

Research Article

Custodial Torture in India: A Human Rights Concern

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The number of cases in which the police personnel are accused of illegally detaining and torturing citizens is on rise. The Law Commission's 152nd Report (1994) titled "Custodial Crimes" highlighted the alarming rise in custodial crimes has pricked the conscience of society and has evoked public outcry against the law-enforcing agencies. The Commission observed that it was mostly the poor and the downtrodden who were the victims. They are illegally detained and harassed in Custody for days together without recording the arrest, in order to avoid legal procedures. There are no accurate figures of such incidents as most such incidents are hushed up. The article, illustrates the response of Indian Government and judiciary in combating custodial crime, in the backdrop of United Nations Convention Against Torture.

Keywords: Custodial Crime, Custodial Violence, Torture, Police Custody

Introduction

International human rights treaties contain a range of guarantees designed to safeguard the individual's physical and mental integrity. The prohibition of torture and inhuman degrading treatment or punishment proscribes serious interference with a person's physical or mental integrity that can negate the very basis of human dignity by traumatising its victim. A special stigma is attached to torture as of the most shocking form of arbitrary state conduct. Therefore, the ban on torture occupies for good reason a special position in international human rights protection and has the status of an absolute and non-derogable norm in all treaties (Kalin and Kunzli, 2011).

Torture and Inhuman or Degrading Treatment or Punishment

The Definition of Torture

Article 7 of the ICCPR, all regional human rights treaties, and diverse provisions of international humanitarian law prohibit torture but contain no definition of the concept.

A legal definition is found, however, in Article 1 (1) of the Convention against Torture, which states that torture is :

"Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he or third person has committed or is suspected of having committed, or intimidating or coercing him or 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 an official capacity. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions"¹.

Thus, torture is severe physical or mental suffering that is intentionally inflicted by or with the consent or acquiescence of state agents where it is undertaken in pursuit of a specific purpose and where the suffering is not the inevitable consequence of a lawfully imposed penalty.

The definition in the Convention against Torture does not fully correspond to what emerges from the Covenant, the regional treaties and international humanitarian and customary law because it excludes cases of torture by private actors in the absence of the involvement of the state. The reason for this restrictive approach is that the Convention against Torture derives far-reaching state obligations from the definition relating, inter alia, to prosecution, extradition and reparations. States were not prepared to assume such obligations for cases of torture by non-state actors. Accordingly, the definition in the other treaties is broader inasmuch as it is not limited to state and state-condoned acts but also covers cases of private abuse (Human Rights Committee, General Comment No 20 (1992), para 2).

Torture is also prohibited by international criminal law. According to the Rome Statute, torture is 'the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions (Rome Statute, Article 7) . It is punishable as a crime against humanity when committed as part of widespread or systematic attack directed against any civilian population (Rome Statute, Art.7). Torture is a war crime when, in the context of an international or non-international armed conflict, severe physical or mental suffering is inflicted on a protected person within the meaning of four Geneva Conventions or on a person hors de combat within the meaning of common article 3 (Article 8). The Rome Statute equally requires that the abuse has the purpose of obtaining information, or a confession, or of punishing, intimidating or coercing the victim. Abuse that occurs for reasons based on discrimination can also be considered torture within the Statute. According to

both definitions, torture is practised in pursuit of a specific purpose and can be perpetrated not only by state agents but also by non-state actors.

Status of Law Combating Torture in India

India signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [adopted by General Assembly of the UN on 10th December, 1984 (Resolution No.39/46)] (known as the UN Convention against Torture, in short "UNCAT") on October 14, 1997 however, so far it has not been ratified. India has expressed its reservations against certain provisions contained in the Convention, such as Inquiry by the UNCAT (Art. 20)¹; State complaints (Art.21)² and individual complaints (Art.22)³.

In India, no explicit definition of torture exists either in Constitution nor any statutory law. However, different

Table I. I Uncat Ratification Status for India

| Treaty | Signature Date | Ratification Date |
|---|----------------|-------------------|
| CAT - Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment | 14 Oct 1997 | - |
| CAT-OP - Optional Protocol of the Convention against Torture | - | - |

Source :https://tbinternet.ohchr.org/_layouts/15/Treaty-BodyExternal/Treaty.aspx?CountryID=79&Lang=EN

¹Article 1 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>.

²Under Article 20 of the UN Convention Against Torture, the UNCAT Committee is empowered to carry out a confidential inquiry if it receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in a State party.

³Article 21 of UNCAT states that "A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration".

⁴Article 22 of UNCAT states "A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration".

statutory enactments provide police power for use of force only in certain circumstances. "India continues to have several draconian security laws that are supposedly aimed at stopping terrorism but are used effectively by state agents to abuse human rights. These laws include the Terrorist and Disruptive Activities (Prevention) Act (TADA), Prevention of Terrorism Act (POTA), the Disturbed Areas Act (DAA), and the Armed Forces Special Powers Act (AFSPA), the Assam Preventive Detention Act, National Security Act, and the Armed Forces (Jammu and Kashmir) Special Powers Act (1990). These laws have the most deplorable effects on the human rights and they have further institutionalized torture. The provisions contained both in the Code of Criminal Procedure, 1973 and in special security laws have led to de jure or de facto impunity from prosecution to perpetrators. Section 197 of the Criminal Procedure Code provides for the need of prior sanction to try security forces. Special laws, such as the Armed Forces (Special Powers) Act, 1958 contain similar provisions barring prosecution without prior government sanction in respect of anything done or purported to be done in exercise of the powers conferred by this Act" (WGHR, 2017, p,9).

The Prevention of Torture Bill, 2010 (PTB) was referred to a Parliamentary Select Committee of the Upper House in August 2010. The pressure and lobbying by human rights defenders, forced the Committee to revise the

aforementioned Bill in 2017, which now partially complies with CAT. However, no substantial efforts have been made to enact this law. Laws governing India's armed forces allow human rights violations by security personnel to be tried in military not civilian courts, further entrenching impunity (WGHR, 2017, p.9).

Magnitude of Custodial Crime in India

Death as a result of torture in police custody is one of the worst kinds of crime in society governed by rule of law that promises to secure to all citizens, amongst others, justice, liberty and equality. Such cases not only pose serious threat to society but also to human dignity (Chakraborty, 2018, p.5).

The National Crimes Record Bureau's Crime in India Report records information on deaths in custodial crimes under the following category:

- Deaths in Police Custody/lock-up (of persons remanded to police custody by Court)
- Deaths in police custody/ lock-up (of persons not remanded to police custody by Court)
- Reasons of custodial deaths in police custody.
- Escapes from police custody.

Table 1.2, depicts that during the period 2011 to 2018 the highest number of custodial deaths have been reported

Table 1.2 Number of Deaths in Police Custody/ Lockup 2011-2018

| S.No | Death in Police Custody/ Lockup | Year | | | | | | | |
|------|--|------|------|------|------|------|------|------|------|
| | | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 |
| i) | Of persons remanded to police custody by Court | 29 | 38 | 21 | 32 | 30 | 32 | 100 | 70 |
| ii) | Of persons not remanded to police custody by Court | 75 | 71 | 97 | 61 | 67 | 60 | 58 | 46 |

Source : Crime in India Report (2011-18). National Crimes record Bureau. Ministry of Home affairs. New Delhi.

Table 1.3 Details on the Custodial Deaths in Police Custody during 2011-18

| S.No | Death during/ due to | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 |
|------|--|------|------|------|------|------|------|------|------|
| 1. | Injuries sustained during the police custody due to physical assault | - | - | - | 9 | 6 | 8 | 5 | 3 |
| 2. | Injuries sustained prior to police custody | - | - | - | 2 | 6 | 1 | 1 | 7 |

| | | | | | | | | | |
|-----|--|----|-----|-----|----|----|----|----|----|
| 3. | During production, process in Courts, journey connected with investigation | 19 | 20 | 15 | - | - | - | - | - |
| 4. | During hospitalisation/ treatment | 21 | 13 | 20 | 10 | 12 | 13 | 28 | 32 |
| 5. | Due to road accidents/ journey connected to investigation | 3 | 7 | 6\$ | 0 | 1 | 1 | 4 | 1 |
| 6. | In mob attacks/ Riots | 0 | 0 | 6 | 4 | 1 | 1 | 4 | 1 |
| 7. | Assault by other criminals | 2 | 3 | 2 | 1 | 3 | 2 | - | - |
| 8. | Suicides | 33 | 24 | 34 | 27 | 34 | 33 | 37 | 17 |
| 9. | During escape from custody | 7 | 7 | 4 | 7 | | 4 | 1 | 7 |
| 10. | Illness | 35 | 36# | 43# | 16 | 11 | 15 | - | - |
| 11. | Natural Deaths | - | - | - | 11 | 9 | 7 | - | - |
| 12. | Other Causes | - | - | - | | 9 | 2 | 22 | 3 |
| | Total Custodial Deaths | | | | | | | | |

Note : "*" -Collected for first time in 2014

'\$' – include only accidents

'#' – also include natural deaths

Source : Crime in India Report (2011-12). National Crimes Record Bureau. Ministry of Home Affairs. New Delhi.

under the category 'suicides'. The Law Commission report states that even if the police records the arrest and custody of a victim, a death in the police station is made to look like a suicide or accident and the body is disposed of quickly, with the connivance of a doctor. Records are manipulated to shield the police personnel responsible.

Judicial Response : Safeguards against Custodial Violence

The Indian judiciary has played a very proactive role and issued directions to prevent the custodial violence. Some of the excerpts of judgments of Supreme Court and High Court are reproduced below:

In D.K. Basu v. State of West Bengal⁵ the Supreme Court observed that: "Torture has not been defined in the

Constitution or in other penal laws. 'Torture' of a human being by another human being is essentially an instrument to impose the will of the 'strong' over the 'weak' by suffering. The word torture today has become synonymous with the darker side of the human civilisation".

The landmark case of D.K. Basu vs. State of West Bengal laid down certain provisions to be followed in all cases of arrest and detention. It arose from a letter written by the executive chairman of the West Bengal Legal Aid Services to the Chief Justice of India pointing out certain instances of death in police custody. The court treated them as writ petitions, appointed senior counsel as 'amicus curiae' (friend of assist the court) and delivered a lengthy judgment. At the end of the judgment, the court set down certain rules which should be mandatorily followed by the police.

⁵AIR 1997 SC 3017.

The Apex Court in the case of *Sube Singh v. State of Haryana*⁶ has taken note of custodial violence and third degree methods used by police during interrogation and has discussed in detail the reasons behind such practice and has also suggested preventive measures as to how such violence can be tackled. The Court observed:

“The expectation of quick results in high-profile or heinous crimes builds enormous pressure on the police to somehow ‘catch’ the ‘offender’. The need to have quick results tempts them to resort to third degree methods. They also tend to arrest “someone” in a hurry on the basis of incomplete investigation, just to ease the pressure.The three wings of the Government should encourage, insist and ensure thorough scientific investigation under proper legal procedures, followed by prompt and efficient prosecution.”

The Court also issued certain directions for providing training reorientation courses for the change of mindset and the attitude of the police personnel, providing for supervision by superiors to prevent custodial violence, strict adherence to the directions issued by the court earlier in the case of *D.K. Basu (supra)* and for investigation by independent agencies on the complaints for custodial violence by police personnel.

In *People’s Union for Civil Liberties v. Union of India & Anr.*, the Court observed:

“Undoubtedly, this Court has been entertaining petition after petition involving the allegations of fake encounters and rapes by police personnel of States and in a large number of cases transferred the investigation itself to other agencies and particularly the CBI.”

In *Francis Coralie Mullin v. Administrator, U.T. of Delhi*⁸, the Supreme Court observed:

“.....any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of Articles 14 and 21.”

The Supreme Court, in *Charan Lal Sahu v. Union of India*⁹, interpreted Articles 21, 48A and 51A(g) of the Constitution, observing:

“In the context of our national dimensions of human rights, right to life, liberty, pollution free air and water is guaranteed by the Constitution under Articles 21, 48A and 51A(g), it is the duty of the State to take effective steps to protect the guaranteed constitutional rights.”

In *Kartar Singh v. State of Punjab*¹⁰, the Supreme Court observed as under:

“..... the recognition of the inherent dignity and of the equal and inalienable rights of the citizens is the foundation of freedom, justice and peace in the world. If the human rights are outraged, then the court should set its face against such violation of human rights by exercising its majestic judicial authority.”

Police atrocities in India has always been a subject matter of controversy and debate. This has been discussed in detail in *Pritpal Singh, etc. v. State of Punjab and Anr.*¹¹ etc. In view of the provisions of Article 21 of the Constitution, any form of torture or cruel, inhuman or degrading treatment is prohibited. Torture is not permissible whether it occurs during investigation, interrogation or otherwise. It cannot be gainsaid that freedom of an individual must yield to the security of the State. Latin maxim *salus populi est suprema lex* - the safety of the people is supreme law; and *salus reipublicae suprema lex* - safety of the State is supreme law, co-exist.

In a Civil Writ Petition¹² filed by Dr. Ashwani Kumar¹³, the petitioner submitted before the Supreme Court that “India faces problems in extradition of criminals from foreign countries because of this (having no law against torture). It’s in our own national interest to have such a law”. The petitioner sought directions to the government to have a legal framework and proper guidelines in terms of the CAT to prevent torture, cruelty, inhuman or degrading treatment to jail inmates.

Recommendations of Law Commission of India

The Law Commission of India submitted to the Ministry of Law and Justice on October 30, 2017, the Report No. 273 on “Implementation of ‘United Nations Convention

⁶AIR 2006 SC 1117.

⁷AIR 2005 SC 2419.

⁸AIR 1981 SC 746.

⁹AIR 1990 SC 1480.

¹⁰(1994) 3 SCC 569.

¹¹(2012)1SCC10.

¹³W.P. (Civil) No. 738 of 2016; In September 2016, the Supreme Court had issued notice to the Central Government on the PIL.

against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation". The following recommendations were made by the Commission in this report to combat custodial torture or crimes in India:

Objective of the UN Convention against Torture: In the backdrop of the UNCAT it was asserted that "The convention seeks to ensure that countries put in place various institutional mechanisms to prevent the use of torture. Each country that is party to the convention is required to carry out certain steps such as (i) legislative, administrative, judicial or other measures to prevent torture, and (ii) ensure that torture is a criminal offence, among others. In order to meet these obligations, the Commission recommended amendments to the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872. In addition, the Commission submitted a draft Prevention of Torture Bill, 2017 which defines acts that should constitute torture and prescribed punishments for such acts" (Law Commission 273rd Report, 2017, Para 7.2 & 7.3).

Ratification of Convention: The Commission pointed out that India has been facing problems in extradition of criminals from foreign countries. This is because the UNCAT prevents extradition to a country where there is danger of torture. It recommended that this issue should be resolved by ratifying the convention (Law Commission 273rd Report, 2017, Para 7.2 & 7.3).

Definition of Torture: The Commission stressed that there is no definition of torture in the domestic law of India. However, the draft Prevention of Torture Bill, 2017, defines torture as "any public servant or an individual authorised by him indulges in an act of torture if he inflicts on another person: (i) grievous hurt, (ii) danger to life, limb, or health, (iii) severe physical or mental pain, or (iv) death for the purpose of acquiring information or punishment" (Law Commission 273rd Report, 2017, Para 7.1).

Penalty for Acts of Torture: In order to deter the use of torture, the Commission recommended stringent punishments for individuals who commit such acts. According to the draft Prevention of Torture Bill, 2017, punishment for torture includes imprisonment up to 10 years and fine. In case torture leads to death, the punishment includes death or life imprisonment in addition to fine (Law Commission 273rd Report, 2017, Para 7.6).

Protection for Victims and Witnesses: The Commission recommended that an effective mechanism be put in place to protect victims of torture, complainants and witnesses against possible violence and ill-treatment. The draft Prevention of Torture Bill, 2017 makes state governments responsible for protecting these individuals. The state government will provide such protection from the time of submission of complaint till conclusion of trial for the offence (Law Commission 273rd Report, 2017, Para 7.8).

Compensation for torture: The Commission recommended amendments to the Code of Criminal Procedure, 1973 to allow for payment of compensation in case of torture. It made this recommendation citing that courts have previously awarded compensation for various forms of torture including illegal detention, and custodial torture (Law Commission 273rd Report, 2017, Para 7.7).

The Commission recommended that courts should determine compensation on the basis of nature, purpose, and extent of injury caused to a person, among other factors. Further, courts should keep in mind the socio-economic background of the victim to ensure that the compensation covers medical treatment and rehabilitation (Law Commission 273rd Report, 2017, Para 7.7).

Custodial Injury: The Commission recommended amendments to the Indian Evidence Act, 1872 to ensure that in case a person sustains injuries in police custody, it will be presumed that these have been inflicted by the police. The burden of proof shall lie on the police authorities to explain such injuries (Law Commission 273rd Report, 2017, Para 7.5).

Sovereign Immunity: Sovereign immunity is the principle that the government is not responsible for the actions of its agents (such as police forces). The Commission states that courts have rejected this principle in various cases and therefore agents of the government cannot engage in torture. The Commission reiterated that citizens are entitled to constitutional rights such as the right to life and personal liberty (Law Commission 273rd Report, 2017, Para 7.9).

Conclusion

The right to life has rightly been characterised as a 'basic' human right; it includes within its ambit both negative and positive obligations for the State. The negative obligation means the overall prohibition on arbitrary deprivation of life. In this context, the State has a positive obligation to protect victims of torture and ill-treatment. The State must ensure prohibition of torture, cruel, inhuman and degrading treatment to any person, particularly at the hands of any State agency/ police force. The Indian Government has an overriding obligation to protect the right to life of every person within its territorial jurisdiction. The obligation requires the State to take all preventive measures in order to protect life and investigate all custodial deaths under suspicious circumstances. The problems of psychological consequences including acute stress as well as a post-traumatic stress disorder must be understood in correct perspective.

Tolerance of police atrocities, amounts to acceptance of systematic subversion and erosion of the rule of law. Therefore, illegal regime has to be glossed over with impunity, considering the cases of grave magnitude. The need of the hour is that Government of India should

steadfastly ratify the United Nations Convention Against Torture, thereby paving way for a strong anti-torture legislation as recommended by the Law Commission of India in its 273rd Report.

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