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The recent Custodial Death of a father and son in Tamil Nadu has staggered the entire nation. P. Jayaraj and his son J Fenix were arrested by the police for allegedly keeping their shop open in the evening and that violated the lockdown restrictions imposed by the state. They were taken in the police custody where they were allegedly tortured and killed. Custodial death is not a contemporary concept. It has been perennial not only in India but also in the world. There have been several instances in the past of Police brutality and the conviction rate of such policemen is considerably very low.

#### UNDERSTANDING THE ROLE OF POLICE

The police force is an important instrument to prevent crime in society and to maintain law and order. It is one of the most predominant instrument of control in society. The police personnel has various roles and duties like prevention of crime, investigation, maintaining law and order, peace, election-related duties, etc. The current police system is of the colonial structure that we got from the British. The Police Act of 1861 governs police forces in India. Some of the states have enacted their own Police Acts but almost comply with the Police Act of 1861.

#### What is Custodial Death?

The term Custodial Death has not been defined under any legislation. Custodial Death can be explained as the death of a person in judicial custody or police custody. The cause of death doesn't need to be because of violence or torture. It may also be a natural death. However, the cause of death must be investigated. The Indian law provides for an inquiry by the Magistrate in the case of custodial death.

As stated earlier, custodial death is not a contemporary concept. It has been seen that there has been a significant rise in the number of custodial deaths in the past decade. According to a report published by National Campaign Against Torture, there were more than 1700 custodial deaths in the year 2019, which gives an average of 5 people dying daily in the custody.<sup>1</sup>

Custodial death has been a major issue over the years, however, it is not being given attention nor addressed.

<sup>&</sup>lt;sup>1</sup> E- Newspaper - The Hindu – 27 June 2020

There have been several cases of custodial death that are caused because of custodial violence and torture. Many petitions have been filed till date. Custodial violence and torture violate the rights of prisoners. It is a complete exploitation of the powers given to the personnel.

## Power of Police with respect to Arrest -

Section 41 to 60A of the criminal procedural code, 1973 states about the provision related to arrest. According to section 41, a police officer may arrest any person, without an order from the magistrate, in the following situations,

- 1. When the offense is cognizable.
- 2. If the offenses committed in the presence of a Police Officer
- 3. Complaint lodged is of a cognizable offence where the punishment is of seven or less than seven years
- 4. If the police have received credible information from the suspicion and is reasonable.

When a non-cognizable offence is committed in the presence of a police officer and the police officer demands to give his name and address and if the person refuses to do so or gives false information then the police officer has the power to arrest that person. (Section 42 of CrPC).

**Section 46** of CrPC states that when a police officer or any other person is making an arrest, he may use the necessary effect to arrest that person if the arrestee does not submit himself in the custody by forcibly resisting to do so or tries to evade the arrest. However, while doing so, it must not cause the death of the person who is not accused of an offence that is punishable with death or imprisonment for life. This section is often misused by personnel.

In the case of **D K Basu Vs State of West Bengal** <sup>2</sup>, a landmark judgment, the Apex court laid down the following guidelines that are to be followed by police officers while arresting someone. These guidelines and rights are available to all arrested people. Following are directives given by the Supreme Court –

1. The police personnel who is carrying out the arrest and investigation should carry their nametag and identification that is clear and visible. The designation and all the necessary

<sup>&</sup>lt;sup>2</sup> AIR 1997 SC 610

- particulars should be mentioned in it. Such particulars of the police personnel should be recorded in the register.
- 2. An arrest memo must be prepared by the police officer handling the case and such a memo must be attested by at least one witness, who may be either the family member or relative or friend or any respectable person of the locality. Other details like time of arrest, place of arrest, date of arrest must also be mentioned. The memo should also be signed by the arrested person.
- 3. The family members, relatives, or close friends must be informed about the arrest as early as possible. The name of such a person, who has been informed about the arrest, be entered in the diary at the place of detention.
- 4. The person arrested must be made aware of his rights.
- 5. The arrested person is allowed to meet his lawyer during the interrogation but not throughout the complete interrogation.
- 6. The use of any kind of torture by the police personnel to extract the information is not permitted.
- 7. The copies of all the documents related to the arrest including the arrest memo must be sent to the Magistrate for his record.
- 8. After the arrest, the arrestee should be medically examined every 48 hours.
- 9. The arrested person, where he so requests, should be examined by a doctor at the time of the arrest. All the major or minor injuries on his body at the time of arrest must be recorded in the inspection memo. The inspection memo must be duly signed by the arrestee and the police. The arrestee must be provided with a copy of the same.
- 10. All the information related to the arrest must be communicated by the police officer to the Police Control Room within 12 hours of arrest. And such information must be displayed on the notice board by the Police Control Room.<sup>3</sup>

Even after the Supreme Court gave guidelines, there has been a significant amount of rising of custodial death. The conviction rate of such police officers accused of Custodial Death is almost nil. It has been observed from the most of past cases that the police have failed to follow the proper procedure of arrest and no inquiry was done regarding the same.

<sup>&</sup>lt;sup>3</sup> Guidelines given by the Supreme Court in D K Basu Case- Constitutional Law of India by Dr. J N Pandey

#### RIGHTS OF THE ARRESTED PERSON

The Constitution of India and the Criminal Procedural Code state the rights of an arrested person. The Apex Court, in various judgments also has highlighted the rights. When a person is arrested, he has the following rights;

- 1. Right to know the Ground of Arrest According to Section 50 (1) of the Criminal Procedural Code (CrPC), every person who is arrested must be informed of the ground of his arrest.
- 2. According to Section 57 of the Criminal Procedural Code, a person's arrest should be brought before the Magistrate within 24 hours of arrest.
- 3. Section 54 of the Criminal Procedural Code states that when any person is arrested he shall be examined by a medical officer or Practitioner.
- 4. Article 21 of the Indian Constitution guarantees Fair and Speedy trial. It also guarantees the right to free legal aid.
- 5. The arrested person has a right to consult a legal Practitioner.
- 6. A person arrested has a right to get bail only if the offence is bailable. Section 52 (2) of CRPC.
- 7. The family members of the arrested person should be informed about the arrest. 4

As stated in the guidelines given by the Supreme Court in the case of D K Basu, the arrestee must be made aware of his rights by the police. It is one of the fundamental rights (Article 21) of the arrestee to be notified about the reason for the arrest.

#### LEGISLATIONS RELATED TO CUSTODIAL DEATH

The Indian Constitution and some other legislation have provisions related to the cases of custodial death. However, there is no specific provision or legislation made by the State for custodial deaths.

#### The Constitution

Article 21 of the Indian Constitution states that *no person shall be deprived from his life and personal liberty except according to the procedure established by law.* Article 21 has a very wide ambit and it covers a variety of rights that have been given the status of fundamental rights.

<sup>&</sup>lt;sup>4</sup> Reference - Rights of Arrested Person – By Richa Goel- Ipleaders

Custodial Death is the violation of Article 21 that guarantees the Right to life and also the Right to live with human dignity. In Francis Coralie Vs Union Territory of Delhi <sup>5</sup>, the court said that right to live is not restricted to mere animal existence, it is something more than just physical survival. <sup>6</sup>

Right against the inhuman treatment by the Police – The use of third-degree torture by the police to extract information violates Article 21. <sup>7</sup> Every accused has the **right to remain silent** and the **Right Against Self-incrimination** [Article 20(c)]. Therefore, violence or torture in the custody to extract information or confession also violates these rights. In Nandini Sathpathy Vs P L Dani<sup>8</sup>, the Supreme Court held that accused persons cannot be forced to answer the questions asked, they have the right to remain silent. It is the choice of the individual to speak or not to speak. The compulsion to speak even though that may expose him violates 'Right against self-incrimination'. [Article 20(c)]

#### Every arrestee has protection against illegal arrest, detention, and custodial death-

In Joginder Singh V/S State of UP<sup>9</sup>, the apex court held that there must be a justifiable reason for arrest and if not, such arrest or detention is illegal. The court has held that a person is not liable to be arrested merely on the ground of suspicion of complicity in an offence. In a fair trial, it is important that the accused person should be informed about the acquisition. If the particulars of the offence are not informed to the arrestee, the arrest or detention is considered to be illegal.

In the case of Nilabati Behera V/S State of Orissa<sup>10</sup>, the deceased was arrested and taken into police custody. The very next day his dead body was found on the railway tracks. It was later found, that the deceased had died due to severe injuries due to ruthless beating in the custody. The mother of the deceased was awarded a monetary compensation of Rs 1,50,000. The Supreme Court further stated that it is the responsibility of the state and not of the police to give compensation in the matter of custodial death. The compensation however can also be recovered from the guilty officers. The compensation awarded in the matter of custodial cases varies from case to case.

<sup>&</sup>lt;sup>5</sup> AIR 1981 SC 746

<sup>&</sup>lt;sup>6</sup> Constitutional Law of India – By Dr J N Pandey (Page 267)

<sup>&</sup>lt;sup>7</sup> Kishor Singh Vs State of Rajasthan – AIR 1981 SC 625

<sup>8</sup> AIR 1978

<sup>9 1994</sup> 

<sup>10 (1993) 2</sup> SCC 746

Article 21 and 22 do not expressly mention any provision regarding the custodial death or torture, however, they state the rights of an arrested person that safeguards the arrested person against custodial death, torture, detention, and illegal arrest.

#### Indian Penal Code and Criminal Procedural Code-

The object of Criminal Law is to protect society against the criminals or offenders by punishing them for the offence they have committed. However, no one should be punished without a fair trial. Denial of a fair trial is an injustice to the accused. It is the fundamental right of every accused to have a fair trial.

One of the most important principles of a fair trial is the **Presumption of Innocence**. It is presumed during a fair trial that the accused is **innocent until proven guilty**. Suspicion is not enough to prove the guilt. The burden of proof lies on the prosecution to prove that the accused is guilty. In the case of, State of UP Vs Naresh and Ors <sup>11</sup>, the Apex Court held that every accused is presumed to be innocent until proven guilty.

#### **Indian Penal Code**

According to Section 330 of the Indian Penal Code, if any person voluntarily hurts another person to extort information or any confession, which may lead to the detection of an offence or misconduct or restoration of any property or valuable security shall be punished with –

- 1. Imprisonment that may extend to 7 years and
- 2. Liable to pay fine

This section is also applicable to the police. So if any police officer tortures an accused or suspect or any other person to extract information or confession, that personnel is guilty of the offence under this section.

#### **Code of Criminal Procedure**

Registration of an FIR in the case of Custodial Death is compulsory as it is a cognizable offence. The Indian law provides for an inquiry by the Magistrate in the case of custodial death.

<sup>11 (2001) 4</sup> SCC 324

Section 176(1) of the Code states that a Magistrate has the power to hold an inquest with or without an additional investigation held by the police in the case of death of the person while in police custody. It is upon the discretion of the Judicial Magistrate or the Executive Magistrate to hold an inquiry. According to Section 176 (1 A) of the Code, a special provision, if any person dies or disappears or a woman is raped while in the police custody, an inquiry shall be held by the judicial or metropolitan magistrate having the jurisdiction in addition to the investigation held by the police officer. This section was inserted by the Amending Act, 2005. The body of the person who died in police custody must be sent for examination within 24 hours of death.

#### NATIONAL HUMAN RIGHTS COMMISSION –

The National Human Rights Commission has a major role to play in the cases of Custodial Death. The commission has also issued guidelines regarding the same. According to the guidelines, the police have to report the case of custodial death within 24 hours of the death followed by a post-mortem report of the deceased. The post-mortem must be video graphed and then sent to the Commission. The Commission has also given guidelines concerning the Magisterial Inquiry being conducted in the case of custodial death. And that such inquiry must be completed and concluded within two months of such incidence. The Commission can hold a separate inquiry in the cases of custodial death. They may also ask for the evidence for the investigation of the case if required. <sup>12</sup>

#### **CONCLUSION -**

The rising number of custodial death is a matter of concern. Police are considered to be a law enforcement agency but ironically it is the one that is failing to stick up to the same. Unfortunately, the procedure or guidelines with regards to arrest are not been enforced properly. In most of the cases, it has been observed that the family of the arrestee was not notified by the police about the arrest or third-degree torture was done to extract information or confessions or no medical examination was conducted of the arrestee, even on request.

Whenever a family tries to lodge a complaint of custodial death, they are either threatened, so that they don't lodge a complaint, or they are told to take back their complaint. Even if the cases come

<sup>&</sup>lt;sup>12</sup> NHRC guidelines regarding custodial death- <a href="https://nhrc.nic.in/press-release/fresh-guidelines-issued-regarding-intimation-custodial-death">https://nhrc.nic.in/press-release/fresh-guidelines-issued-regarding-intimation-custodial-death</a>

before the court, the conviction rate of such officers is very low. Sadly, many cases are closed without a proper investigation.<sup>13</sup>

In the year 2010, the **Prevention of Torture Bill** was introduced in the parliament. The bill broadly defines the term torture and prescribes punishment for the public servants who commit torture. This bill was passed by the lower house of the parliament to the upper. The upper house referred it to the Select Committee. The committee has given suggestions for the same. This bill has however not been passed till date.

It is the time that the colonial police act that we have been following for years be reformed. Legislative backing has become necessary to curb police misconduct. The Second Administration Reforms Commission has also suggested that a separate independent inquiry authority must be formed to look into the matter of police misconduct. Importantly, required changes or reformations need to be made in the Indian Penal Code, the Criminal Procedural Code, and the Indian Evidence Act. The Amendment of Police Act, 1861 is mandatory.

Police brutality and misconduct is a serious matter as it violates human rights and fundamental rights, therefore must be addressed because every accused, every prisoner is a HUMAN!

THE DEAD CANNOT CRY OUT FOR JUSTICE. IT IS THE DUTY OF THE LIVING TO DO SO FOR THEM.

- Lois McMaster Bujold

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<sup>&</sup>lt;sup>13</sup> Bound by Brotherhood – India's failure to end killings in police custody - <a href="https://www.hrw.org/sites/default/files/report\_pdf/india1216">https://www.hrw.org/sites/default/files/report\_pdf/india1216</a> web 0.pdf