

## Judicial initiatives in tackling custodial torture

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### Abstract

Torture is generally defined as an instrument to impose the will of strong over the weak by suffering. Police atrocities are common feature of Indian scenario. Common features of violation of human rights are the torture of arrested persons, the disappearances of suspects who ought to have been in regular police custody, deaths in police encounters and at police stations and undertrials detained in jails for years without trials. A study of various decisions of the Supreme Court and various High Courts revealed that Indian Judiciary has made a tremendous achievement in protecting custodial human rights.

**Keywords:** Custody, Torture, Human Rights, Police, Prisoner

### Introduction

The essence of a modern Criminal Justice Administration is enshrined in three great principles. First in order is the principle of 'legality' which implies that the person subjected to the criminal process shall be treated equally without regard to rank or wealth. The second principle is concerned with 'due respect to the person involved in the criminal process' which implies that regard must be paid to the dignity of the accused, the victim as well as witness etc. both at the substantive as well as procedural levels. The third is the 'principle of quality of criminal justice', which implies compliance with certain minimum standards that would be followed in various criminal processes such as independent and impartial judiciary, trial in an open court, access to legal counsel and free legal aid in case of poor, information about ground of arrest and charge and access to evidence, right to be released on bail and speedy trial [1].

The *Mathura Rape Case* [2] (where Mathura, a kidnapped minor was raped by three policemen in the lock-up), the *Bhagalpur Blinding Case* [3] (where in the course of investigation the police had poured acid in the eyes of the hardened criminals with a view to discipline them), the *Indefinite Prisonization of under-trials Case* [4] (where a large number of under-trial prisoners were identified in various prisons in Bihar State pending trials and even pending investigations and the *forgotten life-termers in Uttar-Pradesh Prison Episode* [5] (where under the order of High Court 249 Life-Termers who had served more than 26 years in various prisons were located) and many other such cases expose the seamy side of our Criminal Justice Administration, which most of the lawmen would wish to be described nothing more than mere aberration. In all these cases, there is failure on the part of one or the other agency of Criminal Justice Administration and involved abuse of custodial power or relate to perpetrating custodial injustice. Such custodial injustice is occasioned whenever there is a killing, a rape or torture of a person in condition of custody, whether in police lock-up, prison, juvenile custodial institution, nari niketan and mental asylum, orphanage etc. Every instance of State sponsored denial of freedom to a person under detention of any kind can be related to custodial justice [6]. There has been a growing tendency on the part of the State functionaries, particularly the police and para-military forces to

sacrifice custodial justice values in the light of the social and political realities [7].

The Supreme Court of India has come ahead to expand the constitutional prospect of providing certain rights and remedies to the prisoners. It heralded a new era of prisoners' rights and blazed the trail of widespread recognition of these rights. The Court, in several cases, recognised the right of prisoner to be treated with dignity and humanity and laid down the holistic principle that human rights belong to inmates also and no one including the State has right to trample upon their human rights.

### Judicial Initiatives on a Persons' Rights from the Pre-Detention Period till his Release

#### Fair and Speedy Investigation

Article 21 of the Constitution of India ensures a 'fair, just and reasonable' procedure in all facets of Criminal Justice Administration. The worst violation of human rights and custodial justice guarantee takes place in the course of investigation, when the police act under the pressure to secure most clinching evidence often resort to third degree methods and torture. The Courts have not only exposed the seamy side of police investigation process but in several cases also dished out exemplary punishments to ensure human conditions of investigations.

In *Gauri Shanker Sharma v State*, [8] three members of police force were charged for custodial death in the course of investigation. It was revealed that the deceased was taken into custody without recording arrest in the general diary on the actual day of arrest. This way the injuries given in the course of investigation were shown to have been incurred in the pre-arrest period. Ahmedi, J. observed that the offence was of a serious nature aggravated by the fact that it was committed by a person, who was supposed to protect the citizens and not to misuse his uniform and authority to brutally assault them or else this would be a stride in the direction of Police Raj. It must be curbed with a heavy hand, the punishment be such that it would deter others from indulging in such behaviour.

Though investigation and prosecution are the functions of two distinct wings of Criminal Justice Administration, but often the investigating agency develops a commonality of interest with the prosecution and at times, resorts to foul and underhand

means to forge evidence to somehow secure conviction. In *Dilawar Hussain v State* <sup>[9]</sup> R.M. Sahai, J. observed, “Still sadden was the manner in which the machinery of the law moved from accusation in the charge sheet that accused were part of unlawful assembly of 1500-2000. The number came down to 150 to 200 in evidence and the charge was framed against 63 under Terrorist and Disruptive Activities (Prevention) Act, 1985 and various offences including Section 302 of Indian Penal Code. Even out of 63, 56 were acquitted either because there was no evidence or if there was evidence against some, it was not sufficient to warrant their conviction. What an affront to fundamental rights and human dignity. Liberty and freedom of these persons were in chains for more than a year, for no reason – one even died in confinement”.

In *Kishore Chand v State of Himachal Pradesh* <sup>[10]</sup> K. Ramaswamy, J. highlighted the over zeal of investigation agencies and its dangers for the liberty of the individual and observed that, “undoubtedly, heinous crimes are committed under great secrecy and investigation of the crime is difficult and tedious task. At the same time the liberty of a citizen is precious one guaranteed by Article 3 of Universal Declaration of Human Rights and also Article 21 of the Constitution of India and its deprivation shall be only in accordance with law”. In *Shivappa v State* <sup>[11]</sup> Dr. A.S. Anand, J. declined to admit in evidence a confession under Section 164, as the facts in the case displayed a real possibility of police influence over the accused and absence of any assurance about the voluntariness of the confession.

The Supreme Court held in case of *State of Andhra Pradesh v P.V. Pavithran* <sup>[12]</sup> that there is no denying the fact that a lethargic and lackadaisical manner of investigation over a prolonged period makes an accused in a criminal proceeding to die every moment and he remains always under extreme emotional and mental stress and strain and the remains always under a fear psychosis. Therefore, it is imperative that if the investigation of a criminal proceeding staggers on with a tardy pace due to the indolence or inefficiency of the investigating agency causing unreasonable and substantial delay results in grave prejudice. Personal liberty will step in and resort to the drastic remedy of quashing further proceedings in such investigation.

In case of *Noor Mohamed v Jethanand*, Court held that access to speedy justice is regarded as human right which is deeply rooted in fundamental concept of democracy and such right is not only creation of law but also natural rights <sup>[13]</sup>.

### Arrest and Detention

The Code of Criminal Procedure confers fairly extensive powers of arrest mainly on the police. No arrest should be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest.

The Supreme Court in *Joginder Kumar v State of U.P.* <sup>[14]</sup> strongly opposing the practice of carrying out indiscriminate arrests said that “an arrest cannot be made simply because it is lawful for the police officer to do so”.

### Harassment and Ill Treatment

Holding that protection of prisoner within his rights is a part of the office of Article 32, in case of *Sunil Batra* <sup>[15]</sup>, Krishna Iyer, J. observed that ‘even prisoners under death sentence have human rights which are not negotiable and even the dangerous prisoner has basic liberties that cannot be bartered away’, while ruling down the practice of putting bar fetters for under trials and provisions regarding solitary confinement.

The act of police officers in giving third degree treatment to an accused person while in their custody and thus killing him is not referable to and based on the delegation of the sovereign powers of the State to such police officers to enable them to claim any sovereign immunity <sup>[16]</sup>.

In *Raghubir Singh v State of Haryana* <sup>[17]</sup> the Apex Court observed that, the diabolical recurrence of police torture resulting in a terrible scars in the minds of common citizens that their lives and liberty are under a new peril and unwarranted because the guardians of law destroy the human rights by torture. The vulnerability of human rights assumes a traumatic torture when functionaries of the State whose paramount duty is to protect the citizens and not to commit gruesome of offences against them in reality perpetrate them. In this case the Supreme Court quoted *Abraham Lincoln* that – *if you once forfeit the confidence of our fellow citizens you can never regain their respect and esteem. It is true that you can fool all people some of the time and some of the people all the time but you cannot fool all the people all the time.*

Prisoners' rights have been recognised not only to protect them from physical discomfort or torture in the prison but also to save them from mental torture <sup>[18]</sup>. In *State of U.P. v Ramasagar Yadav* <sup>[19]</sup> the Supreme Court said, “It wished to impress upon the Government the need to amend the law so that the burden of proof in cases of custodial deaths will be shifted to the police”. In case of *Saheli* <sup>[20]</sup> the Court confirmed that the plea of immunity of State is no longer available and State will have to answer action for damages for bodily harm, which includes battery, assault, false imprisonment, physical injuries and death. The high headedness of the police authorities was brought to the light in *Delhi Judicial Service Assn, Tis Hazari Court v State of Gujarat* <sup>[21]</sup>. This case exhibited the berserk behaviour of police undermining the dignity and independence of judiciary.

The Supreme Court in *D.K. Basu v State of W.B.* <sup>[22]</sup> handed down thirteen directions that not only prohibit certain practices but also require the police to fulfil certain positive obligations such as preparation of memo of arrest, allow the arrestee to meet his lawyer during interrogation, notification of time, place of arrest and custody, telegraphically, getting arrestee medically examined after arrest and every 48 hours, information about arrest to police control room etc.

In *Smt Selvi and Others v State of Karnataka* <sup>[23]</sup>, while dealing with the involuntary administration of certain scientific techniques, namely, narcoanalysis, polygraph examination and the brain electrical activation profile test for the purpose of improving investigation efforts in criminal cases, a three-Judge Bench opined that the compulsory administration of the impugned techniques constitute ‘cruel, inhuman or degrading treatment’ in the context of Article 21. In *Haricharan and Another v State of Madhya Pradesh and Others* <sup>[24]</sup>, the Court held that the expression ‘Life and Personal Liberty’ in Article 21 includes right to live with human dignity. Therefore, it includes within itself guarantee against the torture and assault

by the State or its functionaries. In *Vishwanath S/o Sitaram Agrawal v Sau. Sarla Vishwanath Agrawal* [25], the Court observed, "Reputation which is not only the salt of life, but also the purest treasure and the most precious perfume of life. It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity."

The Supreme Court in case of *Dr. Mehmood Nayyar Azam v State of Chhattisgarh and Others* [26] observed that when an accused is in custody, his Fundamental Rights are not abrogated in toto. His dignity cannot be allowed to be comatosed. The right to life is enshrined in Article 21 of the Constitution and a fortiori, it includes the right to live with human dignity and all that goes along with it. The restrictions imposed have the sanction of law by which his enjoyment of fundamental right is curtailed but his basic human rights are not crippled so that the police officers can treat him in an inhuman manner. On the contrary, they are under obligation to protect his human rights and prevent all forms of atrocities.

### **Unhygienic Conditions in Lock-up**

Right to healthy and clean environment is included in right to life under Article 21 of the Constitution. In the case of *Indu Jain v State of M.P. and Others* [27] the Supreme Court ruled that death of a detained person due to unhygienic conditions in Jail would amount to custodial death and could make officials liable for prosecution.

In *Court on Its Own Motion v Union of India and Others* [28], the Apex Court held that, "The appropriate balance between different activities of the State is the very foundation of the socio-economic security and proper enjoyment of the right to life".

### **Privilege against Self-Incrimination**

The Supreme Court decision in *Nandini Satpathy v P.L. Dani* [29] gave an interpretation to the constitutional guarantee against self-incrimination. The Apex Court speaking through Krishna Iyer, J. accorded a new expanse to the privilege by making it available right from the early stages of interrogation, thereby giving a meaningful protection to an accused person in police custody. The Court ruled that if the police obtained information is strongly suggestive of guilt from an accused by applying any kind of pressure, subtle or crude, mental or physical, direct or indirect, it becomes a compelled testimony violative of privilege against self-incrimination.

### **Bail and Remand**

Bail is an important factor in preserving the personal liberty of an individual. When bail is refused a man is deprived of his personal liberty, which is of too precious value under our constitutional system. It vindicates the traditional right to freedom before conviction; it permits unhampered preparation of a defence and prevents infliction of punishment prior to conviction [30].

In *Moti Ram's* case the Court held that there is a need for liberal interpretation of social justice, individual freedom and indigent's rights and while awarding bail covers release on one's own bond, with or without sureties. When sureties should be demanded and what sum should be insisted on are dependent on variables [31].

In the context of continuance of police remand the court ruled that 'bail not jail' should be the principle to be followed by

Courts. [32] In *Kashmira Singh v State of Punjab*, Bhagwati, J. observed that it would be indeed a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the court ever compensate him for his incarceration which is found to be unjustified? [33].

In *Common Cause's* Case the Supreme Court treated the long pendency of cases and consequent incarceration itself an engine of oppression and issued several directions for release on bail the diverse categories of under-trials [34]. On the rights of bail Bhagwati, J. said that, "This system of bail operates very harshly against the poor and it is only the non poor who are able to take advantage of it by getting themselves released on bail" [35].

### **Treatment of Women in Custody**

Women in custody are particularly vulnerable to physical and sexual abuse. Courts took a very serious view of complaints regarding rape in custody or harassment. Expressing serious concern about the safety and security of women in police lock up, the Supreme Court directed that a woman judge should be appointed to carry out surprise visit to police stations to see that all legal safeguards are being enforced. The Supreme Court directed [36] that

1. Female suspects must be kept in separate lock-up under the supervision of female constable.
2. Interrogation of females must be carried out in the presence of female policepersons.

However, these directions have not been implemented. The Court issued detailed procedures to ensure enforcement of human rights of women and girls in police and prison custody in *Dr Upinder Baxi and Others v State of U.P.* [37] and *Christian Community Welfare Council of India and Others v Government of Maharashtra and Others* [38] when the Court's attention was drawn to horrible conditions in custodial institution's for women and girls. In *Mehboob Batcha and Others v State Rep. by Superintendent of Police* [39], the Court observed, "Crimes against women are not ordinary crimes committed in a fit of anger or for property. They are social crimes. They disrupt the entire social fabric, and hence they call for harsh punishment". The Court further held that the horrendous manner in which victim was treated by policemen was shocking and atrocious, and calls for no mercy.

### **Prohibition against detention of Juvenile in Adult Custodial Institutions**

Practice of locking up children in adult custodial institutions not only exposes the minors to the ways of hardened criminals, but also makes them the victims of sexual and other forms of exploitation. Keeping this in view the Supreme Court ruled against detention of children in adult prisons in *Munna v State* [40].

In *Sheela Barse v Union of India and Others* [41] the Supreme Court held that, the State must ensure strict adherence to the safeguards of the jails so that children are not abused.

- Take precautions that children below 16 years of age are not kept in Jail.
- Ensure that trial of children should take place only in juvenile courts and not in criminal courts.
- Ensure that if a First Information Report is lodged against a child below 16 yrs of age for an offence punishable with

imprisonment of not more than seven years, then the case must be disposed off in three months.

The Supreme Court further pointed out that by ignoring the non-custodial alternatives prescribed by law and exposing the delinquent child to the trauma of custodial cruelty, the State and the society run the risk of sending the child to the criminal clan<sup>[42]</sup>. In *Sunjay Suri v Delhi Administration*<sup>[43]</sup>, the Supreme Court gave specific directions to magistrates and the detention authorities. Ranganath, J. said, "We call upon every magistrate or trial judge authorised to issue warrants for detention of prisoners to ensure that every warrant authorising detention specifies the age of the person to be detained".

### Compensation to Victims of Abuse of Power

There is no wrong without a remedy. The law wills that in every case where a man is wronged, he must have remedy. A mere declaration of invalidity of an action or finding of custodial violence or death in lock-up not by itself provide any meaningful remedy to a person whose Fundamental Right to life has been infringed, more needs to be done.

*Khatri (IV) v State of Bihar*<sup>[44]</sup> was the first case where the question of granting monetary compensation was considered by the Supreme Court. Bhagwati, J. observed, "Why should the court not be prepared to forge new tools and device new remedies for the purpose of vindicating the most precious of the precious, fundamental rights to life and personal liberty". Article 21 would be reduced to nullity, 'a mere rope of sand' if State is not held liable to pay compensation for infringing Article 21.

The Supreme Court brought about revolutionary break – through in the 'Human Rights Jurisprudence' in *Rudal Shah v State of Bihar*<sup>[45]</sup> when it granted monetary compensation to the petitioner against the lawless acts of the Bihar Government, which kept him in illegal detention for over fourteen years after acquittal. The Supreme Court observed, "The refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to *jus* Fundamental Right to liberty which the State Government has so grossly violated"<sup>[46]</sup>.

In *Nilabati Bahera v State of Orissa and Others*<sup>[47]</sup> the Supreme Court observed, "The Court is not helpless and the wide powers given to the Supreme Court by Article 32, which itself a Fundamental Right, imposes a constitutional obligation on the Court to forge such new tools, which may be necessary for doing complete justice and enforcing the Fundamental Rights guaranteed in the Constitution which enable the award of monetary compensation in appropriate cases". The Court further said that, "the purpose of law is not only to civilise public power but also to assure people that they live under a legal system which protects their interests and preserve their rights. Therefore, the High Courts and the Supreme Court as protectors of civil liberties not only have the power and jurisdiction but also the obligation to repair the damages caused by the officers of the State to Fundamental Rights of citizens"<sup>[48]</sup>.

In *Sakshi Sharma and Others v State of Himachal Pradesh and Others*, the High Court has granted compensation of Rupees 15,60,000 to the victim and directed the suspension of the erring police officials. The High Court also directed the Chief Judicial Magistrates's and the Sub Divisional Magistrates's to visit police stations and submit reports to the Sessions Judge,

who would take action against the persons who violated the constitutional provisions and legal mandate<sup>[49]</sup>.

In *Dr. Mehmood Nayyar Azam v State Of Chattisgarh And Others*<sup>[50]</sup>, the Court observed that, the purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights.

The Supreme Court of India has come ahead to expand the constitutional prospect of providing certain rights and remedies to the prisoners. It heralded a new era of prisoners' rights and blazed the trail of widespread recognition of these rights. The Court, recognised the right of a prisoner to be treated with dignity and humanity and laid down the holistic principle that human rights belong to inmates also and no one including the State has right to trample upon their human rights. The Fundamental Rights, which also include basic human rights, continue to be available to a prisoner and these rights cannot be defeated by pleading old and archaic defence of immunity in respect of sovereign acts.

The Prime Minister of the country has shown such a serious concern about the arbitrary exercise of executive power and appreciated the positive role of the judiciary. The Prime Minister Dr. Manmohan Singh said, "Our Courts have protected our citizens from the exercise of arbitrary power and inequities of a poor country trying to modernise itself"<sup>[51]</sup>.

The judiciary has to function as a watch dog to ensure that not only the legislature enacts custodial laws as per the constitutional and statutory rights, but also to ensure that if an executive exercises powers of interrogation, arrest, pre and post trial custody are exercised as per the rules too. The broad range of custodial rules and wide variation in the situations of their applicability make the task of the judiciary complex and almost daunting. That is one of the reasons why despite creditable performance of the judiciary, particularly the Supreme Court and High Courts in several spheres of custodial justice, there remain many 'areas of darkness' still<sup>[52]</sup>.

In *Lakshmi v Sub-Inspector of Police, Nagamalai Pudukotti Police Station, Madurai*<sup>[53]</sup> Murugan, a boy of 15 years of age, was picked up by the police for interrogation in a theft case and detained in police lock-up and tortured in every possible way. The mother's *habeas corpus* petition before the High Court revealed the plight of the little Murugan and also the sordid tale of abuse of custodial power not only on the part of the police but also the magistracy. The most serious violations, however, the respondent committed was the manipulation of the so-called surrender of Murugan before the Judicial Magistrate IV, Dindigul and a remand of judicial custody in Dindigul sub-jail and again, a remand to judicial custody under the orders of Judicial Magistrate No.7, Madurai. Murugan had charged the respondent by alleging that he and other policemen at his command interrogated him (Murugan) and in the course of interrogation tortured him by removing his nails, applying chilli powder over his eyes and forcing him to consume ganja, arrack and human waste diluted in water. The Court said, "There was good material on the record to show that Murugan was produced before the Judicial Magistrate IV, Dindigul by the police. It is enough to conclude that Murugan was taken in custody by the respondent on 8 February 1991 and kept in custody without any authority of law until he was produced before the Judicial Magistrate IV on 1 March 1991. His judicial custody after 1 March 1991 in jail prison was also illegal and invalid as per provisions of Section 18 of the Juvenile Justice

Act, 1986. How and why the Judicial Magistrate IV fell to the scheme of the respondent or any other police personnel is a matter of concern. It appears that it was on the basis of the said interpolation in the surrender petition that the Judicial Magistrate IV ordered remand of Murugan in judicial custody. That order formed the basis of the order of remand to judicial custody by the Judicial Magistrate 7, Madurai. That both the Magistrates failed to notice the obvious that, Murugan was a juvenile is yet another matter of concern. Was it a case of the accused not brought bodily before the Court? Was it a case of remand order passed blindly without seeing the accused? Magistrate who makes orders of remand blindly will not only fail in one case but would cause the failure of the justice system itself' [54].

In *Shakila Gaffar Khan v Vasant Raghunath Dhoble and Others* [55] a private complaint was filed by the appellant (wife) alleging torture in custody of her husband who died in hospital within two days of his release on bail. The Court, particularly the Apex Court in this case, was inclined to agree that the appellant's husband had been tortured in custody but was not prepared to make the accused legally responsible for it, though the fact of torture was considered enough for granting compensation to the widow.

In the aforesaid case would it not be an effective measure against torture if the Magistrate before grant of bail had got the victim examined medically for his injuries? Should the Magistrates not inspect the conditions and the physical state of persons remanded in police custody?

Reacting sharply to gross abuse of custodial powers leading to all-round torture, invasion of modesty and even death the Nagpur Bench of the Bombay High Court speaking through R.M. Lodha, J. (M.B. Ghodeswar, J. concurring) in *Christian Community Welfare Council of India and Others v State of Maharashtra and Others* [56] had issued eight far-reaching directions to the State Government, Law Secretary, Director General of Police with a view to strengthening custodial justice network. Directions (VII) and (VIII) relate to detaining or arrest of females and their custody in lock-ups. It is said that instead of improving the custodial conditions and according a special consideration to female detainee, the State Government moved the Supreme Court against the High Court judgement. It is sadder still that the Supreme Court saw some merit in their appeal. The Supreme Court speaking through Hegde, J. (B.P. Singh, J. concurring) thought it was appropriate to water-down the High Court directions. It was observed in the context of special safeguard in a case of detention and arrest of women, "We think a strict compliance with the said direction, in a given circumstance, would cause practical difficulties to the investigation agency and might even give room for evading the process of law by unscrupulous accused. It may not always be possible and practical to have the presence of a lady constable when the necessity for such arrest arises" [57].

### Conclusion

It may be submitted that the cause of custodial justice to vulnerable sections like women, children and many other under-privileged sections is much more urgent and vital than the 'practical difficulties' to investigation agencies. The judiciary must remember that in most of the situations of custody a person's liberty is deprived because of some kind of exercise of judicial power. Therefore, the judiciary has to

accept its primary obligation for securing to every citizen custodial justice.

The Indian judiciary, especially the Supreme Court of India, has played a significant role in evolving prison jurisprudence in India. The Indian Courts have become the Courts of the poor and the downtrodden. Various decisions reflect that Indian Courts are deeply sensitised to the need of doing justice to large masses of the people to whom justice had been denied by the heartless society for generations [58]. However, while appreciating the judicial approach towards the prisoners, the fact that has to be borne in mind is that the country's criminal justice system still suffers from substantive and procedural deficiencies. Once a citizen is arrested, even if on a relatively minor charge, he could be held in custody for years before his case comes up for trial. Those who are affluent are still able to negotiate their way around the numerous obstacles that lie on the road of justice. For an ordinary citizen, an encounter with the law is very much the stuff of nightmares [59]. There is a long course before the Indian judiciary to be followed in order to achieve the goal of social justice.

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