
A SOCIO-LEGAL ANALYSIS OF CUSTODIAL TORTURE & FAKE ENCOUNTER KILLINGS IN INDIA

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ABSTRACT

This research paper solely examines the issue of custodial torture and fake encounters in India despite a robust criminal justice system. India has the largest democracy, which is regulated by the rule of law, but still frequent reports point towards the brutal behavior of the police officers with the person in custody. The Constitution of India guarantees the Right to Life & Personal liberty under Article 21, but the practice of the state ignoring or supporting violence imposes a question mark on the implementation of this robust provision.

This research paper recognizes that custodial violence is not merely the violation of human rights, but it is also a great threat to a democratic fabric of the nation. Whenever, any state bypasses the legal trial regulations and provides instant justice by fake encounters, it directly questions the strength and implementary framework of the judiciary and judicial bodies, thus undermining the trust of the public.

This study further points out the gap between judicial mandate and ground level implementation of the statutory framework. Ultimately, this research paper calls for the gradual shift from a “punitive” mindset to constitutional morality, to ensure that the protectors of the law do not become violators themselves.

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INTRODUCTION:

The protection of individual liberty and preservation of the “Rule of Law” are the significant rules of the civilized democracy. In India, under the constitutional framework, Article 21 guarantees that no person shall be deprived of their right to life and personal liberty, except in accordance with the procedure established by law.² Thus, the state is under an obligation to protect its citizens by the means of police and other security forces.

However, these protection institutions were often accused of violating the fundamental rights of the individual via custodial torture and fake encounter killings. Custodial torture signals the breakdown of constitutional machinery. It is basically the infliction of physical and mental harassment on an individual when he or she is in police custody. It is taken as the shortcut method of investigation where third degree coercion is performed on an individual bypassing all the scientific methods.

Custodial torture is the brutal form of human rights violation where police authorities try to break the spirit of humans and extract confessions. Under the state custody, the dignity of the individual is violated.³ Similarly, the fake encounters are used by the state for extrajudicial killings. It is thus a breakdown of the rule of law.

Police in these instances themselves play the role of investigator, prosecutor, judge and executioner to dispense justice. They justify their actions in the guise of self defense, but in reality it is a pre planned execution of the plan of the police in order to bypass the slowness of the judicial system. The culture of “instant justice” affected the roots of the foundation of Article 21 of the Indian Constitution, which states that no person shall be deprived of their right to life and personal liberty except according to the procedure established by law.

These practices used by the state do not enhance public safety; instead they erode the legitimacy of the state and often target the marginalized sections of the society. The Indian judiciary has strongly condemned these practices and laid down guidelines to curb custodial violence.

THE LEGAL FRAMEWORK:

There is a detailed legal framework that governs the extrajudicial killings and custodial torture

² The Constitution of India, Article 21

³ *Raghubir Singh v. State of Haryana* (1980) 3 SCC 70

in India. It is categorized into constitutional framework, statutory laws, and judicial guidelines as follows:

CONSTITUTIONAL FRAMEWORK:

The Indian Constitution provides the framework for curbing the custodial violence and extra judicial killings in India. It lays the foundation for the zero tolerance policy against state violence. The relevant provisions are as follows:

- Article 20(3): It protects the individual from self incrimination. It states that no individual can be a witness of his own case. It thus prohibits the third degree torture by the police and other violent methods used in order to extract confessions.⁴
- Article 21: It guarantees the right to life and personal liberty to an individual. The right to life and personal liberty are the bedrock of the individuals' rights. The Supreme Court has consistently held in various judgments that the right to life also includes the right to live with the dignity and the right against torture.⁵
- Article 22: It provides safeguards to an individual against unlawful arrest and detention. It also includes the right to be informed of the grounds of arrest and the mandate to be produced before the Magistrate within 24 hours.⁶

STATUTORY FARMWORKS:

India though does not have any specific framework for anti torture law, several laws lay the statutory framework for regulating the ongoing custodial violence by the police officials. They are as follows:

- Bharatiya Nyaya Sanhita (BNS), 2023: BNS retains and strengthens the provisions against the torture by police officials. Section 330 and section 331 of BNS,⁷ specifically criminalize the act of voluntarily causing hurt or grievous hurt to an individual in order to extort confession. Further to regulate fake encounters, section 302 of the BNS states

⁴ The Constitution of India, Article 20(3)

⁵ The Constitution of India, Article 21

⁶ The Constitution of India, Article 22

⁷ Bharatiya Nyaya Sanhita, 2023, Section 330 & 331

that any police officer who has committed a fake encounter will be prosecuted under section 302.

- Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023: Section 46 of the Act regulates the amount of force that a police officer can impose on a person who is under a police custody. It prohibits causing the death of a person who is not prosecuted for the offence that has the punishment of death or life imprisonment.⁸ Further, section 176 of the Act mandates the inquiry by the Magistrate in case of death, rape or anything unusual happening to an individual in the state custody.
- Bharatiya Sakshya Adhiniyam (BSA), 2023: Section 23 of BSA, 2023 explicitly states that any confession made to a police officer by an accused shall not be admissible in the court of law. Further, section 23(2) of the Act states that the confession made to a police officer by an accused who is in the police custody cannot be proved against him, unless such statement is given in the presence of Magistrate.⁹

JUDICIAL GUIDELINES:

The judicial guidelines have reshaped the custodial torture through binding directives. The judicial body laid some landmark precedents that represent the role of the judiciary as an active guardian of fundamental rights.

➤ **D.K Basu v. State of West Bengal (1997)¹⁰:**

This is the foundational verdict given by the Supreme Court for regulating the custodial violence. The Court exercised their powers under Article 141 and 142 of the Indian Constitution and had laid down 11 mandatory requirements for the procedure of arrest and detention. It states that preparation of arrest memos, the right to be informed about the grounds of arrest, and mandatory medical examinations, etc are the mandatory directives to curb the high handedness of the police officials.

⁸ Bharatiya Nagarik Suraksha Sanhita, 2023, Section 46

⁹ Bharatiya Sakshya Adhiniyam, 2023, Section 23

¹⁰ D.K Basu v. State of West Bengal (1997), 1 SCC 416

➤ **Paramjit Kaur v. State of Punjab (1996)- Jaswant Kalra Case¹¹**

This case represents the image of the rule of law followed by the state through extra judicial killings. Jaswant Singh Kalra, a human rights activist in this case recovered the evidence of thousands of unidentified bodies that were illegally cremated by the police officials. Shortly after he proved all the evidence in the court, he himself was abducted and murdered by the police officials in the police custody. The Supreme Court in this case took *suo motu* notice and handed over the investigative power to the CBI.

➤ **Nilabati Behera v. State of Orissa (1993)¹²:**

In this case, the Supreme Court clarified the difference between sovereign immunity and the liability of the state for the violation of fundamental rights. Suman Behera, a young man was found dead in the police custody with multiple injuries. The police further claimed that he died in the railway incident. The court recognized that the state has a strict liability to protect those who are in their custody.

➤ **PUCL v. State of Maharashtra (2014)¹³:**

It is also known as the “Encounter case”. The court in this case recognizes that the culture of getting a reward after killing is directly a blow to the rule of law. This case lays down 16 mandatory requirements for every encounter. It states that the inquiry by the magistrate, an immediate FIR, an independent investigation by the police officer of a different police station, etc. are the mandatory requisites for following the procedure of encounter.

LEGAL CHALLENGES:

The legal wall of justice to curb custodial violence faces significant challenges that render the constitutional procedures illusory. The Constitution of India guarantees the Right to life under Article 21, but the procedural law like section 197 of BNSS acts as a barrier in the implementation of this right. Section 197 of the BNSS states that the permission of the government is a prerequisite to commence a trial against a police official, which is in reality

¹¹ Paramjit Kaur v. State of Punjab (1996), 7 SCC 20

¹² Nilabati Behera v. State of Orissa (1993), 2 SCC 746

¹³ PUCL v. State of Maharashtra (2014), 10 SCC 635

rarely granted.

Moreover, India has no specified Anti- torture law that can regulate the inhumane behavior of police officials. Further, no police officer testifies against their colleagues, there is no investigative agency other than police officer, thus the legal system ends up with the protection of the perpetrator themselves except the victim.

CONCLUSION & RECOMMENDATIONS:

The increasing rate of custodial violence and fake encounters represents the fracture in the Indian democracy. The procedure established by law is bypassed for the sake of instant justice. To bridge this gap, India needs to ratify the United Nations Convention against Torture (UNCAT) in order to frame an Anti- torture framework. Further, the provision of videography under BNSS must be supported by robust digital infrastructure, where there are no holes for malfunctioning by the police agencies.

Thus, statutory changes must empower the judicial oversight and to ensure that the sanctity of Article 21 remains a practical aspect rather than a provision merely on a piece of paper.