

CUSTODIAL CRIME AND PREVENTIVE MEASURES

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Introduction

The concept of crime is essentially concerned with the social order. Everyone owes certain duties to his fellow-men and at the same time have certain rights and privileges which person expects from others to ensure for him. The sense of mutual respect and trust for the rights of others obviously imposes an obligation to maintain a balance in society. The tough task protecting the law abiding citizen and punishing the law breakers vests for the state which perform it through the instrumentality of the law. The conducts which are prohibited by the law are known as crime.

Custodial crime is one of the worst crimes in a civilized society. Custodial crimes proceed with arrest and detention in police custody. The term police custody means supervision or restriction on the movement of the arrested person or detained fully or partially.² The police custody commences when a person is arrested. Arrest is a formal way of taking a person into custody.

The phenomena of custodial crimes also by known various names in different countries such as police brutality, police violence, police criminality, police misconduct etc. The term torture has been defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purpose as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in a official capacity”.³

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² Section-27 of the Indian Evidence Act, 1872.

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³ Article 1 of United Nation Convention against Torture and other Cruel Inhuman or Degrading Treatment 1984

Custodial Crimes including torture and death in police custody is a stigma in the law abiding society which demands the power of executives should not only be derived from law but also should be limited by law. The law of arrest expects both individual rights and states the collective responsibility towards the society. Transparency and Accountability are two safeguards to prevent any abuse of power to arrest a citizen. Custodial violence in India is wide spread and unaccounted and rarely prosecuted.

Custodial Crime in police custody is not only a serious issue in India but it has also been a concern of International community. Some of intricate issues of victims of torture drew attention at global level, in this context some of international conventions and instruments on torture have been framed such as Universal Declaration of Human Rights (1948) International Covenants on Civil and Political Rights(1966) U.N Convention against torture and other cruel, inhuman or degrading treatment or punishment 1984.Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment(2002).

Causes of custodial crimes are torture in police custody is the main contributing factor of custodial crimes. Torture is used as a tool to investigate crime which generates another form of crime in custody e.g. custodial crime. The use of torture by police to extract confession is found one strategy; however, sometimes police are influenced by the powerful structure in society. This include money and (bribe or corruption) & political power (powerful local and vested interest due to rivalry) to use force or torture.

Consequences of custodial crime are vulnerabilities of the victims' families and communities have been suffering from a number of problems. Generally custodial crimes' victims don't have access to any treatment of rehabilitation. This violated their basic health rights. There is no specific system or scheme for rearranging compensatory and rehabilitation of the victims of custodial crimes available. In few cases, however, the out of court settlement had taken place between the victims and witnesses as well as police personnel.

Concept and Origin of Custodial Crime

Early Concept of Custodial Crime

The perception of custodial crime is not new in India. There were several instances of torture and violence with the police in India since the Vedic period. In the Vedic period custodial crime was the preponderance of the system ordeals of fire or by water to establish the guilt of the accused.

According to Dharamasastra ordeal was the living institution in India. It was practiced strictly through all the centuries of Indian Society. Yajnavalkya mentions five kinds of ordeals balance, fire, water, poison and khosa.

In Colonial Period

In the British period torture used by officials was prevalent there is an ample evidence that colonial administration was aware about excessive pain used by police officials British government used torture for two purposes firstly, to extract revenue from peasant cultivators and secondly, to extort confession from suspects in police cases . Torture commission 1855 appointed by British government for investigation of cases of torture in madras presidency. The recommendation of torture commission has laid foundation of police commission 1860. Our police system is based on Police Act 1861. Subsequently enactments of criminal law and procedure namely Indian penal code 1860, Indian evidence act 1872; Code of criminal procedure 1898 had incorporated various sections which prohibits any form of torture of a person under interrogation.

Post-Independence Period

After Independence many police commissions were formed to look into the performances and method of working during 1950's, 1960's, early 1970's and early 1980's. All these commissions had revealed the story of third degree or torture in police custody due to political pressure, practice of corruption and lack of infrastructure.

Shah commission 1978 drew attention of the government about police brutality during the emergency. The national police commission 1979-1981 recommended that there should be mandatory judicial enquiry in cases of death and rape in police custody. Reberio committee

recommended setting up of the police performance and accountability commissions at state level and district complain authority to examine the complains from the public of police access arbitrary arrest and detention, false implication in criminal cases and custodial violence. Further committee recommended replacement of the police act 1861 with the new act.

Padhmanabhaiah Committee on Police Reform (2000)

Padhmanabhaiah committee recognizes that politicians and criminalization of police force has been growing. Political control over police. There is ample evidence of police deviance in India.

Committee on Reforms of Criminal Justice System

Committee has highlighted many issues associated to the criminal justice system and police system. The committee has examined the fundamental principles of the functioning of criminal justice system such a right to remain silent, rights of the accused, presumption of innocence and burden of proof, justice to the victim to crimes in details.

In recent years the discourage of police reforms institutionalized mechanism to effectively deal with bona fide public complaints against police including custodial violence as well as police accountability towards people of the country. In this regard the government of India having visualized the long felt need to replace outdated police act 1861 setup a police act drafting committee in September 2005. The committee drafted the model police act 2006. **Fifth Report of second administrative reforms commissions 2007** on public order and a draft report on nation policy on criminal justice system 2007 emphasized of custodial violence and need to look upon and dealt with seriously with a view to eliminating this evil from the system.

Indian Legal Framework for Custodial Crimes

There are two approaches for custodial crimes

1. Legal Regime
2. Judicial Precedence

Legal Regime:

In India, neither Constitution nor statutory law defines an express definition of custodial crime but there are some constitutional and statutory safeguards which protects the rights of arrested person.

Constitutional safeguards:

Art. 19 (1) (a) provides for freedom of speech and expression art.20 gives the rights against conviction of offences. Art.21 right to life or personal liberty (to protect the right to be free from torture) Art.22 provides four basic fundamental rights in respect of conviction these include being informed of the grounds of arrest, to be defended by a legal practitioner of his choice, preventive detention laws and production before the nearest Magistrate within 24 hours of arrest

Of the person. Art 32 provides basic remedies.

Statutory Safeguards:

Indian Evidence Act, 1872 sec 24 sec. 25 a confession to police officer cannot be proved as against a person accused of any offence sec.

Code of Criminal Procedure, 1973 sec 46, 49, 50 to 58 is in accordance with art.22 of Indian constitution sec. 160(1), 163(1), Sec. 176 (1-A) in the Cr.P.C.has been added from June, 2006, a duty has been cast upon the Judicial Magistrates exercising local territorial jurisdiction to conduct judicial inquiry in the matters of fake encounters, custodial deaths or extra judicial killings caused by the police and subject to the result of the inquiry to take appropriate further legal action in such matters against the responsible police officer or the arresting officer. Inquiry

report along with evidence collected to be sent to DIG, Prisons (C.L. No. 2/2010 dated 7.1.2010) the Allahabad High Court has directed the CJMs/ACJMs/JMs of the State of U.P. that the powers of enquiry on death during custody as provided u/s. 176 of the Cr.P.C. be exercised by the Chief Judicial Magistrates, Chief Metropolitan Magistrates, Addl. Chief Metropolitan Magistrates, Addl. Chief Judicial Magistrates and the Judicial Magistrates and copy of the enquiry report along with the list of evidence collected therein be sent to the DIG, Prisons of the region concerned to take necessary action. Sec. 67, 309 and 482.

Indian Police Act, 1861 sec. 7 and 29 provides for dismissal, penalty or suspension of police officers who are negligent in the discharge of their duties or unfit to perform the same.

Indian Penal Code, 1860 sec. 330, 331, 342 and 348 were enacted to control the tendency of policemen to resort to torture to extract confession, sec 376 and 376(C).

Custodial Crime: Role of judiciary

Landmark Pronouncements

Torture of an accused in police custody, custodial deaths and atrocities on prisoners in jails have also been one of the major areas of concern as regards the human rights. The Hon'ble Supreme Court has in a plethora of cases (noted below) clarified that if a person in the custody of police is subjected to any torture, inhuman treatment or violence or custodial death takes place then courts can not only take appropriate action against the responsible police officer but can also provide Compensation to the dependents of the deceased or the victim of the illegal torture, violence.

- **Ravindra Nath Awasthi vs. State of U.P., 2010 (68) ACC 61 (All—D.B.)**
- **Shakila Abdul Gafar Khan (Smt.) v. Vasant Raghunath Dhoble, (2003) 7 SCC 749**
- **Raghubir Singh v. State of Haryana, (1980) 3 SCC 70**
- **Gauri Shankar Sharma v. State of U.P., AIR 1990 SC 709**
- **Bhagwan Singh v. State of Punjab, (1992) 3 SCC 249**
- **Nilabati Behera v. State of Orissa, AIR 1993 SC 1960**
- **Pratul Krishna v. State of Bihar, 1994 Supp. (3) SCC 100**
- **Kewalpati v. State of U.P., (1995) 3 SCC 600**
- **Inder Singh v. State of Punjab, (1995) 3 SCC 702**
- **State of M.P. v. Shyam Sunder Trivedi, (1995) 4 SCC 262**

- **D.K. Basu v. State of W.B., (1997) 1 SCC 416**
- **Sheela Barse v. State of Maharashtra, (1983) 2 SCC 96**
- **State of Maharashtra v. Christian Community Welfare Council, (2003) 8 SCC 546**
- **Sube Singh v. State of Haryana, 2006(54) ACC 873 (SC)**

Francis Corlile Mullin vs. Administrator, U.T. of Delhi AIR, 1981 SC608 Supreme Court of India gave due recognition to the international norms while interpreting Art.21 of the Indian constitution. Supreme Court widely elaborated right against self incrimination during interrogation in police custody in various cases.

Nandini Satpati v.P.L.Dhani AIR 1978 SCC 1075 case court said about right against self incrimination and right to silence of accused.

Joginder kumar v. State of U.P. and Others 1994 SCC260 in this case Supreme Court has defined basis of arrest. Arrest should not be made unless arrest is absolutely necessary and there is no other way except arresting the accused to ensure her/ his presence before the criminal justice system to prevent her/him from committing more crimes or tampering with evidence or intimidating witnesses. Unnecessary and unjustified arrest leads to harassment and loss of faith in the system.

Sheela Barse vs. State of Maharashtra AIR, 1983SCC96.

In this case Supreme Court has given some important directions

Female suspects must be kept in separate lock-ups under the supervision of Female constables. Interrogation of females must be carried out in the presence of female Police persons. A person arrested without a warrant must be immediately informed about the Grounds of arrest and the right to obtain bail. As soon as an arrest is made, the police should obtain from the arrested person, the name of a relative or friend whom s/he would like to be informed about the arrest. The relative or friend must then be informed by the police. The police must inform the nearest Legal Aid Committee as soon as an arrest is made and the person is taken to the lock-up. The Legal Aid Committee should take immediate steps to provide legal assistance to the arrested person at State cost, provided such person is willing to accept legal assistance. The magistrate before whom an arrested person is produced shall inquire from the arrested person whether s/he has any complaints against torture and Maltreatment in police custody. The magistrate shall also inform such person of her/his right to be medically examined.

Nilabatti Behera vs.State of Orissa AIR 1993 746.

The State has an obligation to give compensation to a victim or to the heirs of a Victim whose fundamental rights have been violated. The State has a right to recover the compensation amount from the guilty officials after appropriate proceedings or inquiry.

An order of compensation by the State in a criminal case does not prevent the victims or their heirs from claiming further compensation in a civil case [for loss of earning capacity].

It is mandatory to conduct a magisterial inquiry into every case of custodial death under sec.176 of Criminal Procedure Code, 1973.

D.K. Basu vs. State of West Bengal AIR, 1997 SC 610.

Supreme Court of India set up 11 guidelines that police personnel detaining or arresting any suspect or accused have to follow. In essence, the guidelines lay down the rules that the police have to follow in order to maintain transparency and not violate the fundamental rights of the arrested/detained.

Main guidelines:

- Police personnel while making the arrest have to bear accurate, visible and clear identification and nametags with their designations.
- The officer making the arrest has to prepare a memo of arrest at the time of taking an individual in police custody and get it attested by at least one witness, who has to be either a member of the family of the arrested person or a respectable person of the locality from where the arrest is made.
- The memo also has to be counter-signed by a relative or friend of the arrested person as soon as possible about the arrest.
- Making the arrested person aware of his right to have someone informed of his arrest or detention as soon as he is placed under arrest or detained.
- Getting the arrested person medically examined immediately after the arrest if he asks for it or getting him examined by a doctor every 48 hours during his detention by a doctor on

the panel of approved doctors appointed by Director, Health Services of the concerned state or Union Territory.

- Informing the area magistrate with details about the arrest.
- Permitting the accused to meet his lawyer during interrogation, though not throughout the interrogation.
- Setting up a control room at all district and state headquarters to give out information regarding the arrest and the place of custody of all arrested persons within 12 hours of the arrest.

Custodial Crime: Role of National Human Rights Commission

The Protection of Human Rights Act, 1993 has constituted National Human Rights Commission, State Human Rights Commission and Human Rights Courts for better protection of human right for the citizen of the country. The National Human Rights Commission from beginning has been showing concern regarding problem of custodial crime including torture, rape, death and disappearance in police custody. National Human Rights Commission has issued certain important guidelines against custodial crimes.

- Reporting of Custodial Death, Rape within 24hours.
- Video Filming of post mortem examination in case of custodial death.
- Model autopsy forms and additional procedure for inquest.
- Establishment of human rights cell in state police head quarter.
- Establishment of District complains authority.

Despite innovative interventions of National Human Rights Commission in the police functioning there is no scarcity of custodial crimes. It indicates somewhere police machinery is not sufficient to control custodial violence.

International Legal Framework for Custodial Crimes

Custodial crime and misuse of police power are not only strange in India but it is worldwide. It has been the concern of International community because the problem is Universal and challenges are worldwide. Some of the intricate issues such as causes consequences and prevention of torture, restitution and rehabilitation for victims of custodial crime has become a worldwide movement against custodial crime directed by United Nations.

Major International Conventions

United Nations has played an important role in prevention of custodial crimes. United Nations has been providing standard and practice through various international convention and instruments such as Universal Declaration of Human Rights 1948, International Covenant on Civil and Political Right 1966, Conventions against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (2002). Convention on the Rights of the Child 1987, Declaration on the Elimination of Violence against Women 1993, Rome Statute of International Criminal Court.

Regional Conventions/Instruments on Torture

African Charter on Human and People's Rights (1981), European Convention on Human Rights (1950), European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987), Inter American Convention to Prevent and Punish Torture (1985).

United Nation Bodies

United Nation has established various committees to monitor of Human Rights at domestic level the following committees are

- UN Human Rights Committee.
- UN High Commissioner for Human Rights.
- UN Committee against Torture.
- UN Sub- Committee on Prevention of Torture.
- UN Special Rapporteur in Torture.
- UN Voluntary Fund for Victims of Torture.
- UN International Day for Victims of Torture on 26th June.

Conclusion

When the Police takes the liberty of an individual and places him or her in police custody; it is full responsibility for the protection of life and liberty of that person by State itself under the obligation of National and international human rights laws. India is a welfare state and governed by its Constitution which guarantees life and personal liberty of citizens in general and persons in custody in particular. However, this is deep matter of concern at the growing incident of custodial crimes occurring in different parts of country. Complaints of Abuse of power and torture of suspects into custody of police and other law enforcement agencies having power to detain a person for investigation in connection with interrogation of an offence are on upward trend. Compared with other crimes, custodial crimes are particular serious and showing the betrayal of custodial trust by a public servant against the defenceless citizens in custody. Custodial Crimes violates law, human dignity and human rights.

The increase in custodial crimes including torture in police custody has increased the significance of human rights in countries like India. Despite India is a party of various International human rights instruments including UN Convention against Torture and Cruel Inhuman Degrading Treatment or Punishment (CAT, 1984), torture continues to be a serious problem. Torture in police custody has been recognised a serious problem for individuals, victim's families and communities at large.

Suggestions

1. The Government of India should ratify the United Nations Convention against Torture at earliest.
2. Torture should be criminalised under criminal laws as a separate or special offense. There are no specific provisions under the Indian Penal code 1860 as well as Indian Evidence Act, 1872 in dealing with the aspect of custodial crimes.
2. Police Act, 1861 need to be changed which is a basic law and remained unchanged and role of police should be redefined.
3. Custodial Crimes (Prevention, Protection and Compensation) Bill, 2010 which is already pending in the Parliament. This will provide institutional mechanisms for victim's participation in the inquiry, investigation and trial stages to ensure their rights to know, fair justice right and rehabilitation as well as safety and security for victims of custodial crimes.
- 4 The Government should provide compensation to the victims of custodial crimes; generally it doesn't happen in every case. Judicial Inquiry in custodial crimes cases should ensure full participation of victims and witnesses apart from others.
5. The Police Training Academy and Schools should initiate human rights education and training program on custody management for lower level police functionaries such constable and constables.
6. Human Rights Court should be constituted in all the districts. These courts shall be mandated for speedy trial of custodial deaths cases in police custody beside others.