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CUSTODIAL VIOLENCE: AN ATTACK ON LIFE AND LIBERTY

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ABSTRACT:

This paper is dealing with the issue of Custodial violence in India that has always been a burning issue and not a recent phenomenon. It mainly takes place in police and judicial custody. It includes death, torture, and rape. The constitution of India ensures certain rights to an arrested person. Many legal provision and judicial pronouncements also mentions measures to be followed while arresting a person to avoid custodial violence. Despite these rights and many legal provisions, custodial violence continues to occur. The recent death of father-son duo from Tamil Nadu, allegedly due to custodial violence, has sparked anger across India. Another case where a gangster named Vikas Dubey who was accused of killing many policemen, shot dead by police in a shootout while carrying him to Kanpur from Ujjain. These deaths have received media attention and have started a debate on the issue of custodial violence. This paper tries to give an overview and mentions rights of an arrested person followed with the initiatives taken by the government and role playing by the judiciary in eradicating custodial violence from India. This issue is a concern for human rights and an obstacle to Indian democracy. It is a threat to the human well being in a country which is founded on the basis of rule of law.

I. INTRODUCTION:

Abuse of police powers and custodial violence have emerged a major issue of human rights concern and one of the main obstacles to democracy and development of human well being in contemporary societies.

For Indian societies, the incidents of custodial violence is not a new phenomenon, time and again we have witnessed numerous incidents of death, rape and grave injuries in the police custody or during investigation. The police administration is always criticized for denying the basic rights to the accused and using coercion and torture to draw out favourable statements.

Custodial violence has become so common these days that people and authorities take it for granted as a routine police practise of interrogation. The glorifications of violence by police in bollywood films and seriels have further added to the social acceptance of this grave crime. The result is that the news of such outrageous conduct causes nothing more than a momentary shock in the society and only when a certain incident attains public attention, there is some sort of a public uproar and aggression which either dies down with time or at the most subsided by constituting an enquiring committee.

The word “custody” implies care and protection i.e. the authorities are legally bound to provide adequate necessary amenities and ensure the safety of the inmates by providing them a healthy environment which includes timely medical assistance, food, recreational facilities, etc but the real scenario suggests harsh and inhuman treatment awarded to the inmate by Police officials.

There is no doubt that the police officials works under a lot of pressure including the personal and professional disturbances, but the police certainly has no right to take law into their hands and inflict brutality on a helpless person under its custody ignoring the basic human right of an individual. In a democratic setup as that of India, it's the common people and not the police who are the real masters as the sovereign power are rested with them. The police are simply the agent of the government which is ultimately accountable to the people. The police have to protect the society from the acts of murderers, armed robbers, habitual criminals, and terrorists. However, they cannot take law into their hands and inflict punishment to the accused; it is for the court to decide the punishment and conviction after looking into the matter.

Every individual (including the criminals) have certain basic rights which are inherent, fundamental and inalienable, and on the freedom of these rights is based our democratic setup. The police cannot take away these human rights, rather they are meant to be protected by them. It is also pertinent to note that higher judiciary through its creative interpretation has upheld rights of the victims of custodial crimes over the years. Further, India is a party to various International human rights including UN Convention against Torture and Cruel Inhuman Degrading Treatment or Punishment (CAT 1984), but despite all these guidelines and commitments, torture continue to be serious problem for victim, their families and the society at large, the very recent incident remains of the Sathankulam town in Tamil Nadu's Thoothukudi district, where a father-son duo allegedly died due to the custodial violence.

II. CUSTODIAL VIOLENCE: MEANING, CAUSES AND OUTCOMES:

The term custodial violence has not been defined under any legal statute. It is a combination of two words custody and violence. The word 'custody' in general sense refers to guardianship and protective care. As per the dictionary meaning, the condition of being held by the police, arrest or imprisonment is called 'custody'.

Pre-conviction custody is known as under trial custody which as per section 167 of CrPC is chiefly of two types i.e. police and judicial. In police custody, the suspect is detained in the police lock-up by the investigating agency during the period of investigation which can't be more than 24 hrs. Any detention beyond this period has to be with the permission of the magistrate and in total it can't exceed 15 days. In judicial custody there is incarceration of the suspect which is authorized by a magistrate pending investigation or trial in a jail which is distinct from a police lock-up. The investigating agency can have access to such convict in the judicial custody only with the special orders of the court only.

The term 'violence' refers to the state of mind and may include excessive unrestraint or unjustified force, outrage, perforate injury. 'Violence' in its literal sense has been defined as the use of force by one person over another so as to cause injury to him. This injury may be of any kind, be it physical, mental or otherwise. Thus, custodial violence can be understood as any kind of violence occurring in the custody which is not warranted by the law of the land. It is a generic term and includes all and every type of torture, third degree, harassment, brutality, use of force not warranted by law, etc. Violence may be subtle or extreme like abusing, emotional or physical violence, thrashing and beating, rape or even death and the nature of custody may be judicial, police.

The Indian prison system is already facing several issues of overcrowding, malnutrition, unhygienic conditions and lack of medical care, etc, however custodial violence remains the common cause of deaths in prisons and lock-ups. Torture or third degree remains the most common and prominent form of custodial violence by the police.

The worst part of such crime is that it is committed upon the citizens by the very person who are considered to be the guardian of the citizens. It is committed under the garb of uniform and authority within the four walls of Police Station or lock up. The protection of an individual from torture and abuse of power by police and other law enforcing officers is a matter of deep

concern in a free society.

The majority of the victims of Custodial death and violence as observed by the Law Commission are the poor and weak¹. Former Journalist Arun Shourie who investigated 45 cases of custodial death in seven different states observed that “*The victims were invariably poor. Several of them hauled in on no formal charges at all. Even in the case of persons who were arrested, in an overwhelmingly large number of cases they were all accused of petty offences*”²

The probability of violence committed by police on persons in its custody is much greater than such violence being committed by them elsewhere as the victims of such violence are unable to protest against it. The police officers use their official position to vanish evidences against themselves. Death in custody is generally not mentioned on the official records of the lock-up and every effort is made by the police to dispose of the body or to make out a case of fake encounter that the arrested person died while escaping the jail. Any complaint against torture is not given attention because of ties of brotherhood. No direct and substantial evidence is left to establish the case of torture or causing hurt resulting into death, as the police lock-up where generally torture or injury took place is generally far away from public gaze and the witnesses including the policemen or co-prisoners are highly reluctant to appear as prosecution witness due to fear of retaliation by their superiors or the authorities.

However, in spite of the Constitutional and Statutory provisions contained in the Criminal Procedure Code and the Indian Penal Code aimed at safeguarding personal liberty and life of the individual, the incidents of torture and deaths in police custody has been continuously rising in numbers. A detailed analysis of various incidents of custodial death shows that such violence are more likely found to happen during the course of investigation when the police, with a view to securing evidence or confessions, often resort to third-degree methods including torture and techniques of arrests by either not recording them or describing the deprivation of liberty merely as "prolonged interrogations".

The morning newspapers filled with reports of dehumanising torture, assault, rape and death in police custody or other governmental agencies almost every day is, indeed, depressing. The

¹ A.K.Saxena, P.S.V. Prasad and Sankar Sen, “Custodial Deaths in India (A Research Study)”, 1st Ed., 1994, p.1.

² K.G.Kannabiran, “Creeping Decay in Institutions and Democracy”, The Economic and Political Weekly, August – 1992.

day to day increasing incidents of torture and death in custody has assumed a alarmingly high proportions and is now affecting the credibility of the rule of law and the administration of the criminal justice system. As a result the society rightly feels concerned and terrified. The society's cry for justice becomes louder.

III. THE PREVENTION OF TORTURE BILL:

India needs proper implementation of existing laws to curb custodial torture before enacting another in compliance with international covenants. India is one of the signatory to the UN's Convention Against Torture (CAT), but has not yet ratified. Police officials and executives have always alleged to use inhumane methods to procure their needs. Lack of anti-torture laws gives the upper to the aforementioned to go beyond the specific limit. Concerned ministry has presented Prevention of torture bill time and again in the Lok Sabha, but every time it has lapsed. Law Commission also suo moto took to implement the bill, but hasn't got any success yet.

There is no any straight forward definition of the torture in the Indian legal field. Draft of the bill says that, any public servant or any other person authorized on behalf of him commits the act of torture if they inflict on another person: (i) hurt or grievous hurt, (ii) mental or physical pain, (iii) any danger to health, life or limb in any form, or (iv) death during acquiring information or punishment. The bill further proposes punishment of 3 years minimum and may be extended up to 10 years for inflicting torture for the purpose of extorting confession, or for punishing on the grounds of caste, creed, religion, race, community, place of birth or any other relevant ground.

The bill also mentions the signatory status of India to the United Nations Convention against Torture (1975) and other Cruel, Inhuman or Degrading Treatment or Punishment. India signed the convention on October 14, 1997 but remains one of nine countries who have not ratified it so far.

In 2010, after being passed from Lok Sabha, Bill reached Rajya Sabha, but they further referred it to Rajya Sabha Select Committee for further consideration. Committee provided for some suggestions such as expanding the definition of torture, torturing women or children should have severe punishment, independent authority should be set up for the investigation and to provide compensation to the victim. But after being passed from Lok Sabha with the suggested

changes, but has not been passed by Rajya Sabha since.

In 2017, The Law Commission of India (Chaired by Dr. Justice B. S. Chauhan) submitted their concerned report on “Implementation of ‘UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment through legislation’”. The recommendation was made by the Supreme Court as the Court was simultaneously hearing the case related to torture in death sentence. Later, Law Commission said, "We are seriously considering the Prevention against Torture Bill but before proposing the Act, there would be major changes in the existing laws such as Indian Penal Code (IPC), Criminal Procedure Code (CrPC) and Indian Evidence Act and that's hard nut to crack.

IV. RIGHTS OF AN ARRESTED PERSON UNDER THE CONSTITUTION OF INDIA:

1. Right to a fair and just trial:-

Article 14 of the Constitution says that, “every individual is equal before the law” which means that every person should be treated equally as all are equal before the court of law. Principle of natural justice must prevail.

Right to speedy trial has been granted in the case of *Hussainara Khatoon v. Home Secretary, Bihar*³ where the court said that “trial must be disposed off as quickly as possible”.

Section 303 of the Code of Criminal Procedure Code hereafter described as CrPC, provides that every alleged convict/criminal has the right to be defended by a lawyer of his/her choice even if the criminal proceeding has already been initiated.

2. Right against self-incrimination:-

Article 20(3) of the Constitution provides for protection against self-incrimination. The accused has right to remain silent and not to disclose anything before the trial. The right to maintain silence was granted by the Supreme Court in the case of *Nandini Sathpathy v. P.L. Dani*⁴, and Supreme Court held that “nobody is allowed to extract the statement from the accused forcibly, while he has the right to maintain silence during discourse of investigation. Right to remain silent is more evident from the fact that Supreme Court made brain-mapping test, narco-analysis test and lie detector test, as violative of Article 20(3).

³ 1979 SCR (3) 532.

⁴ 1978 SCR (3) 608.

The Supreme Court has widened the scope of the immunity while interpreting the scope of the word 'witness' to be comprised of both the oral and documentary evidence, so that no person be made compelled to provide any kind of evidence which is likely to be used against him in the prosecution. However, such evidences must be in the nature of communication. Similarly, no prohibition is attracted where any object or document is searched or seized from the possession of the accused. And for the same reason, it does not bar from obtaining the thumb impression or signature or the medical examination of the accused.

3. Right to life and Personal Liberty:-

Article 21 provides for the protection of life personal liberty where no person shall be deprived of his life and personal liberty except according to the procedure established by law. The Article reminds of the famous clause from Magna Carta itself:

"No man shall be taken or imprisoned, exiled, outlawed, or in any way destroyed saved... by the law of the land."

It goes by saying that no executive personnel shall be entitled to interfere with the life and personal liberty of the citizen, unless he can justify the action in the light of some provisions of law. Simply, no person can be subjected to any physical torture that does not justified legally. The Supreme Court has consistently reiterated that custodial torture violates right to life. Personal freedom is secured by the judicial writ of habeas corpus [Arts. 32 and 226] by means of which an arrested person may have himself brought before the Court and have the ground of his imprisonment examined, and regain his freedom if the Court finds that there is no legal justification for his imprisonment. The Court will also set the prisoner free where there is a law authorizing the deprivation of liberty of a person but there has been no strict compliance with the conditions imposed by the law. The Supreme Court has more than once observed that "those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty must scrupulously observe the forms and rules of the law".

4. Protection against arbitrary arrest and detention:-

Article 21(1) of the Constitution says that no person who is arrested shall be detained in custody without being informed of the grounds for such arrest. It provides for the protection against arbitrary arrest and detention. The person arrested or detained has right to consult and to be defended by the legal practitioner of his choice. When a person is been arrested under the law of preventive detention:

- (i) The person could be detained only for the three months, not more than that. If the government seeks to detain the person for more than three months, they must obtain a report from the advisory-board, who will examine the documents submitted by the government and decide whether to extend the detention or not.
- (ii) The person detained, shall be informed of the grounds of his detention, except for the facts which the authority considers to be against the public interest to disclose. The person has the right to be supplied with the copies of all the documents and other relevant materials relied upon the detention.
- (iii) The person detained have the right of making representation against the order of detention and it must be provided.

Article 22(2) of the Constitution says that person who has been arrested or detained in custody shall be produced before the nearest magistrate within a period of 24-hour of such arrest or detention failing to which would make the police officials liable for wrongful detention.

Section 50 of the CrPC says that when the arrest is made without the arrest warrant, the police official must inform the person for the grounds and reason for his arrest. The police officer has to comply with the duty and he cannot refuse.

Section 55 of the CrPC says that when a police officer is making an arrest without the warrant, person must be produced before the nearest magistrate of the jurisdiction or the police officer in charge of the police station depending upon the situation.

5. Additional rights available to an arrested person:-

Section 55A of CrPC provides that health and safety of the person arrested has to be maintained by the police official who has the custody of the accused. The principle was established to protect the person from any kind of torture or inhumane treatment within the custody or prison.

Section 358 of CrPC provides for the principle of natural justice. Where if a person is wrongly arrested, detained or prosecuted should be compensated for the loss incurred.

Section 41A of CrPC affirms that the police official must provide with the legal notice to the person who has allegedly committed a cognizable offence to appear before him at a designated time, place and location.

Section 46 of the CrPC affirms about the mode of arrest by the accused person which includes surrender to the official custody by the accused himself. The police official shall arrest the person without any violence, and they must not cause death of the accused person unless the person arrested is an accused of an offence which is punishable with death or life imprisonment or when the person resists his arrest by turning violent or aggressive or trying to

escape from the custody.

Section 49 of CrPC provides that police must not arrest or detain the accused without a legal arrest or ground. The guideline came in the landmark judgement of *D.K. Basu v. West Bengal and Ors*⁵, focuses on “arrested person has rights which further impels the police officials to act in a certain manner”.

The court also observed that if the police official is not able to perform his duty properly that will be accountable for the contempt of the court and departmental inquiry simultaneously. Such matter can be initiated in any High Court that has the jurisdiction over the dispute. But, regardless of all the efforts and numerous safeguards for the accused from the unnecessary torture and inhumane conduct, the rate of custodial deaths and police atrocities are rising.

V. Role of Judiciary:

Judiciary is the custodian of the Indian Constitution and protects fundamental rights mentioned in it. The work of the judiciary is to apply the law and punish the law-breakers. Judiciary is the main aspect that upholds Indian democratic culture. Whenever any person's fundamental rights are violated, s/he can directly move to the Supreme Court under article 32 and to the high court under article 226 of the Constitution of India. Courts provide relief to the victims and give directions to different authorities in question.

Courts in India through its judicial activism and liberal interpretations play an essential role in dealing with the issue of custodial violence. In many landmark judgments, courts issued various guidelines to authorities to restrain custodial violence. Custodial violence mainly takes place in police and judicial custody. It includes death, torture, and rape. Some of the landmark judgments are:

Some of the landmark judgments: -

➤ *Sunil Batra v. Delhi Administration*⁶

In this case, the Judgment was given by a constitutional bench where the Fundamental Rights of the prisoners was preserved by invoking Article 14, 19, and 21 of the Indian Constitution. It was done to guard the prisoners from the violence inflicted on them. It was held in this case that the Prison administration will be liable in a case where the

⁵ (1997) 1 SCC 416.

⁶ (1978) 4 SCC 409.

prisoner subjected to mental torture, mental pressure, or physical force beyond the reasonable limits of lawful imprisonment. In this case, the court condemned the torture inflicted on the prisoners.

➤ *Khatri and others v. State of Bihar and others*⁷

This case is also known as the Bhagalpur Blind case. It was alleged that the prisoners faced violence in the police custody when police officials blinded about 30 prisoners by the usage of acid and needles. The Supreme Court in this Public Interest Litigation case ordered to investigate and punish the guilty Police officers who cruelly blinded prisoners. Further, the Supreme Court condemned this act of police and held it torture which violates prisoners' right to life mentioned under Article 21 of the constitution and announced compensation to the victims.

➤ *Prem Shankar Shukla v. Delhi Administration*⁸

In this case, a prisoner sent a telegram which was considered as a writ petition. When an undertrial prisoner was handcuffed and chained, a telegram was sent by him to the court and court treated it as a writ petition. The petition challenged some clauses of Punjab Police rules as violative of Article 14, 19 and 21 of the Constitution of India. Court held that those provisions which were making the handcuffing necessary to the undertrials who were accused of non-bailable offenses punishable with more than 3 years imprisonment were violative of Article 14, 19 and 21. Article 21 was interpreted to include Right against torture in it. Lordship Iyer said that handcuffing was inhuman; unreasonable and arbitrary. The Supreme Court also referred Article 5 of the Universal Declaration of Human Rights which enshrines Right against torture and Article 10 of the Covenant on Civil and Political Rights and handcuffing to the undertrials was treated as torture.

➤ *Nilabati Behera v. State of Orissa*⁹

Smt. Nilabati Behera sent a letter to the Supreme Court stating that her 22 years old son died in police custody after several injuries given to him by the police. Court took suo moto cognizance and treated it as a writ petition filed under Article 32 of the Constitution of India. Petitioner also claimed compensation as her son's Right to life was violated.

The Court observed that the fundamental rights of the prisoners guaranteed under

⁷ 1981 SCC (1) 627.

⁸ 1980 SCC (3) 526.

⁹ AIR 1993 SC 1960.

Article 21 of the Indian Constitution should not be neglected and only such restriction can be imposed which are permitted by law on the enjoyment of fundamental rights. It was also held that it is police responsibility to ensure that the person in custody should not be deprived of his Right to life. Because the prisoners' rights are already limited so the state's duty of care is essential and exceptions cannot be accepted. If a person is deprived of his right to life in custody except procedure established by the law then the wrongdoer and the state are responsible. The court awarded a sum of Rs. 1.5 lakhs as compensation to the petitioner as her son died in police custody.

➤ *D.K. Basu v. State of West Bengal*¹⁰,

In this case, a letter was sent to the court by an NGO. This letter was treated as a writ petition under Article 32 of the Indian Constitution. The letter outlined the matter of deaths in police lock-ups and in prison the state of West Bengal. It brought four crucial judgments 1997 two times in 2001 and 2015. Court held that policemen can't act arbitrarily while arresting a person. The court came into the view that there should be restrictions on police and outlined certain guidelines that must be followed in all cases of arrest or detention. It brought four crucial judgments 1996 two times in 2001 and 2015 and laid down over 20 commandments which formed the complete structure of the judgment.

First 11 Guidelines in 1996:-

1. The police personnel should have accurate, visible, and clear identification details and name tags with their designation while making the arrest and conducting the interrogation of the arrestee. The particulars of police personnel who handle interrogation of the arrestee must be recorded in a register.
2. The police officer will prepare a memo of arrest at the time of arrest and such memo will be attested by at least one witness, who can be a family member or a person from the locality. It shall even be countersigned by the arrestee and must have the time and date of arrest.
3. A person who is arrested or detained shall be entitled to inform friend or relative or other person known to him that is arrested and is being detained at the actual place unless the arresting witness of the memo of the arrest is himself such an acquaintance or relative of the arrestee.

¹⁰ (1997) 1 SCC 416.

4. The place of arrest, time, and venue of custody of an arrestee must be given by the police through the Legal Aid Organization in the District and the Police station of the area where the next friend of the arrestee lives through phone within a period of 8 to 12 hours after the arrest.
5. The person arrested and as soon as he is put under arrest or is detained must be informed of his right to have one informed of his arrest or detention
6. An entry must be noted in the diary at the place of detention regarding the arrest of the person which will also disclose the name of the friend of the arrestee and of the police officials in whose custody the arrestee is.
7. The arrestee should be also checked at the time of his arrest and injuries must be recorded at that time, if any present on his/her body. The "Inspection Memo" must be signed both by the arrestee and the police officer as well and its copy should be provided to the arrestee.
8. The arrestee should be medically checked by a doctor appointed on the panel of approved doctors. Panel should be appointed timely by Director, Health Services of the concerned State or Union Territory in every 48 hours during his detention in custody.
9. All documents' copies which include the memo of arrest also ought to be sent to the Magistrate.
10. Permission to meet lawyer may be given to the arrestee during interrogation.
11. All district and State Head offices should be provided a police control room, where the arrest's information and custody's place of the arrestee shall be provided within 12 hours and this information should be showed on a board at the police control room.

Other orders till 2015 mentioned submitting compliance reports to all states and Union Territories and responses which are delayed should be looked into by committees appointed by the human rights body. It also motioned the need set up the State Human Rights Commission in each part of India.

The third and last phase of the judgment ended in 2015 where directions were given to set up SHRCs and fill up large vacancies. All prisons were directed to have CCTVs within one year. It also allowed Non-official visitors would do surprise checking on prison and police stations. The Court observed these guidelines essential to be followed during the arrest.

VI. SUGGESTIONS

1. Custodial violence can be a restraint to a larger extent if India ratifies the UN Convention against Torture. Ashwani Kumar India's former law minister criticized the Indian system for not approving the UN Convention against Torture. This Convention provides a system of reviewing the colonial rules, methods, and arrangements for the custody and treatment of persons targeted with any form of arrest, detention, or imprisonment. It will also help in forming exclusive mechanisms of redress and compensation for the victims of custodial violence.
2. There should be no restrictions on regular inspection of the place of detention by independent and qualified persons.
3. Cameras are required to be installed in police stations including interrogation rooms.
4. Inspection of the detention places without any prior information should be made mandatory. This will help in preventing custodial violence. This was said by the Supreme Court in its ruling in the DK Basu Case in 2015.
5. Guidelines should be made to educating and training officials involved in the custodial violence or deprivation of the right to liberty cases. Custodial violence can't be prevented until officials understand the importance and gravity of such issues.
6. There is a need to implement the report of 273rd Law Commission of India. According to this report all accused of committing custodial torture whether they are policemen, military personnel should be prosecuted criminally instead of facing administrative actions.

VII. CONCLUSION

Custodial savagery and custodial death is one of such crime which is hardly recognised by the authorities and the public at large. It has been a common practice since ages. It results out to be so normalised nowadays that the police and administration and even individuals accept it as a normal police culture. Certainly, the existing custodial laws and their implementation are not able to mitigate the practice of use of third-degree methods. The current situation of our country is that whenever a prisoner dies in the police custody, it hardly gets any public or media attention and even people consider that it be good that a criminal has been killed.

The silent acceptance of such brutal killings and the repeated failure to hold officers to account for such breach of their own codes of conduct can only serve to erode the trust and legitimacy

upon which democratic setup depends. Though there are various guidelines issued by the judiciary, and certain specific legislations which are with the rights of prisoners and custodial torture, however the increasing number of incidents suggests that an overall different scenario where the incidents of custodial deaths are reported regularly on a large scale. Thus, it is the right time that the government and law making authorities should consider this issue seriously and must control the future happening of such incidents by enacting strict laws and spreading awareness among the general public.

