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JUDICIAL RESPONSE TO CUSTODIAL DEATH

By: Stuti Chowdhury

Abstract

Often prisoners who are taken by the police in the police custody face there various tortures and many times that torture turns into death of that prisoner. But where the Constitution of our country is protecting several different rights of the citizens and in few cases non- citizens of India are also getting the security of this part III of the Indian Constitution, there prisoners also are not out of that list. Because they also deserve the 'Right to life' which is ensured by Article 21, they also deserve other fundamental rights under Article 19, 20 and 22 in India. Right to equality is also applicable upon them, though they are getting various kinds of violent behaviours in the jail.

In all those cruel treatments the custodial rape and custodial death are the most important offences which are continuously affecting the peace of their minds and taking away their rights to live the life. Now-a-days number of custodial death is increasing and in very few cases questions are arising about the administration of the jail authorities. In this article a light has been put towards the right which the prisoners should enjoy and how the crime of custodial death is spreading like cancer and how the prisoners can be protected by the rule of Law.

Keywords: Custodial death, police encounter, human right commission , Constitution of India , guidelines

Introduction

'Fundamental Rights'¹ which are mentioned in Part III of the Constitution of India ensure the protection of all the rights and liberties of citizens of India, thereby every prisoner also deserves the protection under the fundamental rights of the Indian constitution. Through the case of Sunil Batra (no.2) v. Delhi Administration² it was established by the Supreme Court that 'habeas corpus can be issued not only for defending people from unlawful activities, but also for protecting all the fundamental rights of the prisoners in the custody'. Article 21 of the Constitution protects the 'Right to life' of every single individual in India. Citizens and non citizens of India also come under that criterion of protection.

But nowadays when a person is arrested for various offences they are sent to the police custody and after some time according to the order of the Courts are sent to the judicial custody for their punishment. But that doesn't mean that with punishment they will have to face various tortures there. They also deserve protections of their lives and dignity in the custody. From very ancient

¹ The concept of fundamental rights was taken from the American Constitution. At first in the year 1215 the English people an assurance from King John for respect of the ancient liberties This Part III of the Constitution of India very well been described as the 'Magna Carta' of India.

² Sunil Batra (no 2) v. Delhi Administration, AIR 1980 SC 1579

time before the independence of India they are facing various physical and mental assaults in the jail. Even through Article 21 of the Indian Constitution has been proved various times that every citizen and non citizen of India always demands the 'Right to Life'³ .

But that right of many prisoners are infringed everyday. Various tortures they are imposed to tolerate in the custody. Sometimes their lives have been taken as well. Custodial rape, custodial death all these kinds of offences are increasing in a rapid rate and they are suffering by psychological and physical harassment. Where they are going for their correction in the correctional home there they are suffocated with pathetic inhuman tortures. Sometimes they are admitted in to the hospitals and sometimes they are murdered inhumanly.

Police are getting excessive power in their hands and as we know when everything has to be controlled in a systematic way for keeping the equilibrium strong in the society, that equilibrium is ruined by that partial and biased attitude of the police and the jail controllers. This is breaking the pillar of the society and our society is taking one more step backwards from development. So this kind of crime should be stopped now at anyhow.

Rights which are especially reserved for the prisoners

Constitution of India has secured various rights through different articles for protecting the prisoners from the discretion of the police or from getting any harm in the custody against or without the order of the Court. This article has limited the power of the police and as well as of the Courts to utilise the helpless conditions of the prisoners. Article 20(1) of the Indian Constitution ensures that a person can become the convict of only those offences which is unlawful at that time when he is committing the offence. For the criminal law this provision is applicable specifically. According to this provision no offence has any retrospective effect if that is a criminal offence. Hence here this article has one beneficial provision also with the ex post facto benefits. According to the language of this article that it is reducing the punishment of a person. After that through Article 20(2) the advantage of double jeopardy comes forward. The double jeopardy rule has got wider interpretation through the Constitution of America than India. In India no one can be punished and prosecuted for the same offence more than one time. Again Article 20(3) ensures a prohibition against self – incrimination.

Protection from arbitrary arrest and preventive detention

Article 22, Constitution of India gives protection to every single citizen of India against any arbitrary arrest of a person. According to the Article 22(1) and Article 22(2) if police arrests any person then few steps are needed to be followed by them. And those are –

1. The arrested person is needed to be informed about the ground on which he or she is arrested.
2. The arrested person has a right to be represented in front of the Court by a lawyer and that he can choose by his own wish.
3. The arrested person is needed to be produced in front of the magistrate within 24 hours of his or her arrest. And

³ 'Right to life' is mentioned in the Article 21 of the Constitution of India for every citizen and non citizen of India in the case of Kharak Singh v. State of U. P , AIR 1963 SC 1295

4. The person can't be kept in the custody after expiring a specific period without any more order of the magistrate of the Court.

In the case of *C.B.I v. Anupam J. Kulkarni*⁴, the Supreme Court has made a detailed guideline for governing the arrest of an accused. According to that guideline a person can be kept in the police custody in total for 15 days and some criteria is needed to be fulfilled there and those are within 24 hours of the arrest the arrested person is needed to be present in front of the magistrate and if the investigation regarding the matter of the case is not completed then the person can be kept for 15 days into the police custody for completing the full investigation but if after completing that whole period of 15 days all the necessary investigation is not complete then the person has to be transferred in to the judicial custody from the police custody.

And after that if the investigation is not completed within necessary period which is 90 days then the accused is kept in the judicial custody, the accused has to be released on bail as provided under section 167(2) of the Cr. P. C. Not only that but also by art 22(4) – 22(7) gives the protection to the person who has been detained by the law of Preventive Detention.

Cases of Custodial Death and Remedies Ensured By Court

In the case of *Nilabati Behra v. State of Orissa*, a boy of near about 22 years old was arrested regarding the investigation of a case of village theft in the police station. He was tied, handcuffed and kept in the police custody. When his mother went to give him food in the police station on 2nd December, 1987 near about 2 p. m. she came to know that her son has been dead according to the words of the police that he was trying to flee from the police station and by chewing the rope through his teeth he managed to do that but when he was fleeing an accident upon the railway track happened and he died.

But according to the post-mortem report he died because of excessive torture and beating by the police in the police custody. Here the right of the life and the right of the equality of a prisoner infringed. Even not only that his right under Article 22(1) and 22(2) were also violated. So for the death of the boy the Court granted the compensation of 1, 50, 000/- to the mother of the boy.⁵

Same kind of scenario was created in the case of *Shakila Abdul Gafar v. Vasant Raghunath Dhokha*⁶. In this case the deceased was arrested in respect of F. I. R at D. N. Nagar Police Station on the allegation that he had caused grievous hurt to one Vishnu Shone Bhuwas. The deceased informed his wife regarding the arrest. The complainant was his wife, who found out that the deceased did not come back home at that night. So she came out of her house for searching of her husband.

Near about 8:30 pm she observed that one police van has come on the main road and the accused went out from that van along with some police constable and the deceased was dragged by those police and the wife of the deceased noticed that the condition of her husband was totally broken even he was beaten up so much that he was not able to stand up. After hearing her cry the mother

⁴ C. B. I Vs. Anupam J. Kulkarni (1992) 3 SCC 1025

⁵ <https://indiankanoon.org/doc/1628260/>

⁶ Shatila Abdul Gafar v. Vasant Raghunath Dhokle [AIR 1997 SC 610]

and the sister of the deceased also came and they took the deceased into the hospital where he later announced death.

Here the Supreme Court expressed the great concern for the loss of the complainant and for defeat in the present criminal law due to the adamant and violent behaviour of the police and custodial crime got unpunished. And the Supreme Court suggested amendments in the Evidence Act⁷ as recommended by the Law Commission. But for different disrespects the Court mentioned that the acquittal of the accused became appropriate but took notice of unfinished ends was not noticed by prosecution and the government was directed to pay the compensation of Rs. 1, 00, 000/- to the dependants of the deceased person.

On the other hand in the case of *D. k. Basu v. state of West Bengal*⁸ where a petition was filed by a letter by addressing that to the Chief Justice of India for seeking the attention towards the custodial death of the prisoners. And that letter was considered as a writ petition and later Supreme Court through his judgement made a guideline against the custodial death to the prisoners.

Those guidelines are-

- The police officer who is liable for the arrest and was conducting the interrogation regarding the matter of arrest is always needed to be accurate, impartial, and clear in identification and introduction and name tags with their designation. The participants of all such police personnel who carry out the arrest or handle interrogation of the arrestee must be recorded in a register.
- A memo is needed to be made by the police officer who is arresting the offender and there the name, time and reason of the arrest should be mentioned. Not only that but also the memo is needed to be made in front of a witness who is either the near one of the arrestee or any other responsible person.
- The arrested person should get a permission to contact with a person who ever that can be a good friend or any family member according to his wish.
- The time, place of the arrest and every details and reason of the arrest is needed to be notified to the next friend of that arrested person telegraphically.
- The arrested person is needed to be aware of his right which can give him the protection.
- By mentioning the name of the arrestee with the necessary information at the present of a next friend an entry will have to be made by the police officer.
- If the arrestee has any injury in any part of the body or if any injury has been made during the procedure of arrest, then all those things are needed to be mentioned and signed by both the arrestee and the police officer who has done the arrest.
- The arrested person should be subjected to medical examination by a trained doctor within 48 hours of his detention.
- Copies of all the documents including the memo of arrest have to be sent to the area of the Magistrate for his record.

⁷ The Indian Evidence Act, 1872

⁸ *D. K. Basu v. State of West Bengal* (AIR 1997 SC 610)

- Not throughout the whole interrogation but in the time of interrogation the arrestee can meet with his or her lawyer.

Even all these rules and articles are applicable with the equal force to the Governmental agencies like Directorate of Revenue Intelligence, RPF, BSF, CISF, RAW, CBI, CID, ITBP etc. But although again in the case of *Chiranjit Kaur v. Union of India*⁹ case an Army officer died in service for the negligence of army officers resulting in great mental agony and physical and financial hardship to the widow of the deceased and two minor children. The Court awarded the widow of the deceased a compensation of Re 6lakh as well as Special Family Pension and Children Allowance.

In the case *Kewal Patil v. State of Uttar Pradesh*¹⁰ the Court directed the government to pay Rs. 1,00,000 to the widow and the children of the deceased who was died in the jail by a co – accused while serving under Section 302 of the I. P. C .

Steps taken by the National Human Right Commission against the custodial death

For making a proper report regarding the physical and psychological conditions of an arrested person and to check the number of cases of custodial death, the Commission has issued fresh guidelines to all State Governments. The Commission issued a general instructions in 1993 according to which if any custodial death happens then regarding that death the police is needed to be informed to the commission within 24 hours of that death. This information was to be followed with a Post-mortem Report, Magisterial Inquest Report/Videography Report of the post-mortem etc. However, it was found that there were considerable postponing in sending these reports, which further delayed the processing of cases of custodial violence in the Commission and the awarding of the interim relief wherever was be the prima-facie, there was a reason for concluding that custodial death had taken place due to custodial violence.

Of the total number of cases of death in police custody reported in the period 1999-2000, the maximum number of cases for which inquiry reports are still awaited are - 28 from Maharashtra, followed by 19 from West Bengal, 17 from Uttar Pradesh, 12 from Madhya Pradesh, 11 from Andhra Pradesh, 11 from Assam, 11 from Gujarat, 10 from Punjab and 9 from Tamil Nadu. On the whole, out of a total of 177 cases of death in police custody, registered in the period 1999-2000, the Commission is yet to receive the full reports in 165 cases. As regards deaths in judicial custody, the maximum number of reports is awaited from Bihar – 112, followed by 89 from Maharashtra, 61 from Andhra Pradesh, 41 from Tamil Nadu, 39 from Rajasthan, 38 from Punjab. Among the 916 cases of deaths in judicial custody which were registered in the Commission during the period 1999-2000, of which reports have been received in 396 cases and are awaited in 520. The Commission has thus now instructed that all reports including post-mortem, videography and magisterial inquiry reports must be sent within two months of the incident. The post-mortem reports have to be sent in a new preform, designed by the Commission, which has already been reached to all other concerned authorities. Further, in every case of custodial death, and it is also

⁹ *Chiranjit Kaur v. Union of India* [(1994) 2 SCC 1]

¹⁰ *Kewal Pati v. State of U. P* [1995] 3 SCC 600

needed to make a magisterial inquiry according to the direction of the commission as soon as possible and in such a way that it is also made available within the deadline of two months set by the Commission. In some cases of custodial death, and after the post-mortem, the viscera are sent for examination and a viscera report is called for.

However, the viscera report takes some time in being received. Even the Commission has decided that for the delay in the viscera report at first only the post-mortem report is needed to be sent to the commission. These instructions were sent in a through letter by addressing to the Home Secretaries of all States/Union Territories, all Directors General of Prison and all Directors General of Police by Shri N. Gopala swami, Secretary General of the Commission, on 5 January 2001.

Critical Analysis

After making all those guidelines still now encounter case and custodial death case is increasing in India. In December, 2019 a veteran doctor who was raped by four persons and those four person who was alleged against that murder before presenting them in court they were murdered through an encounter of the police and when there family filed a petition to the court for their justice the Court modified the guidelines a little and kept the remaining part as always. After that in June, 2020 father and son were killed in the custody by the police and against in the case of Vikas Dubay who was renowned as a gangster was also killed by an encounter before presenting him in front of the Court.

As law has made, guidelines are also mentioned to be followed but the police are becoming more rude and cruel day by day. And its implication is falling upon the society. In the case of Jay raj and his son Fenix who were running a mobile shop, there was an allegation come towards them that they kept their shop open for more few minutes after starting the time period of curfew on June 18, 2020 for their necessary works. That's why police arrested Jay Raj and later his son was also arrested by the police. The duo was booked under Sections 188 (disobedience to order duly promulgated by public servant), 353 (use of force to deter public servant from duty), 269 (negligent act likely to spread infection of disease dangerous to life), and 506(2) (Punishment for criminal intimidation) of the Indian Penal Code, 1860.

This was a clear misuse of the police's arresting power, as within 15 minutes, the shop was shut down. Yet, the two were arrested the next day and inculpated on what appears to be an exaggerated count of charges. The timings contradict the claims made by some eyewitnesses. Eyewitnesses claim that the two were beaten repeatedly for hours in police custody, and multiple changes of clothes were brought in to change out of their blood-soaked clothes. Even the charge of sodomy brought against the police by some eyewitnesses. The police force denied these claims in its FIR, declaring that the two had internal injuries only, as they rolled on the ground and resisted arrest. Yet it is claimed that the Magistrate, B Saravanan gave the remand order without seeing the detainees in person, which is crucial as per Rule 6 of the Criminal Rules of Practice, 2019. The combination of the police's apparent penchant for sadism as well as the laissez-faire attitude of the Magistrate turned fatal for the two, as they succumbed to their injuries late Monday night and early Tuesday morning. In the ingenious case of *Tukaram and Another v. State of Maharashtra*¹¹, also

¹¹ *Tukaram and Another v. State of Maharashtra* [1979 AIR 185 SCR (1) 810]

known as the Mathura Rape Case, two police officers on duty raped an underage girl within the premises of the police station, while her family waited outside. The custodial rape case sparked off huge debates about the repulsive acts of policemen.

This case reflects the abusive behaviour of policemen towards women. Another glaring example of custodial violence leading to death of an innocent individual is *Saheli v. Commissioner of Police*¹². Here the Supreme Court awarded compensation of Rs. 75,000 to the mother of the deceased. Meanwhile, in the Tutoring case, the Tamil Nadu state government assured a government job as per eligibility to the deceased's family member. While the opposing party, DMK, declared Rs. 25 lakh worth of financial aid for the deceased's family.

Conclusion and recommendation

Day by day, the number of rape cases is increasing like that the cases of custodial death and the torture upon the prisoners is also going up. So for controlling this number in a limit the judiciary is needed to take some strong steps to prohibit that. Even if it is needed a new provision regarding to the behaviour of the police should be introduced. And the legislature may be needed to make a separation and control of the power of the police which is needed to be curtailed. Because not only custodial death with that custodial violence is also increasing in a rapid rate and in the pandemic situation it is showing a crucial image of the administration. With the custodial death, custodial rape and death by police encounter all these things are also increasing.

Though legislation has been made against them still judiciary will have to take a strong role to apply them otherwise people will start to disobey them who are generally by work is obliged to protect them. Where the register of an FIR against a custodial death is necessary and that is mentioned in the case of *Lalitakumari v. State of UP*¹³ but that is not maintaining properly. If it is needed then through further provision that rules will have to be applied strictly.



¹² *Saheli v. Commissioner of Police* [(1930) AIR 513 , 1989 SCR 488]

¹³ *Lalitakumari v. State of UP* [(2014) 2 SCC 1]