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THE DECISION IN RAM DHAWAN: A PRESSING NEED TO INTRODUCE INCESTUOUS RAPE UNDER INDIAN CRIMINAL LAW

Nikhilesh Koundinya¹

INTRODUCTION

Article 21 of the constitution's expression "*life or personal liberty*" has been interpreted to encompass the right to human dignity, and so includes a safeguard against torture and violence by the state or its agencies. Custodial violence refers to acts of violence on people while they are in the custody of the police or the courts. Torture, death, and other abuses in police custody or prison are examples of custodial violence.

For decades, police abuse in detention has been a major issue. Each year, the number of cases of police torture of detainees rises. According to a report, 1,731 people died in detention in 2019, and detainees are frequently tortured to get money from their families. In situations like that of Jayaraj and Bennix, the magistrate turned a blind eye to assertions and proof of police brutality and torture while in detention. The article looks at this data as well as what can be done to reduce police violence against arrested people.

To address this issue, the Indian Penal Code, 1860 (IPC) contains certain remedies, and the Supreme Court has given directives and instructions to governments on occasion, directing them to look into the situation seriously and take action to prevent police custody abuse. Even so, these measures have not yielded results. There is no anti-torture legislation in India, and the 1984 Convention against Torture has not been ratified. The scope of Human rights Protection is enlarged

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by the judiciary over a period of time. However, the courts should emphasize following proper procedure and investigating the accused officer, which is sometimes overlooked in such circumstances.

INCREASING RATES OF CUSTODIAL VIOLENCE

It is the responsibility of the state to make sure that there is no violation of the right to life of a person in any way, except as required by law. People in detention either in judicial or police, convicts, under trial are not be denied their fundamental rights provided by Article 21 of the Constitution, besides according to the procedure established by law.

According to the India Annual Report on Torture 2019, there were 1,731 deaths in detention, with 1,606 deaths occurring in court custody and 125 deaths occurring in police custody. This means that, on average, five individuals die in prison due to violence by the authorities. Despite the lockdown, the NCAT reported in "*India: Annual Report on Torture 2020*" an upsurge in in-custody deaths. According to research by the United Nations Office on Drugs and Crime (UNODC), deaths in police custody in India are on the rise.

Also, Bollywood portrays extrajudicial actions as morally upright activities in a fascinating way. The prevalence of custodial killings and brutality by compromised police officers is showcased and glorified in movies. Making us accept custodial death for the sake of social morality. Torture in prison is a brutal attack on the rule of law. It is concerning because the violence is conducted by people who are meant to be the protectors of the rule of law and civilians.

SAFEGUARDS AGAINST CUSTODIAL VIOLENCE

There are detailed instructions in laws that are to be followed by police officials to protect the rights of those who have been arrested. The arrested person should be well-informed about the reasons for his or

her detention. The law mandates that the person(s) detained be brought before a magistrate as soon as possible after their arrest, within 24 hours.

In *D.K. Basu v. State of West Bengal*², the Supreme Court acknowledged the troubling trend of custodial violence and issued 11 (eleven) rules to prevent custodial torture.

Act V of 2009 made a change to the Criminal Procedure Code, 1973 (Cr.P.C.), adding Sections 41-A, 41-B, 41-C, 41-D, and 55-A to the Code. Sections 41-B, 41-C, and 41-D of the law recognise the D.K. Basu (supra) guidelines. The person in charge of an accused is required by Section 55-A to take reasonable care of the accused's safety and health.

The person who has been arrested has the right to consult or be represented by a lawyer of their choice and be examined by a doctor. Although Article 22 guarantees the safety of the detained individual, this is not always the case on the ground. Since 2005, there has been a legal provision allowing a judicial magistrate to investigate deaths, rapes, and disappearances in custody. It was a replacement for the former section 176 (1) of the Criminal Procedure Code, which allowed for an executive magistrate's investigation.

The Supreme Court considered the validity of police operations in light of Article 21 of the Constitution for the first time in the case of *Francis Coralie Mullin v. The Administrator, Union*³, and found that Article 21 includes the right to protection against torture. In *Joginder Kumar v. State of Uttar Pradesh*⁴, the court cited the National Police Commission's Third Report's recommendation that police should refrain from arresting people unless they are committing a heinous crime. It further states

² 1997 (1) SCC 416.

³ 1981 AIR 746.

⁴ 1994 AIR 1349.

that the police should clarify the reason for the arrest and that the office is responsible for explaining their actions.

There were also certain directions provided that must be followed when the arrest is made. The arrested person would be informed of their right to inform any of their relatives or friends and should be allowed to do the same. The details of the arrested person should be recorded in the diary. The magistrate to whom the detained individual is brought would also ensure that the police follow the requirements.

The court stated in *Nilabati Behera v. State of Orissa*⁵ that "*each detainee and arrestee have the equivalent fundamental rights guaranteed by law, and the police will have to comply with the law.*" It also ordered the state to pay compensation for police brutality.

The guidelines regarding judicial violence have been established by the National Human Rights Commission ("NHRC") and state that every death in custody must be reported to the commission within 24 hours of its occurrence. Post-mortem reports, Magisterial Inquest reports, post-mortem videography reports, and so on shall be reported to them within two months. Furthermore, in every case of custodial death, a Magisterial Inquiry must be conducted as instructed by the Commission, and it must be finished, within the two-month timeframe.

In the case of *Lalita Kumari v. Government of Uttar Pradesh*⁶, it was established that it is a legal need to file an FIR when information of a cognizable violation such as custodial torture or death reaches the police. In the case of *Paramvir Singh v. Baljit Singh*⁷, the SC directed the states to increase the coverage areas of CCTV cameras in each police station and to record audio video for 18 months.

⁵ 1994 AIR 1349.

⁶ AIR 2012 SC 1515.

⁷ (2021) 1 SCC 184.

SUGGESTED REFORMS & CONCLUSION

Concerning 1,200 deaths in prison between 2005 and 2018, 593 incidents were reported, 186 police officers were charged, and just seven were found guilty (National Crime Records Bureau). Evidentiary issues frequently come up since the victims are usually the only witnesses. In 1995, the Supreme Court ruled that courts should not demand direct or visual evidence in these situations because police personnel sometimes keep quiet to protect their co-workers since they are "*bound by the brotherhood*." Rarely are this stance used, and many trials end in acquittals due to a lack of evidence. Police personnel from the same police station investigate crimes when there are no legal requirements for independent investigations, giving them several opportunities to tamper with evidence.

There is no legislation against torture in India. Even though the Indian Penal Code makes custodial death a crime, there is no legal definition of "torture" in India. In the absence of a definition, courts frequently charge responsible people with less serious offences. Those found guilty of causing fatalities while in custody sometimes get lesser punishments, such as grievous hurt, than those convicted of murder. As a result, India must have an anti-torture statute with a clear definition of torture, penalties for violators, and a suitable process for investigating such cases. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has not been ratified by India. The state parties are required under the convention to produce recurring reports on the implementation of rights. India is one of just 25 nations in the world that has not ratified the pact.

Also, because it is portrayed in movies as a morally righteous act by police officers who disregard the law to battle the "*bad*" guys, it gives the general public the impression that police should be applauded for using torture as a tool to keep society free of crimes. Therefore, there has to be

widespread recognition that this extrajudicial conduct is against the law and detrimental to society. Police frequently engage in unethical behaviour, employ third-degree techniques, and abuse people while they are in custody. Police officers must be adequately trained in the fundamental human rights of detainees and inmates. They should also learn about scientific methods of investigation and appropriate interrogation techniques.