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## ANALYSING LEGAL REGIME AGAINST CUSTODIAL TORTURE AND ITS INSUFFICIENCY IN INDIA

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### **ABSTRACT:**

India is a democratic country that ensures the fundamental rights of every citizen. Dignity and security are the two very foundations of the social contract theory. The state has the duty to protect the rights of its people. However, it is very saddening to acknowledge that there are certain persons who still have their rights violated without any legally acceptable grounds. They are called custodial prisoners. Custodial torture has become a common phenomenon.<sup>1</sup> The constitution of India as well as many international conventions advocates against any kind of inhumane torture inflicted on the person in the custody. Such an instance forces us to think about what will happen to the system when those who are entrusted to uphold the very nature of democracy and the law become its own perpetrators. The steps that have been taken since the 1960s to reform and prevent such cruel occurrences are still in progress. This article tries to analyze custodial torture, its mode of infliction, international and Indian take on custodial torture, and the role of the judiciary in reforming the system. The article also sheds light on the prevention of torture bills passed so far.

**Keywords:** custody, torture, custodial death, compensation, protection against torture, police

### **1. INTRODUCTION:**

Custodial violence is no new phenomenon. Every now and then people have encountered custodial violence by the police in one way or the other. Many have come to know through breaking news or through any social media trends. Recent cases of custodial violence by the people which created the agitation among the common public were the death of George Floyd in the USA led to a whole new movement “Black Lives Matter” and the death of Jayaraj and Bennix in Tamil Nadu. These incidents led to the realization of the absence of separate legislation for laws against torture. The Ministry of Home Affairs has told Rajya Sabha that a

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<sup>1</sup> Chinmay, Custodial Violence In India, legalserviceindia, (Feb. 01, 2024, 4:19 PM), <https://www.legalserviceindia.com/legal/article-5932-custodial-violence-in-india.html>

total of 669 custodial deaths have been registered between 2017 - 2022<sup>2</sup>. National Human Rights Commission has released a shocking report of a total of 175 cases of deaths in police custody reported during 2021- 2022, 100 in 2020-2021, 112 in 2019-2021, 136 in 2018-2019, and 146 in 2017-2018<sup>3</sup>. Therefore, it is evident that nowadays scarcely a week goes by without a case of abuse or fatalities occurring while a person is in police custody. We cannot deny the fact that such inhumane treatment or torture exercised by the police during the investigation is a clear violation of Human rights. India being the largest democracy still suffers to curtail such practices. This scenario has forced us to demand a separate legislation bill for torture in police custody prescribing rules and measures to prevent such actions. This article focuses on the international and national take, the role of the judiciary in curtailing such practices, and suggestions for better implementation of anti-torture law.

## 2. DEFINITION OF CUSTODY AND TORTURE:

### 2.1. TORTURE

The term torture can be interchangeably used with 'violence.' It can be understood as a mechanism used by one person to prove his sense of superiority or power over another. It is generally yielded by powerful ones against powerless ones. The Supreme Court has defined the term as that the law has taken control of the person as it reinforces subordination<sup>4</sup>. The layman's understanding of the terms 'torture,' 'violence,' 'cruelty' or 'brutality' is the act of causing immense physical pain that is beyond the tolerable limits of the person on whom such an act is inflicted. At times, such acts may result in ultimate demise<sup>5</sup>. In the current world, the word 'torture' has become synonymous with the brutal side of human civilization.

### CUSTODY:

The term 'custody' has neither been defined in any substantive nor procedural laws of India. The Constitution of India is also silent on the definition of the term 'custody.'<sup>6</sup> The dictionary meaning of custody denotes a legal duty to take care, more in the sense of protective care. However, it is not imperative that every police custody is a formal arrest. It can be done due to

<sup>2</sup> RISING KASHMIR, <https://risingkashmir.com/669-cases-of-deaths-in-police-custody-registered-in-last-five-years-mhat> (visited Feb. 18, 2024).

<sup>3</sup> ndtv, <https://www.ndtv.com/india-news/669-deaths-in-police-custody-in-last-5-years-home-ministry-3765090>, (last visited Mar. 6, 2024).

<sup>4</sup> Niranjan Singh v. Prabhakar Rajaram Kharote., AIR 1980 SC 785

<sup>5</sup> Collins Cobuild, English Language Dictionary, (1992) p.1546

<sup>6</sup> Shivangi Dubey, Child Custody Laws, legalbites, (Feb. 01, 2024, 4:19 PM), <https://www.legalbites.in/topics/articles/child-custody-laws-892271>

surveillance and to restrict the movement to protect the concerned police. Similarly, police custody is not the only custody in practice.

### **2.3. KINDS OF CUSTODY:**

#### **2.3.1. Pre-conviction custody**

Also known as under trial custody, has two types of custody- police custody and judicial custody. When the suspect is in police custody, he cannot be kept in their custody for more than 24 hours of investigation. He needs to be presented before the nearest magistrate who can extend the police custody but it cannot exceed 15 days. Judicial custody involves a suspect's incarceration, authorized by a magistrate, pending investigation or trial in a separate jail from police lock-up. The investigating agency can access a convict in judicial custody only under court orders. There is no statutory upper limit to under-trial judicial custody except for a provision called 'default bail'. The charge sheet must be filed by the police and other agencies with the power of arrest and investigation within 90 days for offenses punishable with death, life imprisonment, or imprisonment for ten years or more, and within 60 days for other cases. If the charge sheet is not submitted within this time, the detainee has the right to be released. If the charge sheet is submitted within this time, under trial custody can continue for months or years, despite judgments calling for a speedy trial. Section 436A of the Criminal Procedure Code allows for bail release if the detainee has been in custody for more than half of the maximum punishment period.

#### **2.3.2. Protective custody**

Other forms of custody include protective custody, deportation camps for illegal foreigners, and military custody. Juvenile and destitute women are housed in special orders in protection homes, and individuals can be committed to mental hospitals under the Mental Health Act.

#### **2.3.3. Military custody**

Military custody in India is governed by armed forces law, with only military personnel being taken into custody. Paramilitary forces are required to hand over arrested persons to the police when exercising arrest powers. The Border Security Force (BSF) also has some police powers but must hand over detained individuals to local police. In 2010, the Central Government assigned the Central Paramilitary Forces the power of arrest, search, and seizure under the Arms Act. The constitution allows the Central Government to deploy armed forces within a state's territory 'in aid of civil power', but protection against abuse extends to all custodial



situations. Additionally, illegal detention in lockups and undisclosed locations or safe houses remains a persistent issue.

#### **2.4. CUSTODIAL VIOLENCE:**

custodial violence can be defined as any act of violence inflicted on the person in custody that is not warranted by the law of the land. It can be a low-key or life-threatening injury involving physical, psychological, and sexual in nature. The Supreme Court<sup>7</sup> interpreted that custodial crimes involve limitations placed on a person's liberty by the police, directly or indirectly. It is important to note that the control of the police over the victims is more significant than whether the crime occurs within the premises of a police station or post.

### **3. TYPES OF CUSTODIAL TORTURE:**

There are different ways in which custodial violence can be committed by governmental agencies to achieve the required results. It can be physical, psychological, or sexual.

#### **3.1. PHYSICAL VIOLENCE:**

Physical torture involves inflicting pain, discomfort, and dysfunction on the victim, often causing severe pain and discomfort. The inflictor ensures the victim remains undetected by ordinary examinations, but the torturers cannot be trained to do so in such a way that detection becomes impossible. Despite precautions, internal injuries can still be detected even after several years of the incident.

Common methods include

1. disfigurement,
2. exhaustion,
3. fear of immediate death,
4. forcing victims to sleep on damp floors,
5. exposing them to extreme cold weather or sun exposure.
6. Sharp objects are used to make scratches and cuts on the victim's body, leading to severe beatings or forcing them to walk barefoot over thorny surfaces or glass-covered floors.

Joint ligaments are torn off, causing severe pain by twisting and beatings.

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<sup>7</sup> SAHELI -A Women Resource Centre v. Police Commissioner of Delhi., AIR 1990 SC 513

7. Victims are suspended by their legs, arms, or hair, often combined with other forms like falanga, electric shock, heat, or cold.
8. Twisting and pricking with pins, fingers, ears, and hair can impair hearing.
9. Irritants like chili powder and table salts are applied to delicate parts or open wounds.

### 3.2. PSYCHOLOGICAL VIOLENCE:

The victim is subjected to various methods to break their confidence and morale, including

- Communication techniques, coercion, deprivation of basic needs, and pharmacological techniques.
- Communication techniques involve giving the victim wrong information, which can cause mental torture.
- Coercion involves forcing the victim to perform or witness actions that cause mental torture, such as violating social taboos or witnessing other victims' torture.
- Deprivation of basic needs, such as water, food, sleep, and toilet facilities, can cause disorientation and confusion. Pharmacological techniques, such as the use of various drugs, can also be used to facilitate torture.
- Threats and humiliations directed towards persons in custody, family members, or friends can further exacerbate the situation.<sup>8</sup>

### 3.3. SEXUAL VIOLENCE:

Sexual violence, involving verbal abuse and humiliation, has a significant psychological impact on victims. Violators often resort to new methods to break the victim's resistance and satisfy their own urges, resulting in rape or sodomy. The psychological impact of sexual violence is profound, highlighting the need for effective prevention and intervention. Sexual torture is a prevalent issue, particularly among women. The Mathura rape case highlighted the need for justice to address police atrocities and create laws that protect women's interests. The National Expert Committee on Women Prisoners categorized sexual torture into two parts: custodial torture and harassment by police officials. Other inhuman practices, such as

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<sup>8</sup> iasscore, <https://iasscore.in/current-affairs/mains/custodial-torture-cases-in-india>, (Last visited Feb. 01, 2024).

infiltration rods, bottles, and batons, have also been documented, causing rape and death. These practices often involve harm to sexual organs and the genital organs.

### **3.4. TORTURE INFLICTED THROUGH TRUTH SERUM:**

Truth serum, also known as sodium pentothal, is a pressure technique used by interrogators to elicit confessions, often compared to physical torture. However, this conclusion is flawed as the ban on torture is absolute, regardless of the form used. The administration of truth serum constitutes torture, especially when used on an involuntary subject to prevent a terrorist attack. After the September 11, 2001, terrorist attacks,<sup>9</sup> US securities agencies expressed frustration due to terror suspects' prolonged silence and considering more extreme methods, such as truth serum. Former director of the CIA and FBI, William Webster, urged the Pentagon to administer truth serum drugs to defiant Taliban and al-Qaeda prisoners to obtain information that could save lives or prevent fresh terrorist attacks.<sup>10</sup> Former detainees claim that interrogators used unspecified drugs, including tablets, which made them senseless. The shortcoming of truth serum administration is that it does not force the subject to tell the truth, but rather makes them more talkative. The information elicited through this process is not likely to be accurate, and the potential for the victim's death is a potential argument to ban the use of truth serum and related drugs.

### **1. HISTORY OF CUSTODIAL TORTURE IN INDIA:**

Dharma and Danda are two basic foundations of governance in ancient India. 'Danda Niti/rules of punishment' formed a major part of statecraft. According to many dharma sastras, one of the important duties of the king is to properly wield the swords of 'Danda.' In ancient India, villages formed the core of any kingdom and had their own courts to resolve petty cases and civil disputes. Mentions of police can be traced back to Mahabharata<sup>11</sup> and the Buddhist<sup>12</sup> era, who were given the responsibility to arrest and execute the robbers<sup>13</sup>. Ramayana also makes a reference to the need for police to regulate and maintain peace and order. Manu, one of the oldest lawgivers, and author of Manu Smriti signifies the prevalent police system at that time to prevent the commission of the crime. Manu classified police into two departments: criminal

<sup>9</sup> archive.tjssl.edu, <http://archive.tjssl.edu/sites/default/files/files/Keller.pdf>, (Last visited Feb. 01, 2024).

<sup>10</sup> chicagotribune, <https://www.chicagotribune.com/2002/04/26/use-of-truth-serum-urged/>, (Last visited Feb. 01, 2024).

<sup>11</sup> Mahabharata mentions Gramadhipati

<sup>12</sup> Buddhist Jatakas mentions Grambhojaka

<sup>13</sup> Encyclopedia of Police in India, 1993

investigation and law and order wing. The criminal investigation department was divided into units for crime investigation, security, economic offense prevention, and espionage. Manu suggested secret agents for confidential activities<sup>14</sup>. In B.C.600-300<sup>15</sup>, hints of an indirect police system were found. Similar hints can also be seen in the Yagnavalkyasmriti (100-300 A.D), the Naradasmriti (100-400 A.D), and the Katayanasmriti (400-600 A.D)<sup>16</sup> in the garb of policing violence was committed on the captured people.<sup>17</sup>

#### 4.1. Mauryan Period

Kautilya's Arthashastra refers to various methods in which torture had been inflicted such as setting ablaze the limbs, gruesome attack by animals, trampling by elephants, and mutilation of the human body. Torture has been justified in those eras to protect society from greater evil.

#### 4.2. Buddhist Period

The Buddhist period (320 B.C. – 300 A.D.) was known for its humanitarian approach toward society and thus the administration of justice had a humanitarian principle. Custodial violence was repulsed and special treatment was given to prisoners who were women, children, and aged people.

#### 4.3. Gupta Period

In the Gupta period (320 A.D.-500 A.D.), if the evidence against a prisoner was unclear, four types of ordeals were used, with trial by ordeals being common<sup>18</sup>. The criminal justice system during the six and a half centuries between Harsha's death in 650 A.D. and Mohamaden's rise is limited, with a mix of petty Hindu kingdoms engaged in dynastic wars. In the Mohammedan period, Shariat law was applied to crimes, with widespread use of torture, amputation of a thief's hands, and death for both the adulterer and the adulteress. Compensation was not acceptable.

#### 4.4. Mughal Period

<sup>14</sup> The Apastamba Dharmasutra advises the king to prevent theft in villages and forests, appoint truthful officers and subordinates, punish guilty individuals, and ensure fairness in disputes. It also mandates truthful witnesses and punishment for untruthful testimony; P.V. Kane, *History of Dharmasastra* Vol III (1946), pp.1-2 and 167

<sup>15</sup> Narada states that experienced men must trace animals or their property from the place where it was taken forcibly; Surendernath Sen, *Administrative System of Maratha* (1925) p.511

<sup>16</sup> Smritis dictate restitution for land losses to be made by country officers, wardens, headman, forest owners, and road officers, or entire villages or surrounding areas.

<sup>17</sup> Rohit Parashar, Custodial Violence in India, *legalserviceindia*, (Feb. 01, 2024, 4:19 PM),

<https://www.legalserviceindia.com/legal/article-7268-custodial-violence-in-india.html>

<sup>18</sup> S.K.Ghosh, *Torture and Rape in Police Custody: An Analysis* (1993) p.15



Under the Mughal regime, Shariat law was in force, and the quality of justice dispensed by successive emperors was not uniform. Akbar tried to avoid the harsh treatment of prisoners, while Jahangir's punishment was quick and varied. Shahjahan was capable of even greater ferocity and cruelty than Jahangir, taking a savage pleasure in witnessing the execution of the punishment that he had decreed. Aurangzeb, on the other hand, attempted to attain the ideal of a strict Muslim and follow the law and traditions of Islam in every detail of his administration and personal conduct. Hindus were tortured and punished more severely than Muslims for the same offense.

Key police functionaries during the Mughal period were Faujdar and Kotwal.<sup>19</sup> The Kotwal was responsible for policing towns, cities, and their suburbs, preventing crime and social abuses, regulating cemeteries, burials, slaughterhouses, and jails, and taking charge of heirless property.<sup>20</sup>

Aini-Akbari sheds light on the functions of the Kotwals. He patrolled the city at night, collected intelligence from paid informers, and controlled the preparation and distribution of intoxication.

As the leader of the Sarkar, the Faujdar ordered soldiers to put down unrest and insurrection in the primarily rural areas under his control. Although subordinate to the provincial Governor, he could directly communicate with the Imperial Government. He dispersed and arrested robber gangs, took cognizance of all violent crimes, hunted down bandits, prevented firearm manufacture, arrested disturbances of peace, and assisted the Malguzars in the collection of revenue by making demonstrations of force to overcome oppositions. The Faujdar, a key figure in the Zamindar system, ensured that the Zamindars performed their duties correctly and maintained peace and security within their zamindari<sup>21,22</sup>.

#### 4.1. Maratha Period

Maratha kingdom employed physical torture which can be listed as amputation of hands and feet, pouring molten lead into the throat and ear, and driving nails into the body to establish the guilt of the suspected person.

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<sup>19</sup> legalservicesindia, [https://www.legalservicesindia.com/article/1893/Custodial-Violence-in-India.html#google\\_vignette](https://www.legalservicesindia.com/article/1893/Custodial-Violence-in-India.html#google_vignette), (last visited Feb. 01, 2024).

<sup>20</sup> *Id.*, at 1432.

<sup>21</sup> *Id.*, at 1432.

<sup>22</sup> Kamlesh Kumar, Unpublished Ph.D., *Custodial Crimes in Police Custody: Causes, Consequences and Preventive Measures*, Tata Institute of Social Sciences (2011) p.37

#### 4.2. British Period

The Faujdar was responsible for ensuring the peace and security of the people in their zamindari.<sup>23</sup> The British rule in India led to the establishment of a criminal justice system, which was initially plagued by gangs of professional and hereditary robbers and murderers known as 'thugs'. The inhabitants were indiscriminately apprehended on false charges and incarcerated for years before trial. Torture by officials, including Kotwals, was widespread, resulting in deaths.<sup>24</sup> The British evolved order from chaos, destroyed thugs' organizations, put down barbaric social customs, built up the judiciary, police, and jails, and codified law.

The British Raj was known for its police brutality, with men, women, and children subjected to torture and beatings to confess to crimes. The police aimed to create fear among the public to prevent exploitation and revenue exploitation. Justice administration was not their main concern, with torture primarily carried out by revenue collectors. Political workers were also subjected to torture if they did not provide the desired responses. Primitive, repressive, and threatening police could only administer wounded justice to the people in India, making them an agent of imperial brutality<sup>25,26</sup>.

The Select Committee on East Indian Affairs (1832) highlighted the use of torture by revenue and police officials to extort confessions, money, or taxes. The Torture Commission (1855) investigated alleged cases of torture in the Maharashtra presidency, highlighting that it was a structural problem rather than an aberrant one. The report laid the foundation for the establishment of the Police Commission, 1860, which recommended the abolition of military police and the creation of a single, uniform force of civil constabulary under the proposed Police Act, 1861.

The Indian Police Commission (1902-2003) analyzed the police force's performance after forty years of the Police Act, of 1861. The commission found the police force to be inefficient, with defects in training, organization, supervision, and perceived corruption. The police force failed

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<sup>23</sup> Praneeta Kumari and Dr. Seema Kashyap, Unabated custodial violence in India: A critical study V. 3, International Journal of Civil Law and Legal Research, p.10-15, <https://www.civillawjournal.com/article/50/3-2-5-270.pdf>

<sup>24</sup> Praneeta Kumari and Dr. Seema Kashyap, Unabated custodial violence in India: A critical study V. 3, International Journal of Civil Law and Legal Research, p.10-15, <https://www.civillawjournal.com/article/50/3-2-5-270.pdf>

<sup>25</sup> Legalservicesindia, *Supra* note 19, at 1433.

<sup>26</sup> K.P. Shyamsunder, *Custodial Death and Human Wrongs by Police Human Rights and Criminal Justice Administration* (2002) p.101.

to gain public confidence and cooperation, and abuses were widespread. The commission recommended radical reforms, including recruiting educated Indians, separating the law-and-order wing from the investigation wing, and creating a cadre for sub-inspectors at police stations and criminal investigation departments at state levels. However, the subsequent decades saw the rise of the Swadeshi Movement, Non-cooperation, Civil Disobedience, Quit India Movements, labor unrest, communist-backed Kisan movement, and rural insurrection, leading to a preference for coercive solutions over investigative grievances by the colonial government.

The Indian Police Commission (1902-2003) analyzed the police force's performance after forty years of the Police Act, of 1861. The commission found the police force to be inefficient, with defects in training, organization, supervision, and perceived corruption. The police force failed to gain public confidence and cooperation, and abuses were widespread. The commission recommended radical reforms, including recruiting educated Indians, separating the law-and-order wing from the investigation wing, and creating a cadre for sub-inspectors at police stations and criminal investigation departments at state levels. However, the subsequent decades saw the rise of the Swadeshi Movement, Non-cooperation, Civil Disobedience, Quit India Movements, labor unrest, communist-backed Kisan movement, and rural insurrection, leading to a preference for coercive solutions over investigative grievances by the colonial government.

##### **5. CAUSES FOR CUSTODIAL TORTURE:**

The police subculture in India, inherited from the colonial past, has been criticized for its human rights violations against the weak and defenseless. The older generation's autocratic approach to administration and decision-making led to a culture of torture of citizens, which was tolerated by authorities and the public. This subculture has been largely unreacted, even though it was encouraged by superior ranks in the police. To address this, a police Act has been enacted to redefine the police's role and function. The police force is essential for maintaining peace and order, and addressing the causes of torture is crucial for a more effective police administration.

- The negative public image of the police in India hinders their ability to effectively prevent and control crime, which is crucial for the functioning of the criminal justice system. The police maintain confrontational relationships with the public, leading to a lack of trust and



support. The average citizen, who suffers from insecurity due to lawlessness and ignorance of legal and ethical aspects of justice administration, Favours the disposal of criminals through efficient summary methods employed by the police.

- Poor working conditions in the police force contribute to many excesses. Officers face harassment, unpleasantness, and irksome duty, with meager salaries and miserable living conditions. Accommodation facilities are inadequate, and many establishments are understaffed and heavy. The surrounding environment degrades and demoralizes the police, leading to a loss of self-respect and a lack of community interest. Subordinates are treated with a lack of concern for their well-being, and harsh and unethical methods are used against them. Fair play and justice take a back seat, leading to a divertissement of pent-up feelings and wrath against the public. The police force today is dissatisfied with their conditions and the lack of sympathy and interest from the community.
- Political interference in police work often leads to police becoming agents of the ruling party, requiring immediate results for political bosses. This unwarranted interference weakens honest and sincere police personnel, leading to the torture of suspects and political opponents. The belief that third-degree methods are effective in dealing with bad characters and producing better results is concerning, as many ministers, administrators, and police officials believe these methods are necessary for achieving better results.
- The persistence of police torture during investigations and interrogations is attributed to a lack of adequate training and orientation regarding human rights, non-use of scientific aids, an ineffective intelligence collection system, inadequate police station infrastructure, understaffing, and a decay in the criminal justice system. The lack of modern investigative techniques contributes to police excesses, and senior police officers resort to 'third-degree methods' due to the inability to access modern and scientific methods. The training of Indian Police service officers at the national police academy emphasizes the importance of human rights and the need for emancipatory human rights training to make the police more professional, responsive, and people-friendly. The National Human Rights Commission has prepared a model human rights training syllabus for police officers of all ranks in consultation with the Director General of Police of all States and circulated it to all police training institutions. Appropriate training in human rights principles will have a significant impact on the police's handling of cases<sup>27</sup>.

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<sup>27</sup> Shankar Sen, *Human Rights in Developing Society*, APH Publishing Corporation, New Delhi (1998) at 101



- The 1861 Police Act, Section 23, mandates officers to obey orders and warrants from competent authorities, allowing civil and political executives to control the police. However, the police force faces inadequate strength due to increasing crime rates, making their task overwhelming, and requiring time for proper investigation and detection. As a result, the adoption of a third-degree method becomes inevitable in practice.
- Police subculture often glorifies deviance as a requirement for completing the job, rather than personal gain or aggrandizement. This has led to a belief among newly recruited officers that their training is quickly unlearned and they must conform to the prevalent culture, which focuses on apprehending and convicting criminals rather than implementing means to achieve these objectives. Studies have highlighted the unfortunate situation in police organizations and the need for improved training and discipline. Psychological studies show that frustration, helplessness, and failure to control crime through socially approved justice channels lead to a police culture of cynicism, brutality, and counter-violence. Case studies of police barbarity in Narainpura, Baghpat, and Bhagalpur reveal psychological distortions and stress from the defective criminal justice system. This frustration often leads to outrageous violations of the law by the police.
- Custodial torture is a result of the police's immense pressure to detect cases of crime surges, particularly heinous crimes. Police officers who conduct most investigations are often hard-pressed and beleaguered, dedicating only 37% of their time to investigation work. This leaves them with little independence from short-cut, extra-legal methods, and torture. Expert bodies like the Law Commission of India, Justice Malimath Committee<sup>28</sup> report, and National Police Commission suggest increasing investigation staff and separating law and order and investigation staff. However, this would require a larger recruitment of policemen to handle the heavy workload. The result is a farewell to open and painstaking investigations and independence from short-cut, extra-legal methods, and torture.

## 6. INTERNATIONAL PERSPECTIVE:

The question of individual human rights and fundamental freedoms under customary international law has evolved over time, with changes in beliefs, practices, and laws reflecting societal changes. This trend has been evident in contemporary international law, which

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<sup>28</sup> See, Recommendations on Committee on Reforms of Criminal Justice System, (March 2003) at 240

addresses both international and domestic concerns<sup>29</sup>. Torture considered the most barbaric act against humanity, is considered an infeasible right of human beings. The prohibition of torture and other cruel, inhuman, or degrading treatment has been advocated since the adoption of the Universal Declaration of Human Rights in 1948 and the Geneva Conventions in 1949. However, it was only in 1984 that the United Nations General Assembly adopted the Convention against Torture and other cruel, inhuman, or degrading treatment or punishment for the first time.<sup>30</sup>

### 6.1. Universal Declaration of Human Rights, 1948

The Universal Declaration of Human Rights (UDHR) acknowledges the inherent dignity and equality of all members of the human family as the foundation of freedom, justice, and peace.<sup>31</sup> It is a common standard of achievement that nations must strive to promote respect for all human beings as free and equal in dignity and rights. Article 2 of the UDR states that everyone is entitled to all rights and freedoms set forth in the Declaration without distinction.<sup>32</sup>

General standards prohibiting torture, cruel, inhuman, or degrading treatment or punishment are laid down in the UDR and International Covenant on Civil and Political Rights of 1966.<sup>33</sup> Article 5 of the UDR prohibits torture or cruel, inhuman, or degrading treatment. However, the question of whether the UDR has become customary law regarding the rights enshrined in it has not yet received a final answer.<sup>34</sup> The Universal Declaration of Human Rights was declared to be a duty for all participants in the international community during the 1968 Tehran Conference on Human Rights. However, the World Conference on Human Rights in Vienna in 1993 took a more cautious approach, stating that the UDR does not in its entirety constitute customary international law. However, very few states would deny that a state is in violation of international law if it practices, encourages, or condones torture or other cruel, inhuman, or degrading treatment or punishment. The Vienna Declaration and Programme of Action of 1993 highlights that the right to be free from torture must be always upheld, even during periods of

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<sup>29</sup> H.H. Mensah, "International Law and the Violation of Human Rights," AIR 2000 (Journal) 49

<sup>30</sup> congress, <https://www.congress.gov/treaty-document/100th-congress/20>, (last visited Feb. 01, 2024).

<sup>31</sup> ohchr, [https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf), (last visited Feb. 01, 2024).

<sup>32</sup> woventeaching, <https://www.woventeaching.org/udhr/article-2>, (last visited Feb. 01, 2024).

<sup>33</sup> Nowak, Manfred. "What Practices Constitute Torture?: US and UN Standards." *Human Rights Quarterly*, vol. 28, no. 4, 2006, pp. 809–41. *JSTOR*, <http://www.jstor.org/stable/20072769>. Accessed 7 Apr. 2024

<sup>34</sup> woventeaching, <https://www.woventeaching.org/udhr/article-5>, (last visited Feb. 01, 2024).

armed conflict or internal or international unrest. States are urged to put an immediate end to this practice and eradicate this evil forever through the full implementation of the UDR and relevant conventions.<sup>35</sup>

#### 4.1. International Convention on Civil and Political Rights, 1966

The International Covenant on Civil and Political Rights, along with subsequent instruments adopted by the United Nations and its specialized agencies, aims to provide specificity and content to general international norms.<sup>36</sup> Article 7 prohibits torture and other forms of severe ill-treatment, with the addition of a sentence covering medical and scientific experimentation. The objective behind this provision is to prevent the recurrence of atrocities like those perpetrated in Nazi Concentration camps during World War II. Article 9 clause (1) guarantees everyone has the right to security of person, no one shall be subjected to arbitrary arrest or detention.<sup>37</sup>

Article 10 Para (1) guarantees that all persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person.<sup>38</sup> Any person, the victim of unlawful arrest or detention, shall have the enforceable right of compensation.<sup>39</sup> By virtue of this provision, a pre-trial detainee is entitled to respect for his physical and moral dignity, to material conditions and treatment befitting that dignity, and to sympathy and kindness. The two articles have notable differences. Article 7 is of general application (lex generalis), Article 10 targets only persons in detention (lex specialis), and Article 10: 1 is not protected from infringement in times of crises. The observance of this principle of proportionality is also subject to control and review by the Human Rights Committee under Article 40, as is the principle of non-discrimination. Many situations will involve both principles at the same time and therefore require their simultaneous application.

State parties to the Covenant on Civil and Political Rights have an obligation to make elaborate

<sup>35</sup> ir.nbu.ac.in, [https://ir.nbu.ac.in/bitstream/123456789/3251/1/March2010\\_09.pdf](https://ir.nbu.ac.in/bitstream/123456789/3251/1/March2010_09.pdf), (last visited Feb. 10, 2024).

<sup>36</sup> 1. Hathaway JC. International Covenant on Civil and Political Rights (1966). In: *The Rights of Refugees under International Law*. Cambridge University Press; 2005:1030-1049.

<sup>37</sup> humanrights, <https://humanrights.gov.au/our-work/rights-and-freedoms/right-security-person-and-freedom-arbitrary-detention>, (last visited Feb. 11, 2024).

<sup>38</sup> un, <https://www.un.org/esa/socdev/enable/rights/wghrefa10.htm>, (last visited Feb. 01, 2024).

<sup>39</sup> ohchr, <https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/Consultation2014/MatthewPollard.pdf>, (last visited Feb. 11, 2024).



systems for the supervision of places of detention, which is vital for the protection of the human rights of pre-trial detainees. Officers of places of detention or prison should be independent of the place, security forces, and other officials responsible for the apprehension of offenders or the investigation of offenses. Based on the twin concepts of presumption of innocence and entitlement to humane treatment, the United Nations and its specialized agencies have developed an extensive network of international standards. The Covenant introduced as implementation machinery a duty on states to report to different UN organs how they had fulfilled their obligations under the covenants.

However, ten years passed before the covenants came into force in 1976, and it is regrettable that fewer than half the states that ratified them have accepted the inter-state complaints procedure or the right of individual petition. Some states have also appended extensive reservations to their ratifications, thereby appreciably eroding the scale of their commitments. Despite the delay of almost thirty years between the adoption of the Universal Declaration of Human Rights and the two covenants, compounded by the reluctance of many states to comply with the implementation mechanisms, the Universal Declaration of Human Rights has acquired a juridical status more important than was originally intended.

### 6.3. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984<sup>40</sup>

The U.N. Convention against Torture (CAT) is an international human rights instrument aimed at preventing torture worldwide.<sup>41</sup> It requires the State parties to take effective measures to prevent torture within their borders and forbids States from returning people to their home country if there are reasons to believe that they will be subjected to torture.<sup>42</sup> The convention was adopted by the United Nations General Assembly on 10th December 1984 and came into force on 26 June 1987. Article 2 of the U.N. Convention against Torture prohibits torture and requires parties to take effective measures to prevent it in any territory under its jurisdiction. This absolute and non-derivable prohibition cannot be justified by exceptional circumstances,

<sup>40</sup> legal.un.org, [https://legal.un.org/avl/pdf/ha/catcidtp/catcidtp\\_e.pdf](https://legal.un.org/avl/pdf/ha/catcidtp/catcidtp_e.pdf), (last visited Feb. 01, 2024).

<sup>41</sup> equalityhumanrights, <https://www.equalityhumanrights.com/our-work/our-human-rights-work/monitoring-and-promoting-un-treaties/convention-against-torture-and>, (last visited Feb. 01, 2024).

<sup>42</sup> coe, <https://www.coe.int/en/web/compass/legal-protection-of-human-rights>, (last visited Feb. 01, 2024).



including war, threat of war, internal political instability, public emergency, terrorist acts, violent crime, or any form of armed conflict. Torture cannot be justified to protect public safety or prevent emergencies. The U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 comprises 33 Articles divided into three parts. Part I defines torture prohibits acts of torture and allied concepts, and obliges State parties to ensure that all acts of torture are punished. Part II provides for the machinery for the enforcement of the prohibition, while Part III relates to formal matters. Article 2 of the U.N.<sup>43</sup> Convention against Torture, 1984 obligates State parties to take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction.<sup>44</sup> No exceptional circumstances, such as a state of war or a threat of war, international political instability, or any other public emergency, may be invoked as a justification for torture.<sup>45</sup> An order from a superior officer or a public authority may not be invoked as a justification for torture.

#### 6.4.Pact of San Jose, 1969

The American Convention on Human Rights, signed in 1969 by Latin American states and the United States, came into force in July 1978. It prohibits torture, cruel, inhuman, or degrading punishment or treatment, and ensures that all persons deprived of their liberty are treated with respect for the inherent dignity of the human person. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights were both founded by the Convention.

The Convention grants the right of petition to individuals, groups of individuals, and non-governmental organizations, with inter-state complaints operating only among states that have expressly agreed to such a procedure. The Inter-American Convention to Prevent and Punish Torture, adopted in 1985 and enacted in 1987, defines torture as an intentional act causing physical or mental pain or suffering for criminal investigation, intimidation, personal punishment, preventive measures, or other purposes. However, a former president of the Inter-American Court has criticized this convention as a 'disappointing' instrument, as it has

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<sup>43</sup> advocatekhoj,

<https://www.advocatekhoj.com/library/lawreports/custodialcrimes/46.php?Title=&%20Inhuman%20or%20Degrading%20Treatment%20or%20Punishment,%201984>, (last visited Feb. 01, 2024).

<sup>44</sup> treaties.un.org, [https://treaties.un.org/doc/Treaties/1987/06/19870626%2002-38%20AM/Ch\\_IV\\_9p.pdf](https://treaties.un.org/doc/Treaties/1987/06/19870626%2002-38%20AM/Ch_IV_9p.pdf), (last visited Feb. 01, 2024).

<sup>45</sup> ohchr, <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-protection-all-persons-being-subjected-torture-and>, (last visited Feb. 11, 2024).

eliminated the reaffirmation of torture as an international crime and allows for continued application of the right of asylum, suggesting that torture may be considered a political crime and eroding the principle of universal jurisdiction<sup>46</sup>.

## 7. INDIAN STATUTES PREVENTING CUSTODIAL TORTURE:

### 7.1. Constitution of India, 1950

The Indian Judiciary has in a number of its judgments asserted that a person in the custody of police or detained by the police does not be deprived of his/her fundamental rights and violation of which, the said person can move the Supreme Court under Article 32 of the Constitution of India<sup>47</sup>. Even though there is no specific provision containing rights against torture or cruel or inhumane treatments and degrading punishment the courts being familiar with the Police and its administration, evolved from a police state to a welfare state. The police aimed only at the ends of justice and order of law even at the cost of individual rights. After many international declarations and conventions against torture, the Constitution of India also emphasizes that human dignity and fundamental freedoms are to be upheld at all costs. The Preamble, Fundamental Rights, and DPSP<sup>48</sup>. The preamble of the Constitution assures every citizen the dignity and guarantee of equality and equal justice. Though no provision in the Constitution specifically defined or prohibited 'torture,' the Supreme Court held that the right against torture is enshrined in the right to life under Article 21 of the Constitution<sup>49</sup>. Non-exclusive provision against torture does not render the police to violate the fundamental rights of arrested persons. The right to life includes the right to possess all body parts, including limbs and organs, and Article 21 forbids intentional suffering or physical alteration<sup>50</sup>. The following provisions encompass the right not to be tortured:

- Article 20: Protection in respect of conviction for offenses<sup>51</sup>

(1) No person shall be convicted of any offense except for violation of the law in force at the time of the commission of the act charged as an offense, nor be subjected

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<sup>46</sup> Pedro Nikken, 'L' action central system interamericana des droids de l' homme,' in Antonio Cassese, ed., the International Fight Against torture, Nomos verlagsgesellschaft, Baden- Baden, 1991. Cited in Love Kullberg: Torture; International rules and procedures in An End to Torture at 28.

<sup>47</sup>Prabhakar pandurang v state of Maharashtra, AIR 1966 SC 424

<sup>48</sup>Jitendra Mishra; "Custodial Atrocities, Human Rights and the Judiciary" 47 JILI 2005 at 513

<sup>49</sup> Prem Shankar v Delhi Administration, AIR 1980 SC 1535

<sup>50</sup> Kharak Singh v State of Uttar Pradesh, AIR 1963 SC 1295

<sup>51</sup> INDIA CONST. art. 20.

to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offense

(2) No person shall be prosecuted and punished for the same offense more than once

(3) No person accused of any offense shall be compelled to be a witness against himself. The police cannot subject the person so arrested to torture to extract the confession. (Right against self-incrimination)

- Article 21: “No person shall be deprived of his life or personal liberty except according to a procedure established by law.”<sup>52</sup> The scope of this article has been expanded through various judgments to incorporate all the possible rights to ensure life. Some of the rights so far included as part of Article 21 are as follows<sup>53</sup>

Right to live with human dignity, right to livelihood, right to privacy, right to speedy trial, right against handcuffing<sup>54</sup>, right against inhumane treatment, right against solitary confinement, right to free legal aid<sup>55</sup>, and so on.

- Article 22: This Article provides for four basic principles with respect to convictions.
- The right to be informed of the grounds of arrest
  - The right to be defended by a legal practitioner of his choice
  - Preventive detention laws
  - Production before the nearest Magistrate within 24 hours of the arrest of the person.

Thus, these provisions are designed to ensure that a person is not subjected to any ill-treatment that is devoid of statutory backing or surpasses prescribed excesses.

## 7.2. Indian Penal Code, 1860

Section 376 of the IPC was amended because of the Mathura Rape case<sup>56</sup>, which penalizes custodial rape committed by a police officer under Section 376(1)(b).<sup>57</sup> This is a big move that

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<sup>52</sup> INDIA CONST. art. 21.

<sup>53</sup> Menaka Gandhi v Union of India 1978 AIR 597

<sup>54</sup> Sunil Batra v. Delhi Administration 1980 AIR 1579

<sup>55</sup> Hussainara Khatoun v Home Secretary, State of Bihar 1979 AIR 1369

<sup>56</sup> 1979 2 SCC 143

<sup>57</sup> Indian Penal Code, 1860, sec. 376(1)(b), No. 45, Acts of Parliament, 1860 (India).



penalizes officers who abuse their power. In addition, there are other provisions that deter police officers from resorting to third-degree methods.

- Voluntarily causing hurt to extort confession, or to compel restoration of property
- Voluntarily causing grievous hurt to extort confession, or to compel restoration of property
- Punishment for wrongful confinement
- Punishment for wrongful confinement to extort confession, or compel restoration of property

### 7.3.Code of Criminal Procedure, 1973

The Code forbids torture and abuse against those who are detained, even if they are not charged with a crime or are trying to flee. Sections 50–56<sup>58</sup> which deal with the procedure to examine an arrested person and his protection and safety, are in accordance with Article 22, Sections 46 which provides for the procedure of making an arrest, and 49 which emphasizes no unnecessary restraint while arresting, safeguard individuals who are detained against torture. To prevent torture and violence during incarceration, Section 54 mandates that a magistrate inspect a person's body and document the findings. A person accused of maltreatment may also be asked to undergo a medical examination by the courts<sup>59</sup>. If a Magistrate disregards protocol, the High Court may step in under Section 482 of the Code. A mandatory magistrate investigation into the death of an accused person detained by the police is required by Section 176. To protect the rights and interests of accused parties, sections 167 and 309 seek to bring them before the court.

### 7.4.Indian Evidence Act, 1872

According to Section 25 of the Indian Evidence Act, of 1872, a confession made to a police officer cannot be proved against the person who has made the confession. Similarly, a confession made by a person while he is in the custody of a police cannot be proved against

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<sup>58</sup> Code of Criminal Procedure,1973, § 50, No. 2, Acts of Parliament, 1973 (India).  
Code of Criminal Procedure,1973, § 51, No. 2, Acts of Parliament, 1973 (India).  
Code of Criminal Procedure,1973, § 52, No. 2, Acts of Parliament, 1973 (India).  
Code of Criminal Procedure,1973, § 53, No. 2, Acts of Parliament, 1973 (India).  
Code of Criminal Procedure,1973, § 54, No. 2, Acts of Parliament, 1973 (India).  
Code of Criminal Procedure,1973, § 55, No. 2, Acts of Parliament, 1973 (India).  
Code of Criminal Procedure,1973, § 56, No. 2, Acts of Parliament, 1973 (India).

<sup>59</sup> A.K.Sahdev v. Ramesh Nanji Shah, 1998 CrLJ 2645 at 2650 (Bom.)



such person, unless it is made in the immediate presence of a magistrate. Confession is of utmost importance when custodial violence is discussed. Often, custodial torture happens to extract a confession to solve the case. The scheme of the Act about confession can be found in the following manner:

- a) The law allows confessions as evidence in proceedings, as they are a species of admissions and are admissible in evidence.
- b) However, the law restricts their admissibility due to potential punishment. A confession is not admissible if it is not voluntary<sup>60</sup>.
- c) In certain situations, the law may assume that confessions may not be voluntary, enacting "exclusionary" provisions that exclude them from evidence<sup>61</sup>.

For example, a confession made to a police officer cannot be used as substantive evidence to convict a person accused of any offense.

Section 27 of the Act provides that any fact deposed to as discovered in consequence of 'information' received from an accused person in police custody then so much as to that information relevant before the court of law

#### 7.5. Police Act, 1861

The police are an agency of the government tasked with maintaining law and order, public property, and citizen safety. They are supposed to respect morals, true humanism, and human values in addition to abiding by executive laws, rules, regulations, and reasoning. In a democracy, the police are viewed as a public utility, and their effectiveness, efficiency, and integrity serve as the main deterrent to abuses of human rights. They are supposed to meet the demands of the community for advancement, unity, integration, protection, and development. They are supported by the broader population.

Sections 7<sup>62</sup> and 29<sup>63</sup> of the Act allow for the dismissal, penalty, or suspension of police officers who are negligent or unfit to perform their duties, based on violations of constitutional and statutory safeguards and guidelines from *D.K Basu v. State of West Bengal*.

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<sup>60</sup> Indian Evidence Act, 1872, § 24, No. 34, Acts of Parliament, 1872 (India).

<sup>61</sup> Indian Evidence Act, 1872, § 25, No. 34, Acts of Parliament, 1872 (India).

<sup>62</sup> The Police Act, 1861. § 7, No. 05, Acts of Parliament, 1861 (India).

<sup>63</sup> The Police Act, 1861. § 29, No. 05, Acts of Parliament, 1861 (India).

## 8. ROLE OF LAW COMMISSION:

### 8.1.The 113<sup>th</sup> Law Commission of India Report on Injuries in Police Custody (1985)

the commission was constituted after the Supreme Court observed that there is a dire need for recommendations on punishment for custodial crimes in the case of State of UP V. Ram Sagar Yadav<sup>64</sup>. One of the recommendations was that a new provision, Section 114B be inserted into the Indian Evidence Act, 1872 which would have a reverse onus in custodial violence-related crimes. In such cases, the burden of proof should be placed on the police to prove the innocence and show no custodial torture has been exerted on the accused/victim in custody. Especially in the case of custodial homicide, the burden of proof should be on the police and not the prosecution to prove the case beyond reasonable doubt.

### 8.2.The 135<sup>th</sup> Law Commission of India Report on Women in Custody (1989)

The report emphasizes the special protection of women in custody. The report recommended that a new chapter be inserted in the Code of Criminal Procedure, 1973 dealing specifically with the arrest, detention, and other related procedure in respect of women. It also recommended that a new provision be added in CrPC, 1973; Mental Health Act, 1987 and Probation of Offenders, 1968. It was suggested that a new clause be added to the CrPC, that would list guidelines for making an arrest, such as not making an arrest after dusk or before dawn, not touching the woman's body while making an arrest, and if an arrest is to be made outside of the prescribed duration, it must be done with a senior officer's written consent. It would also state that custody would only be presumed after an oral notification of an arrest is made. It was suggested that the female person so arrested be informed by the Magistrate, of her right to medical checkup at the time of arrest. A female registered practitioner must do the examination and the arrestee must receive a copy of that report. When a woman is guilty of an offense for which Section 360 of the Code of Criminal Procedure is applicable, the court must take into consideration the gender while giving probation, or admonition. The report also recommended for suspension of execution of the sentence till the termination of pregnancy of the female offender. Amending section 37(1), Mental Health Act, 1987 to provide that at least one of the

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<sup>64</sup> 1985 AIR 416

five visitors so prescribed under this section be a woman. Inspection of prisons where women are detained by a lady judicial officer.

### 8.3. The 152nd Report of Law Commission of India on Custodial Crime (1994)

The report highlights the widespread use of torture by police during interrogation and investigation, highlighting the organization of the police force, factors contributing to the custodial crimes, statutory provisions, and international covenants. It also discusses laws and practices during arrest, evidence, officer sanctions, and compensation. The report recommends adding provisions to existing penal laws, such as arrest procedures, cognizance of offenses, and medical examinations. It also suggests splitting the police force into two independent units, one for law and order and the other for investigation, and amendments to the Code of Criminal Procedure, Indian Penal Code, and Indian Evidence Act. The report also recommended that a penal provision be inserted in the Indian Penal Code, 1860 for the violation of Section 160 of the Code of Criminal Procedure, 1973.

### 8.4. The 273<sup>rd</sup> Law Commission Report (2017)

Torture, as defined by the Commission, is any deliberate or involuntary harm, whether it be psychological, mental, or physical. They have created a draft bill called "The Prevention of Torture Bill, 2017," based on study, and they have made several recommendations. The Commission suggests that the Convention Against Torture be ratified to solve the nation's challenges with extraditing offenders and guaranteeing the right to life and liberty of an individual. According to the Commission, measures pertaining to the burden of proof and compensation need to be accommodated through revisions to the Indian Evidence Act of 1872 and the Criminal Procedure Code of 1973. The Commission suggests adding compensation payment under section 357B in addition to fine payment. The Law Commission of India's recommendation is endorsed by the Commission, which also suggests adding section 114B to the Indian Evidence Act of 1872. The Commission suggests harsh punishment, including life in jail and fines, to stop torture and discourage acts. Depending on the victim's socioeconomic status, the courts will determine justiciable compensation and make sure it encompasses. Depending on the victim's socioeconomic status, the courts will determine what constitutes justiciable compensation and make sure it pays for the costs of medical care and rehabilitation. Additionally, the Commission suggests putting in place a strong system to shield witnesses, complainants, and victims from abuse, violence, and threats.



## 9. APPROACH OF JUDICIARY:

- *Olmstead v US* (1928)

Justice Brandeis observed that government as the omnipresent and omnipresent teacher teaches the whole people by its example. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself.<sup>65</sup>

- *Sunil Batra v Delhi Administration*<sup>66</sup> (1978)

A PIL was filed by Sunil Batra as one of his co-prisoners was subjected to physical assault in the prison. The court observed that solitary confinement restricts the rights of the prisoner to move and contact with other prisoners and is a violation of Article 21 of the Constitution unless backed by the procedure established by the law

- *Nilabati Behara v. State of Orissa*<sup>67</sup> (1993)

Nilabati Behara, the mother of Suman Behara who after being taken to investigate related to theft was found dead in the railway track. The Supreme Court observed that Article 21, the Fundamental rights of the detainee has been violated. The court also held that it is the duty of the authorities of jail to protect the rights of those under their custody. The court held the state to be liable and ordered one lakh fifty thousand rupees as compensation.

- *Joginder Kumar v. State of U.P and others*<sup>68</sup> (1994)

Article 21 and Article 22(1) of the Constitution of India ensure that the police officer, at the time of arrest should inform the person arrested, of the reasons for such arrest. The Court held that the police have comply to with these rules and the magistrate should also ensure that the rights are not violated.

- *State of MP v Shyam Sundar Trivedi*<sup>69</sup> (1995)

The man who was arrested was killed by the police during a murder investigation, beaten, and tortured to extract a confession. The Supreme Court observed that in cases of custodial violence, there is often no ocular evidence establishing the complicity of the accused police

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<sup>65</sup> *Olmstead v US* (1928)

<sup>66</sup> *Sunil Batra v Delhi Administration* AIR 1980 SC 1535

<sup>67</sup> (1993) 2 SCC 416

<sup>68</sup> 1994 AIR 1349

<sup>69</sup> 1995 AIR SCW 2793

officer. Police officials often remain silent to protect their colleagues, and there should not be an excessive adherence to proof beyond reasonable doubt. The 113<sup>th</sup> Law Commission of India Report suggested that injuries caused in custody may be presumed to have been caused by the police officials. The court emphasized the need for the courts to exhibit sensitivity in such matters rather than adopting a narrow, technical approach to prevent the guilty from escaping justice.

- *DK Basu v. State of West Bengal*<sup>70</sup> (1997)

The Indian Constitution of 1950 prohibits torture or cruel, inhuman, or degrading treatment during custodial violence, regardless of whether it occurs during investigation, interrogation, or otherwise. This right is interrogable even for convicts, undertrials, and other prisoners in custody, except with reasonable restrictions. Even in cases of terrorism, torture or third-degree methods cannot be used to extract information. The court issued guidelines for specific preventive measures at the time of arrest, including identifying police officials, preparing the arrest memo, notifying the accused's family, and medical examination. Compensation for violations of rights under Article 21<sup>71</sup> can be filed under Article 32<sup>72</sup> or 226<sup>73</sup> of the Constitution, with the State being liable for the acts of its servants and paying compensation to the victims or their families.

- *J. Prabhavathamma v. the State of Kerala and others*<sup>74</sup> (2007)

The special CBI court awarded the death penalty to two police officers, who caused the death of a metal shop owner in their custody and said that these kinds of acts are brutal and result in the loss of faith in the police administration

- *Prakash Kapadia v. Commissioner of Police (Ahmedabad City)*<sup>75</sup> (2014)

In a PIL, the petitioner asked the court to investigate several cases of torture committed while a prisoner. To stop these kinds of acts, the Court recommended that police stations be equipped with CCTV cameras. The State Government concurred and declared that the entire state ought to have cameras deployed. The Court demanded that the state government guarantee the

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<sup>70</sup> 1997 (1) SCC 416

<sup>71</sup> INDIA CONST. art 21

<sup>72</sup> INDIA CONST. art 32

<sup>73</sup> INDIA CONST. art 226

<sup>74</sup> WP(C). NO. 24258 OF 2007 (K) AND CRL

<sup>75</sup> 2014 SCC Online Guj 11365

installation and that the tender process be completed. Additionally, the case dealt with self-incrimination.

- Dr. Ashwini Kumar v. Union of India, Ministry of Home Affairs<sup>76</sup> (2019)

Former law Minister Dr. Ashwini Kumar filed a petition requesting the central government to enact a stand-alone legislation on custodial torture based on the UNCAT framework. The court invoked the doctrine of separation of powers, distinguishing between the power of courts to interpret statutes and adjudication and the power of legislatures to enact the legislation. The court ruled that the enactment of anti-torture legislation was already being considered by the Parliament, and it would be improper for the Supreme Court to enforce its opinion. Instead, effective rights of the prisoners could be ensured by expanding the existing laws on a case-by-case basis. The court jurisprudence and the framework, as laid down in cases like the Nilabati case and the D.K.Basu case.

## **10. PASSING OF SEPARATE BILLS FOR CUSTODIAL TORTURE AND THEIR FAILURE:**

### **10.1. Prevention of Torture Bill, 2010**

The Prevention of Torture Bill, enacted in 2010, was the first legislation to regulate custodial torture in India. It aimed to reduce the number of custodial deaths and align with the UN Convention on Torture and Other Cruel Activities. The bill laid down strict procedures for treating cases related to torture and differed from the provisions in the Indian Penal Code regarding forcefully/coercing a confession. The bill outlined specific instances where a public official could be held liable for inflicting harm on a person in custody, such as obtaining a confession or other information to implicate the person in custody. It also outlined the due procedure for victims to file a complaint and the types of torture and remedies available to them. The bill was passed to ratify India's stance on the UN Convention on Torture and Other Cruel Activities as a member state of the United Nations. Some of the main features of the Bill were The definition of 'torture'<sup>77</sup>, is that torture has been limited only to physical violence and failed to incorporate mental torture.

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<sup>76</sup>(2019) 12 SCALE 125

<sup>77</sup> Prevention of Torture Bill, 2010 §3, Acts of Parliament, 2010(India).



- The complaint must be made within six months of the torture having been committed. The approval of the central or state government appointing the accused public servant has been taken<sup>78</sup>.

However, the government faced criticism for its implementation and regulation of causes related to torture. The government failed to pass the bill, which largely reduced the functioning ambit to cases involving physical crimes and neglected the mental aspect associated with torture.

The bill did not lay down provisions to curb other forms of torture and was largely limited to cases where grievous physical hurt was caused. Additionally, the procedure laid down by the bill led to subjectivity and bias, leading to the failure to carry out the intended remedy in the right way. Sections 330 and 331 of the Indian Penal Code deal with the aspect of forcing a confession through coercion. Although certain provisions in the IPC deal with specific incidents related to the broader concept of torture, there was no law solely formulated to regulate torture-based crimes. The provisions prescribed by the IPC were strictly limited to specific crimes while the victim was in custody, making it imperative to legislate a law that would regulate custodial-based torture crimes.

## 10.2. Prevention of Torture Bill, 2017

The Prevention of Torture Bill, 2010 laid out a framework to curb crimes related to custodial torture. However, there were loopholes that needed to be addressed for the safety of detainees. The Prevention of Torture Bill, of 2017 was the primary legislation enacted to address these issues and align with the UN convention of torture and other cruel activities. The 2017 Act primarily seeks to widen the ambit of cases treated as torture, focusing on cases that affect the mental aspect of the victim, not only physical/grievous acts<sup>79</sup>. The Amendment Act introduced new provisions that were omitted in the initial bill, such as prescribing a life term for officials for any kind of inhuman treatment and providing damages against the mental trauma the detainee/victim is put through as well as the physical torture.

However, the 2017 Amendment Act still fails to provide for integral aspects pertaining to the

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<sup>78</sup> Prevention of Torture Bill, 2010 §5, Acts of Parliament, 2010 (India).

<sup>79</sup> Prevention of Torture Bill, 2017 §3, Acts of Parliament, 2010 (India).

life of the detainee. It requires cases to be filed within six months of the crime, which is a direct violation of the convention. Additionally, the law does not require the setting up of a separate body, and cases related to it come under the discretion of the respective criminal courts in the country.

### 10.3. Prevention of Torture Bill, 2022

The misuse of authority and the mistreatment of detainees, while they are in police custody, have alarmed society as they violate both fundamental and human rights. For peace and order to prevail, it is imperative that crimes be investigated and criminals are apprehended. However, no civilized nation can allow the use of third-degree techniques or torture during an investigation or questioning. When it comes to custodial offenses, the current legislation is insufficient and ineffectual, and many guilty officers escape punishment because the complainants are unable to provide sufficient evidence to support their allegations. The Supreme Court has offered criticism of the insufficient statutes and recommendations for changes to the current legislation. Inappropriate officials should be held accountable for appropriate punishment, and victims of custodial wrongdoing should be adequately compensated. The Supreme Court has offered several reform recommendations. After two failed attempts to bring in anti-torture laws, the Prevention of Torture Bill, 2022 was passed. The bill provides for the presence of a legal practitioner while interrogating, entry of arrest to be made in the diary duly and such arrest must be informed to the relative or friend of the person so arrested<sup>80</sup> and all the directions made by the Supreme Court in the case of *D.K. Basu v State of West Bengal*<sup>81</sup> and for compensation for custodial violence.<sup>82</sup>

## 11. CONCLUSION:

Subordinate police officers, such as the Head Constable and Inspector, should have access to body cameras that record body temperature and have GPS tracking capabilities so they may use them for case investigations. The information must be captured in real-time, maintained, and kept for a minimum of sixty or ninety days—this is the amount of time required to file chargesheets with the Honourable Court of Law. Installing and using CCTV cameras shall

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<sup>80</sup> Prevention of Torture Bill, 2022 §3, Acts of Parliament, 2010 (India).

<sup>81</sup> 1997 (1) SCC 416

<sup>82</sup> Prevention of Torture Bill, 2022 §6, Acts of Parliament, 2010 (India).

adhere to the rules set forth in the ruling in *Paramvir Singh Saini v. Baljit Singh & Others*<sup>83</sup>. To guarantee that only mentally and physically fit authorities are assigned for investigative duties, yearly physiological, physical, and medical exams and evaluations of investigating officers should be conducted. Cases of torture and abuse in custody should be included in the victim compensation scheme, and they should be evaluated independently by the relevant District Legal Services Authority. Even in circumstances where a request for compensation has been made that raises claims of violence against the custodian, legal assistance should be granted or commenced in relation to such cases. Torture or blatant abuse of legal authority is committed in violation of the law, frequently directed at marginalized, impoverished, and poor people. Police must understand that they are only the court's auxiliary; they cannot make decisions and administer punishment exclusively. For the law to be put into effect, it needs to be applied with sincere intent.



ABHIDHVAJ LAW JOURNAL

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<sup>83</sup> SLP (Criminal) No. 3543 of 2020