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DAMOCLES SWORD OVER PRISONERS' RIGHTS A CRITIQUE ON CUSTODIAL TORTURE

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"Torture is wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and as heavy as stone, paralysing as sleep and dark as abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself."

–Adriana P. Bartow

INTRODUCTION:

India as a nation is defined by the constitutional and democratic values that have been upheld and imbibed by the law abiding citizens, since her independence. Rule of Law, the principle of checks and balances, an independent judiciary, et al; are all but a, mere exemplar of the tranquil legal ubiquity across the varied topographical domains of the country. A quintessential integrant of the same is the criminal justice system and the efficient administration of the same. To impart justice is the respectful function of our esteemed judiciary but, to enable a prisoner so as to seek that redressal is the primal duty of the law enforcement agencies. Focal to this theory is the fact that, a coherent and systematized legal relationship between the police officers and the prisoners is an inevitable component-in order to realise this objective. But, the commonality of custodial violence and torture is an anathema for the methodical operation of the criminal justice apparatus[2]. Commission of violence on arrested persons after taking them into custody is repugnant to the fundamental philosophy of Rule of Law. Such acts when executed by 'public servants' not only defy the democratic essence but also target the idea of good governance on a whole. Weeding out these inconsistencies from a representative government

[1] Assistant Public Prosecutor, GNTC of Delhi.
[2] Rachel Schon, 'What Human Rights Do Prisoners Have?, (Human Rights News, Views & Info, 19 July 2016)

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system like that of India, is a prerequisite for accomplishing the raison d'être of a fair, transparent and responsible public governance arrangement.

CUSTODIAL VIOLENCE-A LOOK AT STATISTICS:

Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987) defines torture as, "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions[3]." However, a major loophole in the above definition is the exclusion of such actions as torture, which are sanctioned by the State authorities. This leaves out a major chunk of custodial violence cases outside its security nets. India is a signatory to the Convention on Torture but, hasn't ratified it yet. This is the main legal impediment in implementation of the international agreement in the domestic realm. Ratification of the treaty will undeniably, help our nation to take a foundational step towards dealing with the problem at hand. The World Medical Association in its Tokyo Declaration (1975) defined torture as, "the deliberate, systematic, wanton infliction of physical or mental suffering by one or more persons, acting alone or on orders of any authority to force another person to yield information, to make a confession or for any other reason." It must be noted that a law enforcement agent inflicting pain in the form of torture on an arrested person; can either do it as a part of a larger traditional order or, on his/her own whims and wishes. The data with regard to police violence in India is quite

[3] Baljeet Kaur, 'India's Silent Acceptance of Torture Has Made It a 'Public Secret', (Engage, 6 September 2018).

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glaring, and deafeningly highlights the various loopholes that further such custodial mismanagement.[4]

The National Crimes Records Bureau (2017) in two of its reports titled "Prison Statistics India 2017" and "Crime in India 2017" clearly states that in 2017; 1671 prisoners were found to be dead while in judicial custody. The Report categorises the above deaths into two broad categories as- natural and unnatural deaths. A stupendous aggregate rise in unnatural deaths was pegged to be at 15.7% from 115 in 2015. Additionally, the Report comprises of a specific chapter on custodial violence which shockingly notes that a total of 100 persons died in custodial violence, in 2017 alone. Andhra Pradesh grabbed the top spot with a total of 27 custodial deaths. Due to police torture, 106 arrested persons have lost their lives in Maharashtra within a small period of 2013-2017. While Andhra Pradesh reported 65 such deaths, it was embarrassingly followed by Gujarat (51), Tamil Nadu (38) and Telangana (12). A diurnal upsurge in civilian deaths in police action shows how diabolical and execrable the situation is. With 41 civilian deaths as a result of police action in 2014, the number meteorically rose to 786 in the year 2017. Adding to this, encounter killings led to 26 deaths and 29 injuries.[5]

According to the National Crime Records Bureau Data (2016), 300 custodial deaths were registered within a period of 2008-2016. The Report surprisingly revealed that there were zero police convictions for any of these custodial police violence. The data of two decades before the above specified period is a glimmer of hope as it charged the failing policemen. Between 1997 and 2016, 790 such deaths were reported with charging 385 policemen for the same and letting 120 public servants go scot-free. NCRB Data (2018) recounts that a total of 1,727 persons have died in police custody between 2001 and 2018; with only seven states across India accounting for 69% of the total torturous demises. Maharashtra led the states with 78 deaths and was followed by Andhra Pradesh (70) and Gujarat (52). During 2014-2018, only 118 police personnel were charge sheeted, with only 26 convictions. Disturbingly, 7% of the custodial deaths were due to

[4] 'Stop Torture' (Amnesty.org, 2019).
[5] Nirman Arora, 'Custodial Torture in Police Station in India: A Radical Assessment' (1999) 41 Journal of the Indian Law Institute 513-529,

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police physical assault. These adverse and abysmal statistics led a rise in cases being registered against police officials for human rights violations, with over 5000 of them being reported in 2018 alone[6].

The Asian Centre for Human Rights Report (2018) shows a disturbing upward trend in custodial deaths with five deaths being reported everyday in the period 2017-18. The National Human Rights Commission (NHRC) recorded a total of 24, 043 custodial violence instances since Section 176 (1A) was added into the Code of Criminal Procedure (Cr PC), 1973. Section 176 (1A) mandates judicial inquiry into each and every case of death, rape and disappearance in police custody. Magisterial inquiry into such cases is an essential way of determining the actual cause of death and aids in fixing liability on the real culprit. In Suhas Chakma v Union of India (2020)[7], the Supreme Court issued notices to the Centre and the States on a petition seeking mandatory judicial probe in cases of custodial deaths, rapes and disappearances. Section 176 (1A) added in the Code of Criminal Procedure, is an authority on illegal police custodial violence. Determinatively, a single glance at the unfavourable and inopportune figures is capable of showcasing how gloomy and sombre the criminal justice system of our country is. It's high time to channelize the legislative and legal attention to the matter if, we really wish to save it from a silent quietus and pernicious ruination.

LEGAL PERSPECTIVE AND JUDICIAL OUTLOOK:

It might be interesting to know that police torture is not new to the Indian mainland. Mauryan king, Chandra Gupta Maurya and his entire family were tortured in a prison cell and were provided daily necessities for bare survival only. Kautilya in his economic-political treatise Arthshastra, states about various kinds of torturous methods that can be inflicted on a prisoner so as to make him speak the truth. Shariat and British model codes also mention about police tortures. However, today's Indian legal framework is not ignorant to the rights of prisoners who often face such brutalities in police custody. Criminal laws such as Indian Evidence Act (1872),

[6] H. O. Agarwal, International law & human rights (20th edn, Central Law Publications 2014).
[7] Suhas Chakma vs Union Of India on 24 January, 2020.

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Indian Penal Code (1860) and the Code of Criminal Procedure (1973) contain specific provisions which are solely dedicated to prevention and redressal of such anomalies. Predominantly, the grundnorm of our administrative set-up i.e., the Indian Constitution is a life-saver for discrepancies rolled out by a few select public servants. The jurisprudential notions contained in these particular laws is not merely a black letter on a white paper but, were written with a clear intention of making the officers of law to follow the same. Omissions and derelictions in observance of these stipulated caveats is the paramount stimulus leading to shortcomings in the system at whole. If not controlled at the right time, the arbitrary and irrational actions of the law enforcement agents can lead to a serious constitutional crisis, thus acting as a cursed blot on the much cherished principle of constitutional morality. Practicing torture and violence is undoubtedly a treacherous slap on the face, and devilish duplicity with the souls of innumerable freedom fighters, who dreamt of an India possessing legal tranquillity and societal peace[8].

According to the Merriam Webster Dictionary, a prisoner is defined as- "A person who is deprived of his liberty and who is kept under involuntary restraint, confinement or custody." In layman' terms, it simply means a person who has been arrested by the police because of his commission of some offence or such suspicion of similar nature. The Prisons Act 1894 leaves a legal vacuum by not defining prisoners but, it does classify them into civil and criminal categories (Section 3(2)). Police on the other hand is defined as, "the official organisation that is responsible for protecting people and property, making people obey the law, finding out about and solving crime, and catch people who have committed a crime." This definition distinctly brands out the police officials as protectors of prisoners and their human rights. However, this is understandably not the case. The National Human Rights Commission (NHRC) has time and again raised concerns over the unchecked and unbridled prevalence of custodial violence cases in the country. In its 2016-17 Report, NHRC stated, "Custodial violence and torture is so rampant in this country that it has become almost a routine. The commission even regarded crimes like rape, molestation, torture, fake encounter in police custody as manifestations of systematic failure to

[8] R S Saini, 'Custodial Torture in law and practice with reference to India' (1994) 36 Journal of the Indian Law Institute.

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protect human rights of one of the most vulnerable and voiceless categories of victims. Therefore, NHRC commits to ensure that such illegal practices are stopped and human dignity is respected in all cases."

The Constitution of India explicitly argues that just because a person has been arrested by the police, does not mean that such arrested person has lost all his/her human rights. Detention is not a sanction for violence. Although, some basic rights such as those fundamental in nature related to freedom of movement across the territory (Article 19 (1) (d), Art. 19 (1) (e)) are taken away and squeezed a bit; judicial/police custody does not warrant use of third degree on the prisoners. Such person if deprived of any of his guaranteed rights illegally can approach the Supreme Court, through his legal representatives under Article 32 of the Constitution. Article 32 (Right to Constitutional Remedies) was defined as the "Heart and Soul of the Indian Constitution" by the Chairman of the Drafting Committee, Dr. B.R. Ambedkar and, in scenarios like that of police torture- constitutional remedy in form of Article 32 becomes all the more necessary. The writ of habeas corpus is filed in cases on illegal detention or imputation of torture on the arrested person[9].

With regards to the same provision, the Supreme Court in Prabhakar Pandurang v State of Maharashtra.[10] Categorically held that, detention does not take away the fundamental rights of the prisoners. Reiteration of the same observation was found in Sunil Batra (II) v Delhi.[11] The principle of Nullum Crimen Sine lege is a penumbral rule originating from Article 20 of the Indian Constitution and recognised under Article 22 of the Rome Statute of International Criminal Court. It restraints any torturous action or otherwise, on an arrested person whose crime has not yet been proven. Custodial violence casts an omen on this sacred constitutional proposition, if exacted. Protection from double jeopardy (Nemo debet pro eadem causa bis vixari) is also provided under Article 20 further safeguarding twin conviction for the same offence. Uninterrupted, sustained and incessant thrusting of brutal police violence in custody is a

[9] Vibha Sharma, '7,468 custodial deaths in 5 years: Human Rights' (Tribune India, 27 June 2008).
[10] (AIR 1966 SC 424)
[11](1980) 2 SCR 557).

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clear cut contradiction of these postulations and of the right against self incrimination. Furthermore, the Indian Apex Court has remarkably, time and again expanded the scope of Article 21, so as to include prisoners' rights within its ambit.

In D.K. Basu v State of West Bengal[12] the Supreme Court has recognised the right against custodial torture and death in police lockups. Similarly, in Jagmohan Singh v State of U.P[13], the Apex Court has granted the fundamental right to the prisoners against cruel and unusual punishments. In case, such torture is rendered and the prisoner has no visible remedy, the right to free legal aid is granted under Article 39-A as expanded in MH Hoskot v State of Maharashtra[14] and is considered an essential component of Article 21. In Hussainara Khatoon v State of Bihar[15], the right to speedy trial and in Rattiram v State of Madhya Pradesh[16], the right to fair trial was guaranteed to the prisoners by the Supreme Court. The human and fundamental rights of the inmates of protective homes were recognised in Upendra Baxi v State of Uttar Pradesh[17]. Article 21 is basically understood as the fundamental right that has the functional inference of protecting the life of a person, in any situation whatsoever. It contemplates for a life much more than a mere existence. Life is a step ahead of bare animal existence i.e., a fulfilling survival where the person is allowed to breathe free and stand on a pedestal suited for claiming his guaranteed rights. Infliction of torturous means to extract information is equivalent to going against the 'procedure established by law' as pronounced in Maneka Gandhi v Union of India[18]. Article 22 of the Constitution of India speaks about four basic rights of the prisoners which include- being informed about the grounds of his arrest, right to choose the defence counsel of his own choice, production in front of the nearest Ilaqa Magistrate within 24 hours of such arrest and guidelines with respect to preventive detention laws. All these constitutional provisions if complied with

[12] (1997 (1) SCC 416)
[13] (AIR 1973 SC 947)
[14] (1987 (3) SCC 544)
[15] (1980 (1) SCC)
[16] (2012 (4) SCC 516)
[17] (1983 (2) SCC 308).
[18] (1978 AIR 597).

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acquiescently, will not only assure lower custodial deaths and torture but, will also have the effect of cleansing such menace forever.

The Indian Evidence Act, 1872 has specific provisions with regards to confessions and threats in police custody. Section 25 of the Indian Evidence Act clearly states that a confession to police officer cannot be proved as against a person accused of any offence; and according to Section 24 of IEA, confession caused by threats from a person in authority in order to avoid any evil of temporary nature would be irrelevant in criminal proceedings. From the above legal provisos, it can be safely gauged that torture not being per se illegal in accordance to the IEA, 1872; evidence collected by such violence is not acceptable in court of law. These provisions act as deterrence to the police officials as if done to the contrary; they have the capability of weakening the prosecution's (State) case. The Indian Police Act also has some specifications with respect to custodial violence and controlling police action when interrogating or having any kind of interaction with the arrested person. It blatantly provides for the charge of dismissal, suspension or penalty on the police officer under Sections 7 and 29. Another reason for such strict layout can be the frequent non-obedience of the D.K. Basu guidelines by the Supreme Court.

The Code of Criminal Procedure, 1973 has a whole set of guidelines for the magistrates when looking into custodial violence cases. Section 50 to 56 provide for rights of the arrested persons such as-right to know about the provision of bail, right to get medically tested, right to get lawfully searched without any physical injury, right to be produced in front of the Magistrate within 24 hours of arrest, etc.-that have to be followed religiously by the police officials when the person is arrested. These provisions are pari materia to Article 22 of the Constitution. When an allegation of ill treatment is levelled by the arrested person on the police officials, it is obligatory on the Magistrate to inquire about the same and if the Magistrate does not, his actions clearly go contrary to the legal principles and prisoners' safeguards established. The same was held by the Apex Court in Shakila Abdul Gafar Khan v Vasanttraghunath Dhoble.[19] High Court can also

[19] (2004 (1) GCD 812 (SC)).

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interfere in such cases of inaction under Section 482, as held in the case of Mukesh Kumar v State.[20] In Bhai Jasbir Singh v State of Punjab[21], it was opined that Section 167 and 309 of Cr PC have the objective of producing the accused person before the court so as to ward off authoritarianism.

The Indian Penal Code, 1860 under Sections 330, 331, 342 and 348 strictly objects the use of third degree methods against the accused person by the police officials and the aforementioned legal provisions were also observed in State of Madhya Pradesh v Shyamsunder Tviwedi[22] With the advent of public interest litigation in the scenario, the Supreme Court has played an active role by standing guard against the legal fallacies in the prisoners' rights cases. In Sheela Barse v State of Maharashtra[23], the Apex Court laid out certain guidelines for the arrested women prisoners. Magisterial role was emphasised for providing a safety net to anyone whose rights were violated. However, a more landmark case on the subject is that of D.K. Basu v State of West Bengal[24] where the respected Supreme Court accentuated the need for subjecting the arrested person to medical examination conducted by expert doctors. This was done so as to give a stern notice to the law enforcement agencies to reduce the violence committed on arrested persons. Medical examination (mentioned under Section 52-54 Cr PC) is a sui generis way of ensuring that even after two days of arrest and a day after being produced in front of the Magistrate; the person so arrested has been accorded all his fundamental rights and, has not been subjected to any kind of brutal police torture or violence.

The Prevention of Torture Bill, 2017 is a proposed leading Indian legislation to cater to 'custodial violence-specific' cases. However, it has not yet been passed. Section 3 of the Bill provides for the definition of torture as, "any public servant doing any act intentionally for the purpose to punish or to obtain information from any person, whether in public custody or otherwise is said to inflict torture. Torture may include grievous hurt to any person as well as

[20] (1990 CrLJ 1923).
[21] (1995 CrLJ 285 (P&H HC))
[22] (1995 (4) SCC 262).
[23] (1983 CrLJ 1923 Del)
[24] (1997 (1) SCC 416)

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danger to life limb or health (whether mental or physical) to such person." However, inflicting such pain is allowed if done in accordance with law. But it must be noted that no legal principle in the Indian criminal justice system allows torture or infliction of pain to the extent, that it causes death. The punishment for inflicting torture is given under Section 4 which three years as a minimum imprisonment and ten years as the maximum jail term, in addition to fine. The Bill, if passed is an encouraging step towards achieving a transparent police system and ratifying to the International Convention on Torture earlier signed. It will also have the effect of having speedy extradition of Indian criminals from abroad, as the condition of Indian jails is a major obstacle in the same process. On the contrary, it must be noted that most of states are still silent on punishing their respective public servants.

The 273rd Law Commission Report on implementation of UN Convention guidelines in India emphasised on the importance of having anti custodial-torture atmosphere. The same recommendation was given in the 177th Law Commission Report, in addition to bringing major amendments in the Code of Criminal Procedure, 1973. Had the amendments been made, strict liability would have been imposed on the failing police officials. But the same was not done. With respect to the Indian Evidence Act, 1872 as well, the Law Commission in its 185th Report passed certain recommendations. The government constituted Malimath Committee Report is famous for recommending some of the strictest provisions against the erring officials. The 152nd Law Commission Report on Custodial Cases (1994) had expressedly noted the growing custodial deaths and injuries in India, along with specifying strict measures to deal with the few who are maligning the image of the whole criminal justice system.

INTERNATIONAL LEGAL PRINCIPLES:

"Life means not only physical existence. It means the use of every limb and faculty through which life is enjoyed. The right to life includes the right to a healthier environment."

–Justice P.N.Bhagwati

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The Universal Declaration of Human Rights, 1948 is the leading international covenant on human rights. Prisoners possess human rights equal to their non-prisoner counterparts, only with certain restriction. It must be understood that no one can take their rights. UDHR through its Article 1 states that, "All human beings are born free and equal in rights and dignity." Subsequent Articles of the agreement provide equality and try to cease the practice of inflicting torture on any basis, whatsoever. The International Covenant on Civil and Political Rights (ICCPR) 1966 (Article 7) and International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966- provide for respecting human rights of all individuals. Additional Conventions on safe and humane treatment of prisoners are the United Nations Standard Minimum Rules for Treatment of Prisoners, the European Convention for Prevention of Torture and Inhuman or Degrading Treatment of Prisoners and the United Nations Basic Principles for Treatment of Prisoners. All these Conventions read in tandem mandate a safe and secure environment for the arrested persons. England, where torture was a normal practice until recently has removed it completely. Again the New Zealand Bill of Rights Act, 1990 has provided specific protections against police torture. The Human Rights Standards and practice for the Police is a United Nations handbook on preventing torturous police acts.

CONCLUSION:

Recently in February 2020, the National Human Rights Commission gloomily observed that Kerala saw a 100% rise in police brutality in 2018-2019. This is not only shocking but an embarrassment for our criminal justice system. To prevent such malafide actions, police reforms must be initiated. Guidelines must be formulated for strict training of law enforcement agents and access to jails must be regulated as well as regularised for human rights officials and family members of those arrested. More than often, violence is exacted by anyone who is working under pressure. This is what ails with our system. With too little force, too much of burden is loaded on their shoulders. Greed for money and the practice of punitive violence also acts as obstacles in the way of significant police reforms. The police sub culture encourages violent activities with no case for conviction. There is absolutely no fear while acting illegally. To curb this menace,

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reform and the positive reinforcements for a better police system must come from within. This psychological change will ensure better delivery of legal services and a new faith in our criminal administrative system. Prisoners' rights are human rights and the same must be respected, under all circumstances.

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