CUSTODIAL TORTURE: A SOCIO-LEGAL STUDY OF PREVENTIVE AND CORRECTIVE MEASURES

SUMMARY

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AKHILESH RANAUT

DEPARTMENT OF LAWS
PANJAB UNIVERSITY
CHANDIGARH
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‘Torture’ has not been defined in the constitution or in other penal laws. ‘Torture’ of a human being by another human being is essentially an instrument to impose the Will of the “Strong” over the weak by suffering. It has been observed during this study that Torture includes any harassment that causes suffering, physical or mental rudeness by words of mouth, separately calling a man to the police station and then making him wait for long hours, physical assault, denial of food, drink, sleep and toilet facilities, continuous interrogation over long period, use of third degree methods, handcuffing, enforced disappearance, police remand, misuse and abuse of power of arrest, death in police custody, rape of women and children in custody. Torture and deaths in police custody is a daily routine in one part of India or other, though the type of torture inflicted and the number of deaths in police lockups varies from State to State. The victims are ordinarily men and women mainly belonging to the socio-economically disadvantaged strata of society, their defencelessness’s as a factor grows against them.

Besides Article 21 of the constitution which guarantees right to life and personal liberty, Article 22 specifically regulates and affords protection to arrested and detained. A person who is arrested should be informed of the ground of such arrested and should not be denied the right to consult and be defended by legal practitioner. More significantly Article 22(2) provides that every person who is arrested and detained in custody shall be produced before the nearest Executive Magistrate within the period of 24 hours of such arrest,
excluding the time necessary for the journey and that no such persons shall be detained in custody beyond such period without the authority of such Magistrate. Under Article 20(3) of the constitution, a person accused of offence can’t be compelled to be witness against himself.

With a view to protecting the interest of innocent and preventing abuse and misuse of police powers. The Supreme Court has enlarged the scope of Article 21 so as to include within its purview the rights of the suspect and the accused. By doing this Supreme Court has elevated immunity against torture and death in police custody to the status of fundamental right under Article 21 though it does not specifically enumerated it as fundamental right in the constitution. The Supreme Court has interpreted Article 21 in such a manner that it guarantees protection against torture and assault (Sunil Batra v. Delhi Administration AIR 1978)

Human Rights, including the rights of the accused, find frequent expression in our constitution and other laws. The following is an illustrative list of the said rights:

(1) Protection against arbitrary or unlawful arrest (Article 22 of the Constitution and Sections 41, 55 and 151 Cr.P.C.)

(2) Protection against ‘Double jeopardy’ (Article 20(2) of the constitution and section 300 Cr.P.C.)

(3) Protection against conviction or enhanced punishment under ex-post facto (Article 20(1) of the constitution)
(4) Protection against arbitrary or illegal detention in custody
(Article 22 of the constitution and sections 56, 57, 58 and 76
Cr.P.C.)

(5) Right to be informed of the ground of his arrest immediately
after the arrest (Article 22 (1) of the constitution and section
50, 55 and 75 Cr.P.C.)

(6) Right to consult a lawyer of his own choice (Article 22 (1) of
the constitution and section 303 Cr. P.C.)

(7) Right to be produced before a Magistrate within 24 hours of
his arrest (Article 22(1) of the constitution and section 57
and 76 Cr.P.C.)

(8) Right to be released on bail if arrested (sections 436, 437
and 439 Cr.P.C. and section 50(2) and 167 Cr.P.C.)

(9) Right not to be witness against himself (Article 20(3) of the
Constitution)

(10) Right to have himself medically examined for evidence to
disprove the commission of offence by him or establish
commission of offence against his body by any other person
(section 54 Cr.P.C.)

(11) Right to legal Aid at the expense of the State in certain
cases (Section 304 Cr.P.C.)

(12) Right to fair and speedy investigation and trial (section 309
Cr.P.C.)
(13) Right to appeal in case of conviction (Section 351, 374, 379, 380 Cr.P.C. and Article 132(1), 134(1) and 136(1) of the Constitution)

These constitutional guarantees and statutory embargo notwithstanding recourse to questionable methods during interrogation appears to be becoming a part of the very investigative process. It could be that the increase in crime rate and culture of violence permeating modern society world over adds to the pressure on the police, leading distortion of their investigative functions. That however can never be any justification for rendering the constitutional provision nugatory. It is necessary that failure of the police to observe the requirement prescribed by law while arresting a person should be made a punishable offence.

The Criminal Procedure Code, 1973 also provides that

(1) Section 50 of the Criminal Procedure Code requires that every person arrested without a warrant shall be given full particulars about the offence for which he is arrested or other grounds for such arrest. When a person is arrested in execution of a warrant, section 75 of the Criminal Procedure Code requires that the arrested person shall be notified the substance of the warrant and if so required, the warrant shall be shown to him. Further the relation or friend should invariably be informed from the police station where the person was being taken by the policemen arresting him. It is fact that very often the police officer arresting a person with or without a warrant do not follow the procedure laid down in section 50 and section 75 of the
Criminal Procedure Code. It is necessary that failure of the police to observe the requirements prescribed by law while arresting a person should be made a punishable offence.

(2) An arrested person is entitled to have his counsel present during interrogation, so as to minimize the use of third degree methods. It is necessary that at the time of arrest an opportunity should be available to the accused to contact his counsel through telephone or otherwise, so that a prompt action may in proper case be taken for a writ of habeas corpus. These provisions are required to be incorporated in the relevant sections of the Criminal Procedure Code. Breach of these provisions should be specific offence.

(3) The power of arrest is one of the most potent and misused sections of section 41 of the Criminal Procedure Code. It provides police with wide ranging powers of arrest without order from the magistrates or without any warrant of arrest. The Union Cabinet has now approved amendment of Criminal Procedure Code to make it mandatory for the police to record reasons of arrest of suspects. The new amendment now specifies that police officers may instead of arresting the person issue a notice of appearance asking him to cooperate with the police officers in the probe. Further every police officer making an arrest shall be accurate, visible and clear identification mark. At the time of arrest a memorandum will be drawn up and attested by the least one witness who is member of family of person or responsible member of locality.
Section 46 provides the methods and manner of arrest. Section 50 of Cr.P.C. mandates that the arresting officer will intimate the grounds of arrest to the arrestee. The arrested person is required to be produced before a Magistrate within 24 hours under section 56 and 57 of Cr.P.C. If the police requires arrested persons to be further detained, specific order are to be solicited from the Magistrate under section 167 Cr.P.C. These provisions afford procedural safeguards to a person arrested by a police. However, if a person dies in custody of the police, an enquiry is to be held by the Magistrates under section 176 Cr.P.C. It is necessary that failure of the police to observe the requirements prescribed by law should be made punishable offence.

Under section 46 of Code of Criminal Procedure, 1973 police can use unspecified and unlimited force to arrest individuals. Sub section (2) permit police officer to use “all means necessary to effect the arrest” if a person attempts to resist or evade arrest. Sub section (3) allows police to cause the death of a person only if a person is accused of an offence punishable with death or with imprisonment for life. It is necessary that use of force in effecting arrests provided for in section 46 (3) of the Cr.P.C. and other legislation and guidelines should conform to international standards (minimum force necessary to avoid unnecessary injuries or death) and such legislation and guidelines should be amended accordingly.
Section 51 of Cr.P.C. provides that all arrested persons be brought before a Magistrate within 24 hours of arrest. The crucial safeguard against torture is not only being regularly ignored but routinely abused. In addition to the illegal detention of individual it is common practice for police to bring a person who is not the detainee concerned before Magistrate to cover up evidence of torture. Therefore it becomes impossible for Magistrate to identify individuals or positively ascertain the basic medical condition of the detainee. Section 54 of the Cr.P.C. requires that “the Magistrate before whom arrested person is produced shall enquire from the attested person whether he has any complaint of torture or maltreatment in the police custody and inform that he has right under section 54 of the Cr. P.C. to be medically examined. In order to ensure a safe environment in which detainees are able to bring complaints of torture before a Magistrate, there should be an opportunity for detainee to be heard by the Magistrate in the absence of police official. Magistrate should question detainees brought before him to ascertain that they have not been tortured or ill-treated have not made involuntary confessions and are not being held in conditions amounting to ill-treatment marks of any injury on the body of those arrested should be noted within arrested records. Detainees should have an enforceable right to medical examination and should be given to the detainee or their nominated representative such as their lawyer or relatives.
Under the Indian Penal Code, Section 330 and 331 of Code deals with causing hurt and grievous hurt respectively for the purpose of extorting confession or to compel restoration of property. The principle object of these sections is to prevent torture by police. The offence is complete as soon as hurt or grievous hurt is caused to extort confession or any information. The police officer by inflicting hurt or grievous hurt becomes party to a crime or offence punishable under the Indian Penal Code. It is necessary that section 330 and 331 of the I.P.C. should be implemented and used against police officer found guilty of using torture as means of obtaining confessions.

Section 25 and 26 of the Indian Evidence Act provides for confession to police officer by the accused while in custody of police. Section 27 of this Act provides as to how much a confession or information received from accused may be proved. The significance of these three sections is to protecting the person charged with crimes from being exposed to ill treatment by the police. It is substantial rule of law that confession made to a police officer in the absence of a Magistrate is inadmissible in court of law. Section 162 of the Cr.P.C. prohibits the use of statement of an accused recorded by a police officer and prohibits the police officer from obtaining the signature of a person on the statement made by the accused. Despite this, it is common practice for police to force detainee to sign statement or blank sheets of paper. Section 164 of the Cr.P.C. states that magistrate are required to ensure that a confession is made voluntarily and sections 330 and 331 of the I.P.C. provide for punishment for voluntarily causing hurt or grievous hurt to extort
confession or to compel restoration of property but these provisions are rarely used against police officers. It is necessary that detailed guidelines should be drawn up for the interrogation of suspects in consultation with lawyers, Bar Association, human right groups and medical professionals. Guidelines should be published and reviewed periodically to ensure they remain effective mechanism to prevent torture and ill treatment.

The provisions relating to arrest and detention of women are in routine violated by police and security forces. Women continue to be subjected to torture and ill treatment. It is regular practice for police to arrest and detain women relatives of individuals whom they want to question. Women are often detained illegally without charge for several hours or days as hostages to force the surrender of a husband or other male relative. There is no legal basis to these arrests and in numerous cases such women have been subjected to sexual abuse and rape while in detention. Section 160(1) of Cr.P.C. allows police to require attendance of witnesses at a police station provided that no male person under the age of 15 years or women shall be required to attend at any place other than the place in which such person or women resides. It is, however routinely ignored.

It is necessary that in the prevailing circumstance arrest or search should be made in the presence of women police officer. Women should be detained separately from men. The practice of arresting women whom there are no charges, as a means forcing suspect to surrender should be clearly identified as illegal and constituting the offence of 'wrongful confinement'.
In relation to protection to the juvenile section 18(2) of the Juvenile Justice Act, 2000 specifies that no child can be put in jail or lock up. Children should be taken immediately before a Magistrate who can order their detention in remand home. Committee on the Rights of Child recommended that registration of each child taken to police station be mandatory including time, date and reasons for detention and that such detention be subject to frequent mandatory review by a Magistrate. The committee further recommended that section 53 and section 54 of the Cr.P.C. be amended so that medical examination including age verification is mandatory at the time of detention and at regular interval.

Besides this International law also prohibits both “Torture” and “Cruel, inhuman, or degrading treatment or punishment. Under International law, States are responsible for protecting all those under their jurisdiction from torture and ill-treatment. They are required to make torture a punishable offence under the law. The responsibility of state extends beyond its official employees to include other groups like paramilitary groups and bring those responsible to justice. State officials who commit acts of torture are personally liable for their actions under international law. Torture convention stipulates that “any order from a Superior Officers or a public authority may not be invoked as a justification of torture”. United Nations had made substantial efforts to ensure adequate protection for all persons against torture or cruel or degrading treatment and to evolve universally applicable standard in this regard. Some of the most important international documents relating to torture can be list out as which are of relevance and significance.

Thus in view, of above under International law it is obligation on state that it must respect the international obligation enjoined upon them and they must ensure to take effective legislative, administrative or other measures to prevent act of torture, no exception including war may be invoked as justification of Torture.

India has ratified several international human rights treaties which incorporate prohibition against torture. India became a signatory to the convention against torture in October 1997, but it is still a major concern that positive steps have not yet been taken towards ratification of the convention. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment is well established and non-derogable international obligation. It is part of customary international law, is found in the Universal Declaration of Human Rights and in international humanitarian law treaties to which India is a party and is provided for detail under the Convention against Torture. Despite this there is widespread tolerance and social acceptance of torture and ill-treatment in India which appears to run through government as well as much of civil society.
Human Right abuses by police or any other law enforcement agencies seems perhaps Universal malady. The highest risk is the first 24 hours following detention. The total range of such abuse are fairly vast and can spread from minor incidents of mental and physical violence on the victims up to homicides and even genocides i.e. third degree methodology of investigation; Misuse and Abuse of Power of arrest; Police Remand; Disappearance, custodial rape; Torture of children; and Death in Police Custody. There seems to be a pervasive misconception among some misguided elements in the police ranks at various levels that the police Act or major penal legislations prescribe their powers and the goal is thus set. But the important thing that often tend to get ignored is the fact that the constitution of India which is the mother of laws makes it clear that every activity of the state shall be in accordance with the law. This indicates that the ‘means’ employed have got to be correct and lawful. Rule of Law presupposes that all action of the state are done strictly in accordance with the law of the land. Article 21 clearly enjoins the inevitable prerequisites of “fair just and reasonable” actions in all spheres.

When a complaint is made against torture death or injury, in policy custody no evidence is available to substantiate the charge in court of Law. The prosecution is unable to produce evidence to prove the charge. It is difficult to secure the evidence against the policemen responsible for resorting to third degree methods, since they are incharge of the police station, which they do not find difficult to manipulate consequently, prosecution against the police officer generally results in acquittal. On the suggestion of the Supreme
Court in Ramsagar Yadav v. State of U.P. AIR 1985 SC 416 the Law Commission in its 113th report, recommended the insertion of a new section 114(B) in the Indian Evidence Act, which provides that if there is evidence that the injury was caused during a period when that person was in custody of the police, the court may presume that the injury was caused by the police officer having custody of that person during that period. Section 29 of the police Act, 1861 stipulates that every police officer who inflicts personal violence to any person in his custody shall be liable to punishment of fine in the form of salary of three months and imprisonment of three months or both.

All the offences relating to arrest and detention fall within wider category of violation of Human Rights. As these violations are usually committed by government agencies such as the police and other security forces, a body free from executive influence is necessary to investigate such violation. This work should be carried by the Central and State Human Rights Commissions. The National Human Rights Commission has already been set up under the Act of 1993 and some states are in the process of setting up their state commissions. The Act, however, has many shortcoming which may render the Human Right Commission ineffective. The commission’s immediate action in taking steps to monitor incidents of custodial violence leading to death by issuing an order that all cases of death or rape in custody should be reported to it within 24 hours ensures further openness about incident of custodial violence.

The National Human Rights Commission under section 12(C) empowered the NHRC to visit custodial institutions but only under intimation to the state authority concerned. However these limitations
have been challenged by the NHRC itself and reported that “Disturbed by the increasing reports of violence in police lock up, the commission took a decision that its officers would make surprise visits to police lock ups”.

The Indian judiciary has no doubt been very sensitive to the torture and deaths in police custody. The judiciary has not only provided justice to the kins of victims of police excesses but has also been policing the police. In the opinion of judiciary the doctrine of sovereign immunity is not only anathematic to the republican polity in India but it also incompatible with the principles of human right jurisprudence. The doctrine of sovereign immunity completely negates the fundamental human right.

Judicial activism has led to the granting of exemplary compensation under Article 32 of the Indian constitution to the victim of police atrocities. Grant of compensation not only provide some succor and recompense to the unfortunate victims of police torture but also serve as preventive measures to some extent. In India there is neither a compressive legislation no a statutory scheme providing for compensation by state of offender to victims of crime. The legislative vacuum of a legal right to monetary compensation for violation of human rights has been supplemented by the higher judiciary by providing parallel constitutional remedy.

The law Commission in its Report in 1996 has stated that the principles of Compensation to Criminal Victim need to be review and expanded to cover all cases. The compensation should not only be limited to fines, penalties and forfeiture. The state should accept the
principles of providing assistance to victims out of its own funds. Justice Malimath Committee Report has made recommendation of far reaching significance to improve the position of victims of crime in the criminal justice system including victim’s right to participate in cases involving serious crime to adequate compensation. Human Rights groups operate throughout India in investigating abuses and publishing their findings which are often the basis for reports by international human right groups. However the police have targeted human rights monitors for arrest and harassment. Some domestic NGO’s and human Right Organization faced intimidation and harassment by local authorities. The Government appointed National Human Rights Commission in October, 1993 and is directed to contribute for the establishment, growth and functioning of non governmental human rights organizations.

Despite the various provisions both at national and international level, for the protection of custodial violence the hard reality is that custodial violence in India is a common occurrence and this can’t be justified on any ground. The basic question in how do we prevent or at least curb reoccurrence of custodial violence. The following suggestions are made in this regard:

1) The right not to be tortured should be explicitly enshrined within the fundamental rights chapter of the Indian Constitution. In addition torture should be prohibited as a distinct penal offence in Indian Law. Its definition should incorporate the definition of Article 1(1) of the UN Convention against Torture. All forms of cruel, inhuman and degrading treatment or punishment should be similarly prohibited.
2) The prohibition against torture should be made an overriding law applicable to all situations and conditions where the potential of torture may exist, including situations of preventive detention as well as custodial institutions including juvenile homes and prisons and must not be suspended under any circumstances, including state of war or other public emergency.

3) Ratify all relevant treaties regarding torture including the International Covenant on civil and Political Rights and its first optional Protocol, the Rome Treaty Creating the International Criminal Court as well as Convention Against torture and its optional protocol (OPCAT). Thus recognizing an individual right to file a complaint with relevant international bodies.

4) Steps should be taken to abolish or amend laws or provisions of laws which facilitate torture or ill treatment including those laws which provides for preventive detention and laws governing arrest and detention procedure.

5) Evidence elicited as a result of torture should be excluded in all trials and specially prohibited in legislation including special legislation.

6) Step should be taken to amend the Indian Evidence Act and Cr. P.C. in such a way that in case of custodial death / violence, a rebuttable presumption of willful malafide action is imposed on the implicated police official.
7) Step should be taken to develop a system to make not only perpetrators of police torture but their superior’s accountable for their deeds.

8) Before prosecuting a Police Officer for custodial death/violence sanction for prosecution is required to be taken under section 197 Cr.P.C. This is unnecessary and avoidable in that by no stretch of imagination can it be said that killing a person in police custody can be deemed to be in the discharge or purported discharge of official. Therefore requirement of sanction of prosecution under section 197 Cr.P.C. should be done away in case of custodial death/violence.

9) The remaining provision of Cr.P.C. 2008 amendments safeguard for detainee of arrest which have been set out by the Supreme Court particularly in D.K. Basu v. State of West Bengal should be incorporated in relevant statutory law and all police manuals as a matter of urgency. Measures should be put in place to monitor their implementation and statistic’s published periodically.

10) In areas of armed conflict where powers of arrest are provided to paramilitary forces as well as police, information about arrests should be kept in Central Register which is publically available and which should also include any information on transfer of detainees between forces giving times and dates and individual officer responsible. Instructions which exist in law that those arrested by armed or paramilitary forces should be handed over to police within 24 hours of arrest.
11) Steps should be taken to introduce a system of comprehensive police custody records covering all aspects of the treatment of detainees including time of arrest, when offered food, when brought before Magistrate, period of interrogation any marks of injury on the body, information about arrest and detention given to third parties, access to legal advice and independent medical inspect, outside monitoring groups and lawyers should have access to these records at all times, failure to keep proper custody records should be made an offence.

12) In order to ensure a safe environment in which detainees are able to bring complaints of torture before a Magistrate is suggested an opportunity for should be provided to detainee to be heard by the Magistrate in the absence of those police official who have brought them from the police station and may have been responsible for their arrest interrogation and detention.

13) Investigation of allegations of torture ill-treatment should incorporate Istanbul principles as endorsed by UN Special Rapporteur on torture. Those investigating the allegations should be fully independent of the alleged perpetrator and have the necessary power and expertise required to open prompt criminal investigations when ever there is reasonable ground to believe that an act of torture has been committed. Public officials suspected of involvement of torture or ill- treatment should not be allowed to be associated with the investigation into the allegation of torture in any manner and should be removed from any position of influence over alleged victims or
witnesses for the duration of the investigation and any trial proceedings.

14) It is further suggested that gender sensitive training be provided to police, the security forces, judiciary and medical professionals. It should be provided to all ranks from the highest to the lowest. The absolute prohibition against torture and ill-treatment should be reflected in the training officials involved in arrest and custody. The officials should be instructed that they have right and duty to refuse to obey any order to participate in torture.

15) The NHRC and SHRC should be given the power to investigate allegation of human right violation which took place even one year previously and should be given power to visit custodial institutions without having to previously notify state officials. N.H.R.C recommendation should be promptly complied with and the Central and State Governments should demonstrate respect for the role of the NHRC and SHRC.