

## CUSTODIAL DEATHS- BANE OF JUSTICE

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*“If the criminal law as a whole is the Cinderella of Jurisprudence, then the law of sentencing is Cinderella’s illegitimate baby.”<sup>1</sup>*

Before I put down my views on custodial deaths I would like to quote *Alexander the Great* that “*If I can love myself despite of my infinite faults, how can I hate anyone at the glimpse of few faults*”. Our constitution has enshrined fundamental rights to guarantee certain basic rights and liberties to our citizens and several institutes are making a praiseworthy effort to assure the reach and exercise of such rights by the common man. Such institutes along with NGO’s treat life as a rope that swings us through hope and always believe that today is better than yesterday and tomorrow will be better than today. Many NGO’s have contributed tremendously in the sphere of legal education of people and brought some grave matters to light. Before the National Human Right Commission complaints of deaths in police lock-ups have been made in large number, and it has been high on its agenda, the protection of civil liberty.<sup>2</sup> Today the society has nearly succumbed to the syndrome of lawless tensions, psychic penury and miseries of conflict, at individual, domestic, local, national and international levels. The legal mutiny far from salvaging man is gnawing at him from within.

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<sup>1</sup> Sentencing and Probation, page. 1 (American Bar Association)

<sup>2</sup> [www.newstrackindia.com/newsdetails/235](http://www.newstrackindia.com/newsdetails/235)

Incarcerational barbarity has been validated by the popular retributive- deterrent philosophy, this is current sentencing coin in many criminal jurisdictions.<sup>3</sup> It has been observed that in the past decade the toll of deaths in police lock-ups is on the rise. Many deaths have occurred while in detention but so far no attention has been paid. In India police lock-ups are solely managed by the police personnel and such incidents are only possible by their actions. Recently, there was a public uproar in West Bengal against the monstrous acts of the police against the faultless citizens. The Government of India allows torture, so inflicted in police lock-ups, considering it necessary for the administration of justice while providing impunity to the law enforcement officers. Principally, it is believed that the court lock-ups be governed by the judiciary. Although it is seen that even the magistrates are dependent on the police officials for their judicial functions. The root of all the evil lies in vesting enormous judicial powers to the police officials. Their job begins from the arrest to the conviction of the arrestee. Revelations brought forth that practically the independence of the Judiciary has not been observed. This is taken to be contrary to the tenets of the Constitution and goes against the intention of the Criminal Procedure Code, 1973 that establishes the judiciary to be severed from other parts of the government.

Taking into account the intensity of the present problem National Human Right Commission has proposed that in cases of custodial deaths the police officer in-charge must be held responsible and not the state. This refers to the least applicability of the principle of Vicarious Liability of the State in cases of Custodial deaths. But if we were to analyse the gravity of the present problem the doctrine of Vicarious liability should be made applicable. The *raison d'être* is to provide the maximum security to those who are the victims in such cases. It is believed that if the liability of such an act is poured on the State the amount of compensation and relief provided shall be exemplary which will be in the interest of the one oppressed. The constitution enshrines the right to life and liberty by Article 21 and empowers the State to guarantee these rights. This is sufficient to justify the applicability of the principle of vicarious liability of the State in cases of Custodial deaths where there is covert and overt infringement of the basic rights of life and liberty of an individual. Article 21 lays down that, "No person shall be deprived of his life or personal liberty except according to procedure established by law." But this procedure not only refers to the enacted law but also extends to the principle of natural justice. The link between custodial violence and compensation is

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<sup>3</sup> V.R Krishna Iyer : *Constitutional Miscellany*, 2<sup>nd</sup> Edn ( 2003) p. 149, 151

direct and set at rest any questions regarding the compensation to be paid for violation of rights in Article 21.<sup>4</sup> It should be made sure that the rights of the arrestees is restricted, which does not connote to violation of one's rights. The UN Convention against torture and Other Cruel, Inhuman and Degrading Treatment provides that the human dignity of the arrestees must be maintained. Although our domestic law in this regard is not so effective, we need to mould the domestic law on the guidelines of international treaties and conventions and together with the necessary institutional implementation custodial deaths shall diminish. Moreover, conditions of the police lock-ups will improve and perpetrators will be properly punished. To ensure justice to the oppressed, the High Court in the case of *Mariayappan v State of Tamil Nadu*<sup>5</sup>, directed to initiate criminal proceeding against the police officials and ordered State to pay a compensation of 2 lakhs to the family. Custodial deaths invoke the criminal liability of the officer-in-charge,<sup>6</sup> additionally the tortuous liability of the State helps to render adequate justice in such cases.

There are many other instances of torture and deaths in custody all across the globe. Thailand and some of the Middle-east countries reveal that severe torture victims are still in custody while the police torturers remain in posts. Moreover, impunity, forced confessions, inhumane treatment to the prisoners, denial of due process of rights are some of the maladies. There is an incessant human rights violation in the prisons of Guantanamo Bay and Abu Gharib by the highest authorities of U.S, who are in disguise acting as Global Super-Cop. All this has brought the plague of torture into fore. All around the world the police officials or the authorities, openly or in disguise inflict pain and torture on the prisoners whether under-trial or not, in the name of security and state function. Police use torture to extract confessions, for extortions or just to settle personal scores. The toll of custodial deaths is on a rise according to the figures presented by the National Human Rights Commission's annual report which reported complaints of 34 custodial deaths in 1993-1994, increasing to 1297 custodial deaths in 1998-99 and reaching its peak to a startling figure of 1493 custodial deaths in 2004-2005. We must adopt a humane tool to reform the crime, criminal, abandon the fanatical superstition that the State brutality will sensitize the savage into a social member and offer

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<sup>4</sup> *Nilabati Behra v. State of Orissa* (1993) 2 SCC 373; *D.K Basu v. State of West Bengal* (1997) 1 SCC 416; *Rudal Shah v. State of Bihar* (1983) 4 SCC 141.

<sup>5</sup> 2000 Cri Lj 4459

<sup>6</sup> *Moheela Moran v. State of Assam* (2000) 2 Gau LT 504; *Phoolwati v. NCT of Delhi* 2000 Cri. LJ 1613; *Ajab Singh v. State of U.P* (2000) 3 SCC 521; *Laxman v. State of Rajasthan* (2000) 3 Raj. LW 1469

new break through in crime control consonant with human rights and curative curial compassion.<sup>7</sup>

There is a daily routine of outcry over the rampant custodial deaths prevalent in the jails of Jammu and Kashmir. In last five years about 220 personnel were found blameworthy and were castigated for human rights violations and custodial killings in the state. That is why the situation of inordinate killings in police custody is not new and more than 300 deaths have occurred since the Muslim insurgency which began in 1989. It was the time when Kashmiri Muslims felt marginalised by the policies formulated by the Central Government and the mass protests began. Indian security forces were accused of abominable human rights violations at that time. Large sections of the police have come to accredit that the only way to perform their role of peace-keepers and dependable protector of common men is to meet violence against the perpetrators with all the weaponry at their command. So much so that torture and third degree treatment is resorted in the ordinary course, not only to make criminals open their mouth but also to make hostile witnesses reveal details about the wrong doers and many a times coerce innocent men to confess crimes which they have never committed. Judicial punitivity must be qualified by the philosophy of reform and not retribution and stern preventions must be made for inflictions, sadistically masked as deterrence but actually proving to be counter-productive.<sup>8</sup> Many such episodes result in custodial deaths. In the policemen's ardour to prevent anticipated violence and ensure justice to the criminals which may not be possible through long drawn out court cases, they take law in their own hands and eliminate such persons by kidnapping and fake encounters. Many such allegations pour out from the Kashmir valley and are yet unnoticed. For years the families of the victims have been running from pillar to post seeking justice for the victim who was killed in a fake encounter and branded as a foreign national or a 'Fidayeen'.

On analysing particularly the above figures, in the past decade the number of custodial deaths and violence reach the courts regularly even as courts have been imposing compensation holding the state liable for several acts committed by the police or other employees. In *Moheela Moran v. State of Assam*<sup>9</sup>, *Phoolwati v. NCT of Delhi*<sup>10</sup>, and in other cases of custodial deaths, the court gave the verdict upholding the applicability of the doctrine of vicarious liability. India is in a position of relativity and is aiming to evolve the new and

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<sup>7</sup> V.R Krishna Iyer : *Constitutional Miscellany*, 2<sup>nd</sup> Edn (2003) p. 151

<sup>8</sup> V.R Krishna Iyer : *Constitutional Miscellany*, 2<sup>nd</sup> (2003) p. 152

<sup>9</sup> (2000) 2 Gau LT 504

<sup>10</sup> 2000 Cr Lj 1613

flawless concepts of law. It is forming an admixture of law, a hybrid idea that is complete in every sense. This law brings the essence of constitutional law in consonance with that of the Tort Law, and helps to strengthen the inherent sense of natural justice reflected in our evolving legal complex.

Being aware of pathological fall-out of social entropy and poignant primitivism in our One world, jurists and other officials must harmonize their skills so that homo-sapiens may soulfully enter into an era of symphony and harmony.<sup>11</sup> Along with the formulation of legislations relating to prisons, we are in an exigency to shape up the institutional implementation. For the same NGO's and other departments must become pro-active and plan to organise surprise visit to police lock-ups in the Capital and other States to control cases of brutality, torture and monstrous acts of the officer in-charge. The visits so organised must check whether the prescribed rules and regulations as also given in the Prison Act 1952 and Prison Rules 1999 were complied with or not. Whether the name of the arrestee has been entered in the register, whether the person has undergone a medical examination, conditions of sanitation and hygiene in the lock ups, hospital setting of penitentiaries and healing hope of rehabilitative techniques fall within the large rubric of law. Such surprise visits will ensure prevention of any illegal acts of policemen and higher authorities and will expose if any such activity is carried on. Correspondingly, we must aim to transform the temperament of the officials in-charge to deal with such situations in a more humane way. In spite of all reiterated efforts, torture and custodial deaths is the cause of worry. "*Gundas in wardi* have lost their vision and losing their vision is worse than losing their sight." The perpetrators of crime go scott free since no law in our country is able to resolve the present problem effectively. It is almost unexpected that justice remains a dream for most of us and the payment of a small amount of compensation to a few oppressed is posed to be a benevolent act rather than a piecemeal gesture by a debased system. Social justice at a higher dimension of penological development can flourish only if a jail milieu and penitential atmosphere is fashioned where society offers scope for the free expression of the full potential of every human inmate and for the gradual lessening of their seething psychic aggressiveness and unresolved inner tensions.<sup>12</sup> However, the Constitution stipulates as one of the directive principles of state's policy to endeavour to foster respect to international law and treaties which are based on principles of natural justice which establishes a progressive society in a

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<sup>11</sup> V.R Krishna Iyer : *Constitutional Miscellany*, 2<sup>nd</sup> (2003) p. 148

<sup>12</sup> V.R Krishna Iyer : *Constitutional Miscellany*, edi. 2 Eastern Book Company, Lucknow, 2003 p. 152

quantum leap of creativity and awakened to a high destiny, no longer sick or savage or victim of stress, neurosis and breakdown. What adds to the fury is a repeated refusal of India to ratify the UN Convention against torture and other cruel, discriminate and inhumane acts. It is right to say “Accept what you cannot change, change what you cannot accept”, the present problem is the axis of our worries.

My ardent concern is that the State cannot debase bastilles by zoological bestiality inflicted on criminals. It is psychiatric nonsense and medical menace to inflict injuries as a healing process. It is nobly believed that criminals are made and not born, and are curably human and not irredeemably brutish.

Crimes are the psychotic syndromes and patients suffering from this must be healed by medico-legal recipes inside prisons where social beings are kindled and not killed.<sup>13</sup> But I will take a stand that “Why are prisoners still treated as alien in the lay mans land”. Our aim is to strive towards the goals of creating a just world where avoidable suffering and noxious negativity is extirpated and plentiful love, concern overflows because every life in this world is painted by God and we are no one to make anyone’s life colourless. To boost the morale of all those who are travailing to end continuous human rights violations, Thomas Alva Edison said that, “I will not say that I failed 1000 times, I will say that I discovered there are 1000 ways which can cause failure.”

We still confide in our police authorities because they are trying fervently to doff the dust off their coats. They have the courage to lose the sight of the shore and by carrying this attitude only new oceans can be discovered. Believing in their reiterated efforts it is not far to say that Kalyug will usher in Ramrajya.

***“Seeking Policewaalas efficacious brace but not in a way like old wine in a new bottle”***

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<sup>13</sup> Ibid, p. 152

