



**ADDRESSING CUSTODIAL VIOLENCE THROUGH PROCEDURAL  
CHECKS**

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**ABSTRACT**

*The very idea of custody is protection or guardianship even when applying it to arrests and incarcerations. Police officers are considered as the one who are entrusted with the job to maintain peace and harmony in the society. They are the one who plays a pivotal role in safeguarding the interest of the general public. Police is one of the most powerful organ in the functioning of the Judiciary. But sometimes the same person violates laws instead of protection it. “If the torchbearer of the law uses torture, it is not acceptable”. The police sometimes arrest the person for the purpose of investigation and subject them to torture in order to get the truth out. This torture sometimes leads to the death of the arrested person. When a suspect dies in the police custody, it conveys disgrace to our constitution. Custodial violence and death has become an alarming issue and it need to be addressed. This article will be dealing on different aspects and measures dealing with custodial death. This includes the various provision given under the constitution providing basic fundamental rights to the individual in custody, differentiating police custody and Judicial custody, role of the police officer while making the arrest, Rights of the arrested person, Steps taken by the Supreme court, Prevention of torture bill, Case laws dealing with Custodial Violence, Legislations pertaining to the offence of custodial death in India and the guidelines provided by National Human Rights Commission. The objective of the study is to provide remedial measures to curb the menace of Custodial Violence and keep a check on working of Police.*

Keyword; Custodial, torture, arrest, Fundamental Rights, Police Officers, Violence, Investigation

## INTRODUCTION

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The role of the police is to implement the law, investigate in the given case, and ensure smooth functioning of the Criminal Justice System. But when the police exceed the power which is entrusted to them it causes a great miscarriage of Justice. Custodial Violence is perhaps one of the most cruel crime committed in a civilized society. The notion that is upheld is 'Innocent Until Proven Guilty' but the reverse is happening in case of custodial violence. The torture that one has to undergo gives other way round notion i.e 'Guilty until proven Innocent'. Custodial violence broadly includes custodial deaths, torture and sometimes as per the recent reports even custodial rapes. Violence is used as a cheap and easy method of investigation and also as a tool of oppression. The most vulnerable group that comes under the ambit of Custodial violence are generally the one who comes from lower economic and social strata. Custodial death is an alarming issue in a country like India, where the constitution upheld the notion of securing equal rights, liberty and dignity of all citizens. A person even if is in custody should not be deprived of basic human rights, except those which are curbed by the court. Various other institutions such as the National Human Rights Commission, the Supreme Court and the United nations forbid custodial violence and death that occurred due to custodial violence. Police cannot arbitrarily use the power that has been enshrined upon them. A proper check has to be maintained right from the time a person is arrested to the time the trial proceeds. During this entire period ranging between arrest and trial, the person is either detained in police custody or Judicial Custody and in some matters may be released on bail. But at the time when the accused is in either of the custody a proper surveillance has to be kept on. Police is from the prosecution side they have to establish the guilty of the accused. But that guilty has to be established adhering to the rule of law and not using excessive coercive measures.

## POLICE CUSTODY AND JUDICIAL CUSTODY- THE MAJOR DIFFERENCE

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In India, the various procedures of the administration of the criminal law is governed by Code of Criminal Procedure of Criminal Procedure code which came into existence in 1973. Section 41 of the Crpc laid down the grounds for arrest without warrant. Arrest primarily means putting restriction in the movement of the person. Under Section 41 a police officer is authorised to arrest a



person if the police officer is satisfied that arrest is necessary on certain grounds which are- to prevent the person from committing the offence further, to prevent tampering of evidence, to prevent witness tampering, if the person is in possession of a stolen property, if the person is a proclaimed offender, the person obstructs the police in carrying out their duties, and against whom a reasonable complaint, credible information and reasonable suspicion exists. Once the police arrest a person, the person has to be presented before the magistrate within 24 hours of arrest excluding the journey time. Section 57 of Crpc states that the <sup>1</sup>arresting authority cannot detain a person in custody for more than 24 hours without producing him or her before a magistrate. Indian Constitution also lays down provision under Article 22 for the protection of person during arrest of detention.

Whenever a person is arrested by police and the investigation of the police is not completed within 24 hours, it is mandatory provision to produce the person arrested before the magistrate. The police if says that the investigation is not completed and there is need for further investigation, in such cases the magistrate to whom the accused is forwarded (not necessary having jurisdiction or not) shall authorise the detention of term not exceeding 15 days in whole. The magistrate shall record his reason for doing so. Police custody means that the accused stays in the lockup of the police station. The provision of Police Custody and Judicial custody is contained in Section 167 of Crpc.

Judicial Custody on the other hand is granted when the police investigation is not completed within the 15-days period of police custody. As per Section 167 (2)(a) Magistrate may authorise the detention of the accused person beyond the period of fifteen days if he is satisfied that adequate grounds exist for doing so. The Judicial Custody is further divided into two- 60 days and 90 days. 90 days of Judicial Custody is granted where the investigation relates to an offence punishable with death, imprisonment for life, or imprisonment for a term not less than 10 years and 60 days of Judicial Custody is granted where the investigation relates to other offences. In Judicial Custody the accused is lodged in jail and is under the custody of magistrate. The investigation if not completed

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<sup>1</sup> "Arrest under CrPC, India. To make sure that the power to arrest is not arbitrary exercised by the police officer Article 22 of the constitution of India and Chapter V of Criminal Procedure code provides direction for safeguard against arbitrary arrest.", University/Law/other Jurisdictions/Indian Law, 2011-09-07



within the period of 60 days and 90 days the person can be released on default bail. Provided the accused has to apply and furnish the bail.

## **ROLE OF POLICE OFFICER WHILE MAKING THE ARREST**

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Section 41B of Crpc lays down the procedure of arrest and the duties of officer making the arrest. Every police officer while making an arrest shall- bear an accurate visible identification of his name, the officer has to prepare a memorandum of arrest and the arrest memo should be attested by at least one witness who is the member of the family of arrested person or a respectable member of the locality where arrest is made after this the person arrested shall countersign the arrest memo. In case the arrest memo is not attested by the family member of the accused, the person arrested should be informed that he has the right to have a relative or a friend named by him to be informed of his arrest. The memorandum of arrest shall contain the following-

- Name, age and address of the accused
- Date, time and place of arrest
- Name of police station
- Name and designation of arresting officer
- Name and sign of witness and arrested person
- Name of the court where produced
- Date and time of Production in Court

## **RIGHTS OF THE ARRESTED PERSON**

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There are certain rights which the person can avail even if he/she is arrested. The arrested person in general is not deprived of certain basic rights. The rights of the arrested person as mentioned in Code of Criminal Procedure are as follows-

1. Right to know the grounds of arrest (Section 50)

The police offer making the arrest without warrant shall inform the person arrested <sup>2</sup>full particulars of the offence for which the person is arrested and the ground for such arrest. If

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<sup>2</sup><https://www.humanrightsinitiative.org/press-releases/custodial-killings-show-india-needs-to-go-beyond-police-reforms-must-ratify-anti-torture-convention-chri>

a police officer arrests any person without warrant other than a person accused of non-bailable offence, he shall inform the person arrested that he is entitled to release on bail and may arrange for sureties on his behalf.

2. Right to know when the arrest is done by subordinate officer without warrant (Section 55)

The sub-ordinate officer making the arrest shall in the first place has to show to the accused a written order which states that the senior officer has designated the power to arrest the accused to the sub- ordinate officer. If the sub- ordinate officer does not show the order while making the arrest, the arrest will be considered as illegal.

3. Right to inform about the arrest to the nominated person of the accused (Section 50A)

Police officer making any arrest shall give the information regarding such arrest and place where the arrested person is being held to his friend, relative or nominated person. Police officer shall inform the arrested person his rights. Facts informed by the person arrested to the police officer shall be made in a book to be kept in the Police station for record. It is the duty of the magistrate to ensure that provision mentioned in Section 50A are complied with in respect of arrested person.

4. Right to be taken before a magistrate without delay (Section 56 &76)

Police officer after making arrest has to present the person arrested before the nearest magistrate without any delay.

5. Right to be examined medically (Section 54)

Soon after the arrest is made the person will be medically examined by the registered medical practitioner. The medical practitioner shall prepare the record of such examination mentioning injuries or marks of violence, approximate time of injuries inflicted upon the arrested person. Copy of medical examination shall be furnished to the arrested person or person nominated by the arrested person.

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6. <sup>3</sup>Right not to be detained for more than 24 hours (Section 57)
7. Right to free legal aid
8. Right of the arrested person to meet advocate of his choice during interrogation (Section 41D)
9. Right to Silence/ Against self- incrimination (Article 20(3) Of Indian Constitution)
10. Right to fair and speed and trial. (Article 21 of Indian Constitution)

The rights mentioned above keeps a check on the activity of the police. If any such rights as mentioned above is violated or not complied with, the police officer is the one who is answerable for it.

## **CASE LAWS DEALING WITH CUSTODIAL VIOLENCE AND THE STANCE OF SUPREME COURT**

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### **<sup>4</sup>JOGINDER KUMAR VS STATE OF UP AND OTHERS-**

Joginder Kumar was detained in the police station and the family of Kumar filed a writ petition in the Supreme Court. After hearing the case the court held that the power of the police officer to arrest and the exercise of such power is two different things. Whenever police officer exercises the power of arrest they have to state with reasonable justification the reason for such arrest. The arrested person has right under Article 21 and 22(1) of the Indian constitution to inform the relative of the arrested person about the arrest. Police officer shall be required to make an entry in the diary so as to keep a record who was informed of the arrest. It is the duty of magistrate before whom the arrested person is produced to satisfy himself that these requirements have been complied with.

### **<sup>5</sup>RUDUL SAH VS. STATE OF BIHAR**

In this case, the petitioner Rudul Sah was illegally detained in jail for a term of 14 years. A writ of Habeas Corpus was filed for the immediate release of Rudul Sah. This was the landmark case where

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<sup>3</sup> Shreya Tandon, Problems, perspective and laws surrounding custodial death (accessed on April 15, 2021) <https://blog.ipleaders.in/problems-perspective-laws-surroundingcustodial-deaths-dire-need-anti-torture-law/>

<sup>4</sup> 1994 AIR 1349 SCC 4 260

<sup>5</sup> 1983 4 SCC 141



the Supreme Court for the very time realised that if the constitutional rights of a person is violated by the state, then the person aggrieved shall be compensated.

#### **6SMT. NILABATI BEHERA VS. STATE OF ORISSA**

In this case, the accused Suman Behera was taken into the police custody and detained at the police outpost in connection to an offence of theft. The next afternoon he was found dead lying near the railway station. The medical report and post mortem report provided by the doctor said that the possibility of injuries on the body of the deceased was not due to train accident but was of merciless beating given to him. The deceased was deprived of his right to life and personal liberty as enshrined under Article 21 of the Indian Constitution. Police transgressed their right and used excess of power. The petitioner demand compensation on violation of fundamental rights. The Court directed a payment of a sum Rs. 1,50,000 by the state to the petitioner.

#### **7YASHWANT AND OTHERS VS STATE OF MAHARASHTRA**

In this case the Supreme Court <sup>8</sup>upheld the conviction of nine Maharashtra cops in connection with a 1993 custodial death case. The bench said that incidents which involves the police tends to erode people's confidence in the criminal justice system. In the present case the police personnel were found guilty of inflicting torture and extending the power granted to them. The cops were charged under section 330 of the Indian Penal Code which involves voluntarily causing hurt to export confession or to compel restoration of property.

#### **9D.K BASU VS STATE OF WEST BENGAL**

The instances of deaths in police Custody was decided in this case and this case became a bedrock for developing 'Custodial Jurisprudence' in India. The Supreme Court laid down certain statutory provision which the police must adhere to while arresting or detaining a person. The guidelines are as follows-

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<sup>6</sup> 1993 AIR 1960, 1993 SCR(2) 581

<sup>7</sup> 2018 4MLJ (cr) 10 (SC)

<sup>8</sup> Deeksha Sagi, Custodial Deaths and the role of Judiciary, accessed on Mar 26, 2021, 10:04 AM), [www.latestlaws.com](http://www.latestlaws.com)

<sup>9</sup> 1997 1 SCC 416

- The Police Officer who carry out the arrest or interrogation should wear clear accurate and visible identifications and name tags with their designations.
- Arrest memo should be prepared at the time of arrest and should include the time and date of arrest.
- It should be attested by one witness and should be countersign by the arrested person.
- When a friend or relative lives outside the district, the time, place of arrest and venue of custody must be notified by police within 8 to 12 hours after arrest.
- At the time of arrest, the arrestee must be inspected and if he/she bears any injuries this must be recorded in an ‘inspection memo’.
- The copies of all documents referred in above must be sent to the magistrate.

If the police officers do not comply with the given guidelines, it would attract departmental enquiry and contempt of court proceedings.

## **<sup>10</sup>LEGISLATIONS PERTAINING TO THE OFFENCE OF CUSTODIAL DEATH IN INDIA**

The laws which deals with the offence of Custodial Death are as follows-

### **THE INDIAN PENAL CODE, 1860 (IPC)**

A police officer committing murder of a suspect in custody shall be punished under section 302 of IPC which is punishment for murder. Police officer can also be punished under Section 304 IPC which says Culpable Homicide not amounting to murder. The provision of 304A can also be attracted in case of custodial death which is Death by Negligence. Punishment under Section 306 can also be attracted if it is proved that the victim has committed suicide and the police officer has abetted the commission of such crime. The punishment for voluntarily causing hurt and grievous hurt.

### **THE CODE OF CRIMINAL PROCEDURE, 1973 (CRPC)**

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<sup>10</sup> Deeksha Sagi, Custodial Deaths and the role of Judiciary, Mar 26, 2021, 10:04 AM, [www.latestlaws.com](http://www.latestlaws.com)



Significant provision with respect to custodial torture is <sup>11</sup>Section 176(1) of CrPc where a magistrate is empowered to hold inquest with respect to an unnatural death may hold an inquiry into the cause of death in addition to the investigation held by the police officer. When an allegation of ill-treatment is made by the person in custody before the magistrate, the magistrate is then and there required to examine his body and produce the report.

### **INDIAN EVIDENCE ACT, 1872**

Evidence collected by illegal means including torture is not accepted in courts. Section 24 of the Act states that a confession made under threat and inducement is considered to be irrelevant in the criminal proceedings and Section 25 States that a confession made to the police officer shall not be proved against an accused.

### **PREVENTION OF TORTURE BILL, 2010**

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<sup>12</sup>The prevention of torture bill, 2010 seeks to provide for punishment for torture committed by government official. The bill has explained the word ‘torture’ that if a public servant while trying to drive information from an individual or third person or trying to get the confession grievously hurt that person or mentally or physically torture the life and health of the person will come under the definition of ‘Torture’ and the punishment prescribed against this is 10 years. The bill was passed in Lok Sabha and presented before the Rajya Sabha. Rajya Sabha presented the bill before Rajya Sabha Select committee for further suggestions. The committee has provided certain suggestions which are- Expanding the definition of torture, torturing women or children should have severe punishment, and setup an independent authority which can investigate all the activities and can provide compensation to the victim. The bill is not yet passed by the Rajya Sabha. In 2017 the law commission said that they are seriously considering the bill. Subsequently in the year 2019 India has reported more than 1700 Custodial deaths. If the bill is passed it will keep a strict check on the activities of the government official and the country today is in a dire need of this.

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<sup>11</sup> RatanLal & DhirajLal, The Code Of Criminal Procedure, pg 341, (LexisNexis, 17<sup>th</sup> Edition, 2008)

<sup>12</sup> The Prevention of Torture Bill, 2010 <https://prsindia.org/billtrack/the-prevention-of-torture-bill-2010>

## NATIONAL HUMAR RIGHTS COMMISSION GUIDELINES

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<sup>13</sup>To curb the problem of Custodial Violence in India, the National Human Rights Commission proposed a set of guidelines in regard to the conduct of magisterial required for intimidations of custodial deaths.

- The magisterial enquiry should be conducted without any delay.
- The enquiry magistrate shall himself visit the place of occurrence to be acquainted with the fact of the case.
- Public notice should be circulated and the magistrate has to ensure that the information reaches to all the concerned particulars and relatives of the victim.
- The magisterial enquiry shall include the following aspects- the circumstance of death, the manner and sequence which lead to the death of the person, the cause of death, act of commission/omission on the part of the public servants that contributed to the death and the adequacy of medical treatment provided to the decease
- <sup>14</sup>The enquiry magistrate shall examine and verify records, such as inquest report, post-mortem report, Viscera report, Investigation report, FIR, General diary, etc.

## CONCLUSION

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Custodial death is still prevalent in India. The rampant increase in custodial violence raise a doubt in the mind of citizens that the one who are responsible to protect them are the one who are using their power in excess of their authority. Reforms has to be brought to curb the rising menace of Custodial Violence. Regular inspection should be made by the Non- official member to keep a check on the condition of the detained person. CCTV cameras can be installed in the police station

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<sup>13</sup> Shreya Tandon, Problems, perspective and laws surrounding custodial death ( Dec 11, 2020) <https://blog.ipleaders.in/problems-perspective-laws-surroundingcustodial-deaths-dire-need-anti-torture-law/>

<sup>14</sup> [https://nhrc.nic.in/sites/default/files/Guidelines\\_conducting\\_Magisterial\\_Enquiry\\_in\\_cases\\_of\\_CD\\_or\\_police\\_action.pdf](https://nhrc.nic.in/sites/default/files/Guidelines_conducting_Magisterial_Enquiry_in_cases_of_CD_or_police_action.pdf)



to keep a surveillance check on the activities of the officers. The 273<sup>rd</sup> Law commission report should be implemented which recommends that those accused of committing custodial torture should be criminally prosecuted. The police officials need to respect the human rights and should not over use their power in the name of serving their duty. Compared to other crimes, custodial crimes are particularly heinous and it is the need of an hour to implement the laws that will help curb such instances.







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