note 11.

<sup>14</sup> Adhya Khanna, *The Enshrinement of Custodial Violence in India*, Bar&Bench, July 17, 2020, 10:40 am. <https://www.barandbench.com/apprentice-lawyer/the-enshrinement-of-custodial-violence-in-india>

<sup>15</sup> *Supra* note 11.

<sup>16</sup> § 24, The Indian Evidence Act, 1872, No. 1 of 1872, INDIA CODE(1872).

<sup>17</sup> § 25, The Indian Evidence Act, 1872, No. 1 of 1872, INDIA CODE(1872).

<sup>18</sup> § 26, The Indian Evidence Act, 1872, No. 1 of 1872, INDIA CODE(1872).

<sup>19</sup> Shodhganga, *Judicial Response in the prevention of custodial crimes in India*, available at

police unwilling to accept responsibility, and officers assisting each other in commission of these crimes., the judiciary takes on the role of ensuring accountability.<sup>20</sup>

Although the legislature has failed to provide a standard definition for custodial violence, custodial torture and solitary confinement have been defined by the judiciary.<sup>21</sup> In situations where statutes have failed to provide an understanding of the application of laws, the courts have stepped in.<sup>22</sup> In the case of *D.K Basu v. State of West Bengal*, the Supreme Court issued a set of guidelines which were to be applied in case of an arrest of a person.<sup>23</sup> It included the procedure for police officials to follow when detaining a person with respect to a crime, maintenance of an inspection memo, keeping details of personnel conducting investigation, etc.<sup>25</sup> Similarly, in the landmark case of *Joginder Singh v. State of Uttar Pradesh*, the court issued guidelines which included the rights of an arrested person and directed the police to enforce these guidelines to the fullest extent.<sup>24</sup>

Courts have also looked into interrogation techniques used by law enforcement in order to obtain information from a subject. The court in the case of *Kidar Nath v. State of Punjab*, made clear that violent practices held no place in criminal jurisprudence.<sup>25</sup> The decision in *Public Prosecutor v. Shaikh Ibrahim* also displayed a similar opinion.<sup>26</sup>

The judiciary's position is best summarised by Justice Y.V Chandrachud in the case of *Dagdu and Ors. v. State of Maharashtra* where he writes, "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 that temptation must, in the larger interests of justice, be nipped in the bud."<sup>27</sup>

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[https://shodhganga.inflibnet.ac.in/bitstream/10603/128150/17/11\\_chapter%204.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/128150/17/11_chapter%204.pdf)

<sup>20</sup> Aneesha Sareen, *Gaping holes in probe report*, Chandigarh Tribune, January 20, 2011.

<sup>21</sup> Deeksha Saggi, *Custodial Deaths and Role of Judiciary: A Critical Analysis*, July 25, 2020.

<https://www.latestlaws.com/articles/custodial-deaths-and-role-of-judiciary-a-critical-analysis/>

<sup>22</sup> *Vishaka v. State of Rajasthan* (1997) 6 SCC 241.

<sup>23</sup> *D.K Basu v. State of West Bengal* (1997) 1 SCC 416.

<sup>24</sup> *Joginder Kumar v. State of UP* AIR 1994 SC 1886.

<sup>25</sup> *Kidar Nath v. State of Punjab* 1960 Cr.L.J. 390 (Punjab).

<sup>26</sup> *Public Prosecutor v. Shaikh Ibrahim* AIR 1964 A.P. 548.

<sup>27</sup> *Dagdu v. State of Maharashtra* (1977) 3 SCC 68.

#### IV. RECOMMENDATIONS AND CONCLUSIONS

In order to address the issue of custodial violence, a unilateral effort by a single stakeholder may not be sufficient. The multiple stakeholders involved in this scenario, ranging from the government and its institutions to the police themselves, have to jointly effect change.

##### *AMENDMENT TO THE INDIAN EVIDENCE ACT, 1872*

The reports of the Law Commission of India have for ages guided lawmakers in the enactment of statutes and in the updating of laws already in place, in order to combat a specific issue.<sup>28</sup> However, the legislature has no obligation to implement its recommendations since it is merely an executive body.<sup>29</sup>

The Law Commission on several occasions has addressed custodial violence, however the government has chosen to overlook many of the recommendations by the commission. Certain recommendations made in the 113th<sup>30</sup> and the 152nd<sup>31</sup> Law Commission Reports seem to be repeated, particularly the recommendations to include an amendment to the Indian Evidence Act, 1872 particularly Section 114.<sup>32</sup> The Amendment shifted the onus of proof in the event of custodial violence to the police officer who had kept the person in custody.

This amendment was recommended in the 113th report keeping in mind a 1985 Supreme Court judgement, wherein the court dealt with the issue of prosecution of police officers in the matter of a custodial death.<sup>33</sup> In this case the person arrested died in six hours and during this time, was in custody of the police officer. This is why the court highlighted the fact that the burden of proof did not lay on the officer but on the victim, even though the victim was in the custody of the police.<sup>37</sup> The court stated in the case:

“The law as to the burden of proof in such cases may be re-examined by the legislature so that hand-maids of law and order do not use their authority and

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<sup>28</sup> Law Commission of India, official website. <http://www.lawcommissionofindia.nic.in/main.htm#a2>

<sup>29</sup> Diva Rai, *Important pointers you must know about Law Commission of India*, iPleaders, September 9, 2019. <https://blog.iplayers.in/law-commission-of-india-2/>

<sup>30</sup> Law Commission of India, *Injuries in Police Custody*, Report no. 113(July 1985).

<sup>31</sup> Law Commission of India, *Custodial Crimes*, Report no. 152(August 1994).

<sup>32</sup> § 114, The Indian Evidence Act, 1872, No. 1 of 1872, INDIA CODE(1872).

<sup>33</sup> *State of UP v. Ram Sagar Yadav*, AIR 1985 SC 416.

opportunities for oppressing the innocent citizens who look to them for protection.”<sup>34</sup>

Even though the amendment was recommended after the Ram Sagar Case, it was still considered relevant 23 years later as the Law Commission in October 2017 reiterated the insertion of this particular amendment to the Indian Evidence Act.<sup>35</sup> The section ensures that the burden of proof is shifted to the police authorities, bringing about a sense of caution among authorities due to their increased accountability.<sup>36</sup>

## ADOPTION OF INTERNATIONAL STANDARDS

India has never had a legislation dealing specifically with custodial violence. Even though provisions in enactments such as the Indian Penal Code can be applied, a specific law has not been introduced. The benefit of the adoption of a statute on torture apart from gaining a specific legislation, is that India would officially ratify the United Nations Convention Against Torture (UNCAT).<sup>37</sup>

The UN Convention Against Torture, is an international human rights treaty which aims at prohibiting the usage of torture by states.<sup>38</sup> India is a signatory to the treaty, but has not ratified it. The previous attempt at ratification was the Prevention of Torture bill in 2010, which never made it past the Selection Committee of the Rajya Sabha, despite being passed by the Lok Sabha.<sup>39</sup> The Committee pointed out many shortcomings in the Bill, namely the lack of a broad definition for torture,<sup>40</sup> exclusion of offences under IPC,<sup>41</sup> exclusion of

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<sup>34</sup> *Supra* note 38, ¶20 (per Y.V Chandrachud J.).

<sup>35</sup> Law Commission of India, *Implementation of United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment through Legislation*, Report No. 273(October, 2017).

<sup>36</sup> *Id.*

<sup>37</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <https://www.refworld.org/docid/3ae6b3a94.html> [accessed 15 August 2020].

<sup>38</sup> Alex Severson, *Top 10 Things You Wanted To Know About UNCAT but were too afraid to ask*, Amnesty International. <https://www.amnestyusa.org/top-10-things-you-wanted-to-know-about-uncat-but-were-afraid-to-ask/>

<sup>39</sup> Adhya Khanna & Chetan Chawla, *The Enshrinement of Custodial Violence In India*, Bar&Bench, July 17,10:40am.

<https://www.barandbench.com/apprentice-lawyer/the-enshrinement-of-custodial-violence-in-india>

<sup>40</sup> SELECT COMMITTEE, Rajya Sabha, *Report of the Select Committee on Prevention of Torture Bill, 2010*, Pg 3

[https://www.prsindia.org/sites/default/files/bill\\_files/Select\\_Committee\\_Report\\_Prevention\\_of\\_Torture\\_Bill\\_2010.p](https://www.prsindia.org/sites/default/files/bill_files/Select_Committee_Report_Prevention_of_Torture_Bill_2010.p)

*df* (last visited 15 August, 2020).

<sup>41</sup> *Id.*



provisions pertaining to the torture of women and children<sup>42</sup> and the absence of a provision dealing with attempt to torture.<sup>43</sup> Seven years later, the government once again looked into the ratification of the Convention and sought the insight of the Law Commission on the matter. The Commission delivered a comprehensive report on international standards pertaining to rights of prisoners and detainees, as well as a draft Prevention of Torture Bill, 2017.<sup>44</sup> It included amendments to existing legislations such as the Code of Criminal Procedure as well as the Indian Evidence Act.<sup>45</sup> The highlight was the recommendation provided in order to ratify the Convention.<sup>46</sup>

The implementation of these recommendations rests solely on the political will of the legislature and the executive. The judiciary has done what it could within its power to curb this problem, however these are only short term solutions. Systemic change can only be brought about by the other two wings of governance.

### **ESTABLISHING ACCOUNTABILITY AND CHANGING THE NARRATIVE**

It is recommended that the NHRC and independent observers take on a greater role to oversee the functioning of the police, but challenges in funding and implementation cause hurdles. There is also a need to bring changes to the perception of law enforcement, by ending the aggrandisement of the police forces, and holding them to a higher standard of accountability and liability.

The lives and liberty of the common citizens are under a new peril when the guardians of the law gore human rights to death. The vulnerability of human rights assumes a traumatic poignancy when the violation is perpetrated by the police arm of the State whose function is to protect the citizens and not to commit gruesome offences against them.<sup>47</sup> It is high time that the State recognises the deep rooted issue of custodial violence, and takes a stand against it, for persons in custody are persons too.

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Supra* note 35.

<sup>45</sup> *Id.* At 79.

<sup>46</sup> *Id.* at ¶7.2.

<sup>47</sup> *Raghubir Singh v. State of Haryana*, A.I.R. 1980 S.C. 1087.