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With this thought, we hereby present to you

W H I T E   B L A C K  
L E G A L

# **NATIONAL LEGAL FRAME WORK TO COMBAT CUSTODIAL VIOLENCE IN INDIA- AN ANALYSIS**

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## **ABSTRACT**

Torture is so brutal and unkind practice which disrespects the human dignity. It is the clear violations of the human rights. There are number of provisions under the Constitutional other as well as under other Penal Laws to safeguard the interest of the suspect/accused but there is no practical implementation of these provisions. It is very important to strike a balance between the power used by the police and the human rights of those on whom they used such powers. It is so fateful that the protectors of the human rights have become the violator of human rights. There is continuing hatred for the state and central government by the activist of human rights and civil liberty organization that they fail to safeguard the human rights of the citizen. This study analyses the national legal frame work to combat against custodial violence in India.

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## **INTRODUCTION**

The legal system in India both Constitutional and statutory has provisions dealing to combat against custodial violence in India. The substantive legislation (Indian Penal Code, 1861) prescribes punishment of a person committing damage, torture or death on the body of a person in custody. The procedural law (Criminal Procedural Code, 1973 and Indian Evidence Act, 1872) contains several provisions safeguarding the legal rights of a person in custody. The Constitutional and the relevant statutory provisions on the subject have been supplemented by the significant judicial pronouncements. In addition, the Protection of Human Right Act, 1993 provides institutions of the National and State Human Rights Commissions as well as Human Rights Courts for better protection of human rights of a person in custody. This study analyses both the substantial and procedural laws combating the custodial violence in India.

## **CUSTODIAL VIOLENCE UNDER INDIAN CONSTITUTION**

Our constitution includes provisions for the preservation of life and liberty as well as protection from or against citizen arrest. If at all his life and liberty are to be restricted, it must be in accordance with Article 21 of the Indian constitution, which states that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. The protection of life and liberty of a citizen includes the person so arrested because he is also a citizen of India and is protected by that article.

Article 21 - No individual will be deprived of his life or personal liberty unless pursuant to procedure prescribed by law. Right to life is a fundamental right. Right to life does not mean just bare existence it means life full of dignity necessary for human existence in a society, personal liberty is taken care of by Article 22 which provides that the arrested person should be informed about the grounds of his arrest and should be produced within 24 hours of his arrest before magistrate. "Liberty is the most cherished possession of man".

The constitutional restrictions set out in Articles 20, 21, and 22 have a direct bearing on the criminal justice system. Article 20 (1) forbids the use of criminal law retroactively. The prohibition on double jeopardy for the same offense is included in Article 20(2). According to Article 20(3), no one accused of a crime should be forced to testify against them. Of course, a provision of the constitution forbids the compulsion of testimony on the grounds that it could have a subliminal coercive effect on the accused. According to Article 21 of the Constitution, no one may be deprived of their life or their personal freedom until a legal process has been



followed. The Constitutional protection against torture has been understood to encompass the phrase "Life and personal liberty" that appears in the article.

An under-trial or convicted prisoner may not be subjected to physical or mental restraint that is not warranted by the punishment ordered by the Court or that would otherwise amount to human degrading treatment, according to the Apex Court in the case of *Inderiet v. State of Uttar Pradesh*<sup>2</sup>. Because one of its goals is to guarantee that legal safeguards are in place to avoid the abuse of power or the power of arrest and detention, Articles 22(1) and 22(2) of the Constitution are also pertinent for the purposes at hand.

Article 22(1) - No one who has been arrested may be held in custody without being promptly informed. He must not be informed of the reason(s) for such an arrest, nor shall he be denied the right to counsel and to be represented by counsel of his or her choice. Every person who is arrested and held in custody must appear before the closest magistrate within 24 hours of their arrest, not counting the time it takes to get them from the place of arrest to the court of the magistrate. This person may not be held in custody for any additional time without the consent of a magistrate, according to Article 22(2).

**Article 39(A) - The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any person by reason of economic or other disabilities.**

Protection from Conviction or Enhanced Punishment under Ex-Post Facto Law: According to Article 20(1) of the Indian Constitution, no person shall be found guilty of any crime other than a violation of the law in effect at the time the act charged as a crime, nor shall they be subjected to a penalty greater than that which might have been imposed under the law in effect at the time the crime was committed. As a result, the article forbids the creation of ex-post-facto criminal legislation as well as the imposition of any punishment higher than that which may be imposed under the law in effect at the time the offense was committed.

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<sup>2</sup> AIR 2002 SC 556

Protection against Double Jeopardy: According to Article 20(2) of the Constitution, no one may be tried and sentenced more than once for the same offence.

Right not to testify against oneself: According to Article 20(3) of the Constitution, no accused person may be forced to testify against oneself. This is crucial because it serves as a protection against coercion and torture used to get evidence from the accused.

Although it doesn't specifically mention it, the Indian Constitution's Article 21 (Right to Life and Personal Liberty) prohibits torture in detention in a wide range of circumstances. According to this right, no one may be deprived of their life or their personal freedom unless doing so follows the legal process. The right protects against custodial abuse by include a constitutional provision against torture, assault, or harm.

The Supreme Court broadened the application of Article 21 of the Constitution in *Menaka Gandhi v. Union of India* (1978), highlighting that this right extends beyond simple physical survival to encompass the inalienable right to live in dignity. *Inderjeet v. State of Uttar Pradesh* (2014), the Supreme Court once more ruled that torture-inflected punishment is unconstitutional. In *Pram Shankar Shukla v. Delhi Administration* (1980), the Supreme Court rejected the practice of handcuffing inmates as being prima-facie inhumane and established several rules in its place.

Right to Privacy: According to the Supreme Court's recent decision in *K. S. Puttaswamy v. Union of India*<sup>3</sup>, the right to privacy is a basic right that is guaranteed by the rights to life and liberty. Prior to this, in *Kharak Singh v. State of U.P.*<sup>4</sup>, it was ruled that life is much more than merely animal existence. The Puttaswamy ruling is historic because it affirms the "right to be left alone," which is essential to maintaining one's sense of self-respect. Thus, this includes the prohibition against physical abuse, against which the State cannot assert immunity.

The accused individual has the option of a speedy trial under Article 22(2) of the Indian Constitution. Any individual who has been arrested must appear before the closest magistrate within twenty-four hours after their arrest. A magistrate must approve of any continued

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<sup>3</sup> AIR 2017 SC 4161.

<sup>4</sup> AIR 1963 SC 1295.

detention. This privilege enables him to request release on bond, express any complaints he may have regarding any maltreatment he received while in jail, and request an independent investigation of the validity of his incarceration. These rights (the imprisoned person's appearance before a magistrate and detention for an excessive amount of time without a magistrate's special order) are explicitly stated in Sections 56 and 57 of the Code of Criminal Procedure.

## **STATUTORY LEGAL PROVISIONS AGAINST CUSTODIAL TORTURE IN INDIA**

The provisions of the statutory laws relating to the custodial torture are analyzed to find out the effectiveness of the legislature in combating the custodial torture in India.

Section 163 of the Code of Criminal Procedure, 1973 prohibits the investigating officers from making any inducement, threat, or promise under

Section 24 of the Indian Evidence Act, but it also forbids them from coercing anyone into making a statement against their will. In accordance with Section 24 of the Indian Evidence Act of 1872, any confession obtained by means of coercion, threat, or promise is not acceptable. As it is widely known, if such evidence is admitted, it would serve as a catalyst for the police to employ torture and force to extract evidence against the accused, hence the provision grants the accused the right to refuse to make any confessions against his will.

In accordance with Section 164(4) of the Code of Criminal Procedure, confessions must be properly recorded, signed, and endorsed by a magistrate who attests to the confession's voluntariness. The International Covenant on Civil and Political Rights calls on the member states to guarantee that the accused is not forced to testify against oneself or to admit guilt in Article 14(3)(g), which is in line with this right against self-incrimination. Among other things, the Indian Penal Code, 1860, establishes laws pertaining to unlawful imprisonment and forbids such confinement for the purpose of extracting a confession or information in order to identify any crime or wrongdoing. Such unjust incarceration is now a crime that carries a maximum three-year sentence.

Section 41 of the Criminal Procedure Code (CrPC) was amended in 2009 to include safeguards under 41A, 41B, 41C, and 41D, ensuring that arrests and detentions for interrogation have reasonable grounds and documented procedures, arrests are made

transparent to family, friends, and the public, and legal representation is available.

Section 163 of the CrPC restricts investigating officers from any sort of bribing, intimidating or promising under Section 24 of the Indian Evidence Act (1872) and it also prohibits him from forcing someone to make any statement that he wishes to make of his own free choice. All confessions made through inducement, intimidation, or promise are inadmissible under Section 24 of the Indian Evidence Act of 1872. The clause gives the accused the right not to make any confession against his will because it is generally understood that if such evidence is declared admissible, it will provoke the police to employ torture and force to extract evidence against him.

Section 348 of the IPC addresses wrongful confinement and prohibits such confinement to extort any confession or information to detect any offence or misbehaviour. Wrongful confinement has been made a penal offence, punishable by imprisonment for up to three years and a fine.

Section 25 of the Indian Evidence Act provides that no confession given to a police officer can be used to convict him of any crime. Section 26 of the Indian Evidence Act declares that any confessions made while in custody are inadmissible unless made in the immediate presence of a Magistrate. Section 27 of the Indian Evidence Act provides an exemption to Section 25. It states that a statement made in custody may be acceptable if it leads to the discovery of some new information. However, the Supreme Court has stated that if the accused is forced to deliver a confession under this Section, he may exercise his protection against self-incrimination under Article 20(3) of the Constitution.

Section 49 of the CrPC serves as a protection from excessive punishment. It specifies that an arrested individual cannot be subjected to greater restriction than is necessary to keep him from escaping. As per Section 55A of the CrPC, the custodian of the accused person is duty-bound to take care of the accused's health and safety.

Article 22(1) of the Constitution of India gives the arrestee the right to receive information on the grounds of his arrest and also gives him the right to consult a legal practitioner of his choice to defend him. Section 50 of the Code of Criminal Procedure, 1973, provides a similar right to the arrested person and also gives him the right to seek bail.

Section 49 of the Code of Criminal Procedure, 1973 is also a safeguard against custodial excesses. It states that an arrested person shall not be subjected to more restraint than is necessary to prevent his escape.

Section 50A of the Code of Criminal Procedure, 1973 makes it incumbent upon the police to give required information relating to the arrest of a person, including the place of arrest to his friends, relatives, or any such person nominated by the arrestee. Section 55A of the Code of Criminal Procedure, 1973 makes it mandatory for the person under whose custody, the accused is detained to care of the health and safety. Section 75 of the Code of Criminal Procedure, 1973 provides for disclosing the substance of the warrant to the arrested person and even showing it to him, if required.

The country's substantive legislation (Indian Penal Code, 1861) has penal sanctions for harm, torture, or death on the body of a person in custody. It is important to note that the Criminal Law (Amendment) Act, 1983, which included Section 376(2), modified Section 376's rape-related provisions to expressly address rape in captivity. By virtue of this modification, the minimum sentence for rape performed on a woman in a person's custody by a police officer, a public employee, a member of the staff of a prison or hospital has been increased to 10 years, up from 7 years in previous rape cases.

### **NHRC AND CUSTODIAL TORTURE**

In India, the National Human Rights Commission (NHRC) was founded on 12<sup>th</sup> October 1993 under the protection of Human Rights Act (PHRA), 1993. The constitution in conformity with the Paris Principles, adopted at the first international workshop on national institutions for the promotion and protection of fundamental rights held in Paris in October 1991 and endorsed by the General Assembly of the United Nations by its Resolutions 48/134 of 20 December 1993.

The Commission is a physical representation of India's commitment to the advancement and defense of human rights. As soon as the Commission was established, it issued specific instructions to the law enforcement agencies on how to report deaths in police cells and correctional facilities because it was realized that incarceration torture was one of the worst violations of human rights. It compelled notification of custodial fatalities by the DMs and SPs of the districts, within 14 hours of the incidence of death. Additionally, it became necessary to

videotape post-mortem examinations.

It is necessary to look into the cause of this instruction's problem. The Commission was alarmed by the increasing number of fatalities in custody and believed that the police were deliberately trying to cover up their abuses and excesses. There was a conscious effort to hide the truth. Police influence caused the physicians doing the post-mortems to conduct the examinations improperly. They gave up to the police's demands. One of the most crucial ways to determine the real cause of death is through a post-mortem, yet what was being reported at the time was merely the police's account of the circumstances. In this way, the post-mortem served to cover up the victim's death through torture while in custody rather than shedding light on the cause of death. The outcome of the case hinged only on the observations made and the doctor's assessment provided in the post-mortem report because there was no other independent evidence. The panel also modified the autopsy model and the procedure for the magisterial inquest as an additional precaution. The panel also established a thorough methodology for reporting physical changes brought on by torture.

There is no question that the NHRC's pro-Strive stance has put some pressure on the police because they always live in fear of being stopped at any moment. The Commission considers complaints from the victim's family members very seriously and does not just depend on police responses. According to a Transparency International investigation, the commission received more than 16 Lakh complaints involving fatalities in custody between 1993 and 2016, but only roughly 22,000 of those complaints have still to be resolved. Additionally, the use of videography, post-mortems, and court inquiries has increased transparency and compelled law enforcement officials to exercise greater caution<sup>5</sup>

The National Human Rights Commission (NHRC) suggested a series of recommendations for the conduct of magistrates necessary for intimidation of custodial fatalities in order to address the issue of increasing custodial violence in India. The Protection of Human Rights Act, 1993 (PHRA), an act of Parliament passed on October 12, 1993, established the NHRC in India. It was put into effect for the purpose of "better protecting and promoting human rights." It is a body that serves as an adjunct to the judiciary and is tasked with defending and advancing all citizens' constitutionally guaranteed fundamental human

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<sup>5</sup>Domestic Implementation of Human Rights by KaushikDhar (NALSAR) University Feb 19,2012

rights.

The National Human Rights Commission (NHRC) issued new recommendations to the State Governments in order to simplify the entire process of disclosing the information regarding custodial fatalities. In 1993, the agency issued general instructions stating that the commission must be notified within 24 hours of discovering any incident of a custodial death on the grounds. The necessary pieces of evidence, including as videography reports, post-mortem findings, and magisterial inquest reports, would be used to support this procedure.

### **STAND-ALONE LAW AGAINST TORTURE**

When the anti-torture bill was approved by the Lower House in 2010, a move in this direction was made. It was subsequently submitted to the Rajya Sabha select Committee, who made significant amendment recommendations. The bill then expired, and according to the Central Government's version, it is currently laying with the Law Commission for review. Another instance is the Indian Evidence Act's failure to include Section 114A.

As a result, the much-needed legislative reforms have not yet been started. Additionally, there have already been many instances of recommendations not being implemented and crucial orders and directions from the NHRC and the Supreme Court not being followed. It proves that governments at all levels are more at ease depending on the police, which are commonly seen as the most crucial administrative apparatus for running the government and assisting the political elite in carrying out their duties, whether fairly or unfairly. So, should we prioritize defending people's right to life and liberty over upholding their commitment to human rights. It is past time for a strict law that criminalizes torture, imposes severe penalties on those who commit it, and gives victims sufficient opportunity to air their complaints and seek redress, compensation, and rehabilitation to be passed as soon as possible and carried out in letter and spirit. To prevent the use of torture, the Indian judicial system should also take into account implementing the non-custodial sanctions outlined in the Tokyo Rules<sup>6</sup>.

### **HARMONIOUS CONSTRUCTION BETWEEN INTERNATIONAL LAW AND NATIONAL LEGISLATIONS:**

India is a party to many International Conventions/Covenants which prohibit torture.

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<sup>6</sup> Custodial death and Anti Torture Law by AyushVerma

But there are no explicit provisions in the Constitution regulating the incorporation of and status of international law in Indian legal system. Article 51(c) stipulates as one of directive principles of State policy, that: "the State shall Endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another."

The Supreme Court noted in *Kesavananda Bharati v. State of Kerala*<sup>7</sup> states that although the Universal Declaration of Human Rights is not a binding legal document, it demonstrates how India saw the nature of human rights at the time the Constitution was formed. Consequently, even though the Supreme Court has declared that the Declaration cannot establish a binding set of principles and that even international treaties may only serve to enlighten judicial institutions and motivate legislative action, the Declaration has had a significant impact on constitutional interpretation in India.

The Supreme Court in *Chairman, Railway Board vs Chandrime Das*<sup>8</sup> Observed the applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence. In *Peoples' Union for Civil Liberties v Union of India*<sup>9</sup> the Supreme Court stated that The provisions of the Covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by Courts as facets of those fundamental rights and hence, enforceable as such.

In *Vishaka vs State of Rajasthan*<sup>10</sup>, The Supreme Court held that it is now an accepted rule of judicial construction that regards must be had to International Conventions and norms for construing domestic law when there is no inconsistency between them. In *Apparel Export Promotion Council v A.K. Chopra*<sup>11</sup>, the Supreme Court has stated that "In cases involving violation of human rights, the Courts must remain alive to the international instruments and Conventions and apply the same to a given case where there is no inconsistency between the international norms and the domestic law occupying the field."

The judicial opinion in India as expressed in numerous recent judgments demonstrates that the rules of international law should be constructed harmoniously, and only when there is

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<sup>7</sup>AIR 1973 SC 1461

<sup>8</sup> AIR 2000 SC 988.

<sup>9</sup> (1997) 3 SCC 433.

<sup>10</sup>AIR 1997 SC 3011.

<sup>11</sup>AIR 1999 SC 625



an inevitable conflict between these two laws municipal law should prevail over international law. Article 253 of the Constitution of India provides that, notwithstanding anything in the foregoing provisions of this chapter, Parliament has power to make any law for the whole or any part of the territory of India implementing any treaty or, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

In light of the aforementioned context, it is important to note that India is one of the very few nations that has not signed the UN Convention against Torture, which is not promising for the defense of human rights in our nation. India does not already have a standalone anti-torture statute, thus creating one would be necessary for ratification. Most of the time, nations have refused India's demands for the extradition of their nationals because they feel that, in the lack of sufficient legislation, cases of human rights violations, including torture of suspects in custody to get evidence, would occur. Thus, as the Supreme Court noted, such a measure would advance our national interests.

The fact that our nation was closely questioned on this matter at the Universal Periodic Review of its human rights duties at the UN Human Rights Council in Geneva is even more unsettling for the country. The Supreme Court expressed worry about this as well.

The IPC has various legal provisions intended to prohibit torture, including those dealing to causing great bodily harm in order to get confessions, criminal intimidation, and unlawful imprisonment. The Code of Criminal Procedure of 1872, the Indian Evidence Act, and the Indian Constitution all contain provisions that protect the rights of the accused. However, most individuals believe that this is insufficient. A stand-alone bill would be a far better solution to persuade the world community and demonstrate our solidarity for the defense of human rights and the elimination of torture. For the successful implementation of the International laws in the domestic legal system, they have to be transformed into domestic law by the legislative act.

## **CONCLUSION**

The right against custodial violence is a fundamental aspect of human rights protection at both the international and national levels. Internationally, various treaties and conventions, such as the United Nations Convention against Torture, have unequivocally condemned

custodial torture and established the absolute prohibition of such acts. These international instruments emphasize the importance of preventing and addressing custodial violence, promoting accountability, and providing remedies to the victims.

At the national level, countries have the responsibility to enact domestic legislation that aligns with international human rights standards and ensures the protection of individuals in custody. This includes guaranteeing the right to personal integrity, due process, access to legal counsel, and fair trials. National institutions, such as human rights commissions and oversight bodies, play a crucial role in monitoring detention facilities, investigating complaints, and holding perpetrators accountable. However, despite these international and national efforts, custodial violence continues to persist in various parts of the world. Addressing this issue requires sustained commitment from governments, civil society organizations, and the international community. Efforts should be directed towards strengthening legal frameworks, enhancing training and awareness among law enforcement agencies, promoting a culture of human rights, and providing support and protection to victims. Eliminating custodial violence requires a comprehensive approach that includes prevention, investigation, prosecution, and redress. It is essential to create an environment where custodial violence is not tolerated, and perpetrators are swiftly brought to justice. By upholding the right against custodial violence, societies can strive towards a more just and humane system



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