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Custodial Torture: A Preventive Framework

Dr. S.K. Singh
Associate Professor, T.D. Law College
Pili Kothi, Jaunpur

Custodial torture, death in lock-ups, strikes a blow at the rule of law, which lays down the basic tenet that the power of the State should not only be derived from law but the same also be subject to law. However, the magnitude of such an infraction of an individual's freedom liberty and dignity is compounded as the same is committed by an agency of the State. Which is entrusted with the duty and obligation td protect the rights of the citizens of the State.

"Torture" of a human being by another is essentially an instrument to impose the will of the "strong" over the "weak". In all custodial crimes, the ambit of concern is extended beyond the infliction of bodily pain but also the mental agony which the the person undergoes.

Thus, it is contended that a proactive legal framework should be established by virtue of which the incidence of custodial torture can be minimized, if not the radication of this evil. The justice mechanism in a post-custodial torture scenario, viz., compensation of the victim or the investigation and punishment as to the perpetrators of the crime is far from perfect. However, a model whereby custodial deaths can prevented has to be devised as the previous models is more of a hangover from the retributive and deterrent models of justice, which in exclusivity hag ceased to be an effective recourse in criminal jurisdictions all over the world.

The Law Related to Self-Incrimination

It is contended that there exists, what can be best described a certain loopholes in the law related to self-incrimination. Which allow confessions, possibly made under duress to be admissible in a court off law. The primary questions to be addressed are the causative factors of custodial torture. A logical explanation is that torture is inflicted on the victim in order to extract information which may lead to a conviction in a court of law or any other information which may be required by an investigative agency. A criticism of such a view may be that the debate is: being oversimplified but a fitting response would be that if the core issues are addressed, the peripheral issues will automatically become easier to tackle.

The Legal Anomalies

The wording of Section 27 of the Indian Evidence Act 1972 makes it clear that it is imperative that the person giving information leading to the discovery of a relevant fact. in this case an accused providing information in the course of police interrogation. (i) Should be accused of an offence. i.e., this does not merely have to be one in a number of suspects being questioned and (ii) should be in custody at the time of giving the information.

However, the second requirement may give rise to an anomaly in those cases where the information is gives to a police officer. The anomaly is that information given to a police officer by a person in custody is relevant in court if it leads to the discovery of a fact, whereas no portion of the information given to a police officer who is not in police custody is relevant, even if leads to the discovery of a fact. The Apex court in State of U.P. V. Deoman Upadhyaya, when it faced the alternative of declaring this provision of ultra vires, explained such an anomaly as a consequence of reading together Section 27 of the Evidence Act and Section 162 of the Criminal Procedure Code.

Furthermore. it is contended that the Supreme Court by the process of interpretation has taken away the protection given to an accused against self-incrimination. Section 25 of the Evidence Act stipulates that no confession made to a police-officer shall be proved against a person accused of an offence. By holding that Section 27 is an exception to Section 25 of the Evidence Act is State of

Bombay v. Kathi Kalu Oghad, because as a natural corollary to the proposition that Section 27 is a proviso to Section 95 is that information leading to the discovery of a relevant fact could be given to anyone including a police officer. Although in the case. the Supreme Court pointed out that if the accused showed that he was compelled to make a statement before the police vide questionable means he could claim the privilege against self-incrimination contained in Article 20(3) of the Constitution. However, it is contended that such a protection is illusionary and is effectively is a facade. The reason being that is throws an almost impossible burden upon the accused (victim). How can the accused, if "compelled" in a police station ever Satisfy a Court there was compulsion? Thus, the need of the hour is that the protection. Should lie in a process of checks and balances in the investigative level itself to prevent such an atrocity rather than in a situation where the wrong has already been committed.

The Rule against Self-Incrimination

The broad submissions which lay down the rule against self- incrimination is such that any proceeding in a court of law, on the ground of refusal to answer questions while in police custody while in police custody under Section 179 of the Indian Penal Code, would be deemed illegal and unconstitutional as this charge would be unsustainable due to the protective umbrella of Article 20(3) of the Constitution and Section 161(2) of the Criminal Procedure Code.

The above question was addressed by the Supreme Court in Nandini Sathpathy v. P.L. Dani The first issue before the Court was whether the person has to be an accused when the particular person seeks the protection of Article 20(3). The Court extended the ambit of Article 20(3) and enlarged its application beyond the technically accused Person, i.e., a person against whom a Charge-sheet has been filed In the opinion of Krishna lyer, J., that the rule against self-incrimination extends not merely to accusation registered in police stations but also that are likely to be the basis for exposing a person to a criminal charge. Moreover, it explored the exact meaning of "witness against himself". It postulated that the term included "any giving of evidence or furnishing of information is sufficient to attract this Article including the investigation at the police level." Thus, the interpretation of Article by the Court was from a protectionist standpoint, in accordance to the principle of *neno tenetur Se ipsum accusare* a man cannot represent himself as guilty. In respect to Section 161(2) of the Criminal Procedure Code, the Court stated part "expose himself to a criminal charge" is applicable not only in cases where the person is already exposed to a criminal charge but also instances which will imminently expose him to a criminal charge.

The American Experience

Whigmore, a leading authority on evidence, reflecting on the law prevailing in 1940, pointed out that a confession was not "inadmissible because of any illegality in the method of obtaining it" or "because of any connection with privilege against self-incrimination'.

The Supreme Court of America first evolved a test based on the "due process clause". In Rochin v. California,Frankfurter. J., pointed out that "involuntary confession are inadmissible under the due process clause even though the statements contained therein may be independently established as true because they offend the community sense of fair-play and decency". Thus, the most emphatic statement of the "police methods rationale" appears in Rogers v. Richmond, where the Court in concurrence with Franfurter, J., held that "convictions based on involuntary confession must fall not so much because the confessions are unlikely to be true but because the methods used to extract them offend the underlying principle of enforcement of our criminal law'.

Consequently, the Supreme Court of America evolved the 'due process "voluntariness" test' for admitting confessions. This test works on the "untrustworthiness" rationale. Which views that rules governing the admissibility of confessions were merely a system of safeguards against false and induced confessions In Ashcraft v. Tenesse the

extended police questioning to which the appellant had been subjected to was argued "inherently coercive" and "questionable". The Court ruled that the defendant's confession should not be allowed into evidence. In the author's opinion, under the circumstances. Ashcraft seems to reflect less on concern with the reliability of the confession but more on the disapproval of police methods which the Court considered dangerous and prone to abuse.

However, the Judiciary soon grew enchanted with the "voluntariness test" and turned to the protection of the "right to counsel principle'. Such an disenchantment was caused as there were many variables in the equations of the former, i.e., the suspect's age, _ intelligence, education and prior criminal record, whether he was advised of his rights; the use or threatened use of violence, that one determinant served as an useful precedent to another, the test offered neither the police nor the Courts much guidance.

Following such a principle, the Court threw out the confession in Escobedo v. Illinois, even though Escobedo had been interrogated - before "judicial" and "adversary" proceedings had commenced against him. As the Court saw it, the "right to counsel" approach to the confession problem threatened the admissibility of even "volunteered" statements.

In a consequent development, the Court built a confession doctrine on the privilege against compelled self-incrimination. The question before the Court was whether the American Constitution prohibited the use of all confession made after arrest because questioning, while "one is deprived of freedom', is "inherently coercive'. The Court's opinion was in the affirmative in Miranda v. Arizona', where by a 5-4 majority, the Court stated that the Constitution does prohibit use of all confessions obtained by "incustody questioning" unless "adequate protective devices" are used to dispel the coercion inherent in such questioning. The protective devices were deemed necessary to neutralize the compulsion element inherent in the interrogation environment and is now known as the familiar "Miranda warning".

Other Safeguards

Right to Counsel

On the examination of the question at to whether a right to counsel exists has to be made in a schematic mode of understanding. The question for examination are at what stage of the entire criminal proceeding, legal counsel should or must be made available to the accused or a arrestee.

In light of Article 39A of the Constitution, and the resultant interpretation by the judiciary in Madhav Hoskot v. State of Maharahtra, the Supreme Court interpreted the Article in a stricter interpretation. Krishna Iyer, J., took cognizance of Article 8 of the universal Declaration of Human Rights and Article 14(3) of the International Covenant of Civil and Political Rights, both of which guaranteed "the right to be tried in his presence and to defend himself in person or through legal assistance." The interpretation has been thus that the three provisions have been held to be synonymous. Such an interpretation has been held to be a tool to Article 21, especially in the post Menaka Gandhi dictum. Whereby Article 21 has been held to be a "reservoir of un-enumerated rights" and any right which has not been explicitly stated, the right, if held to be "an inviolable portion of the basic tenets of justice and equity", the right flows automatically flows into Article 21.

However, it is contended that such a right to legal counsel should extend to an accused in the pre-trail stage. Applying the "right to counsel" test evolved by the American Supreme Court in Miranda, an explicit right to counsel should be made available to an arrestee or any individual in custody. The scope of such a right should encompass the | fact that an individual should have the choice to legal counsel before or during any questioning by the police authorities.

The D. K. Basu Dictum

The Supreme Court in D. K. Basu v. State of West Benga, laid down certain guidelines with respect to the rights of the arrestee, and made such guidelines mandatory to be followed by the police. However. Although such a step by the Apex Court is applaud able, the interpretation of the Court can be criticized. The Hon'ble Dr. Anand, C. J., in his judgement

has stated in one of the guidelines that "the arrestee may be permitted to meet his lawyer though not for the entire period". It is contended that such a stipulation has wavered in the fundamental approach towards the arrestee's rights. And that such a stipulation lays the ground for discretion at the hands of the police and consequently allows the possibility of misuse by the police. It is obvious that the mere presence of a lawyer with the arrestee would be a disincentive or deterrent to the police from employing any illegal means to extract information.

Moreover, it is contended that the notion of lacuna within the criminal justice mechanism is well founded. To illustrate such a proposition, it can be seen that even after the landmark case of Sunil Batra v. Delhi Administration, wherein certain codes of conduct and minimum standards for the humane treatment of prisoners was laid down. it is lamented that in the case of Prem Shankar Shukla v. Delhi Administration it was shown that the judgement of the Apex Court had no practical effect on prison administrators as handcuffs were widely used to take prisoners to court and prisoners were chained without cause. Consequently. in Kishore Singh v. State of Rajasthan' the complete violation of the norms laid down by the Supreme Court, Kishore (the appellant) was kept in solitary confinement without cause.

The Reverse Onus Clause

The judiciary has in several occasions laid down that in matters of investigation into alleged instances of custodial torture. "Exaggerated adherence to and insistence upon the establishment of proof beyond reasonable doubt by the prosecution" during a trial investigating into police excesses, "ignores ground realities". Reasons which can be attributed to such an opinion are that the fact situation and the peculiar: circumstances of a given case of custodial torture makes the nature of the task extremely difficult. The legal framework, in its "innocent till proven guilty beyond reasonable doubt" model does not facilitate justice as the very upholders of the rights of the individual are the alleged perpetrators in the case.

Thus. it is contended that the courts should not encourage such an unrealistic approach, which defies any logical limits of pragmatism as there would hardly be any evidence available to the prosecution to directly implicate the accused. This is because atrocities within the police station are left without any direct or ocular evidence to prove that they are the offenders.

Consequently, in the Syamsunder Trivedi case, The Supreme Court has taken into cognizance the recommendations of the Law Commission of Indi whereby the principle that the Court May presume that a particular injury was caused by the police personnel having Custody during that period, unless the police can prove to the contrary. This amounted to shifting the burden of Proof to the prosecution to the accused. Thus, the onus on the Prosecution would lie to the extent to prove injury suffered during the time period of custody by the police. No direct or indirect complicity in the injury suffered with the police is. Required. This is adequate for the court to presume that injuries were inflicted during by the Police officer who was in custody. Thus, the same is adequate for a conviction, however, such a presumption is rebuttable and justifiably so in the interests of equity and justice. The burden is on the accused to prove that the injuries were not inflicted by the him/her, beyond reasonable doubt.

Conclusion: Suggested Legislative Amendments

The need of the day is legislative action whereby the representatives of the citizens of the nation can protect the very principles of freedom and liberty of a democratic form of government. Thus, In light of the above mentioned arguments. it is contended that certain amendments in Various laws of the Criminal justice system.

Section 26 and 27 of the Indian Evidence Act, 1872 which determine the conditions for determining the relevancy of confession and admissions by an individual, possibly under interrogation or in custody should be amended as follows:

Section 26 - Confession made by an accused while in Custody of police not to be proved against him. No confession made by a person

whilst he/she is in the Custody of the Police shall be Proved against such a Person, unless it be made in the immediate presence of a Magistrate, after the accused has been given an Opportunity to confer with his/her legal counsel and has been appraised of the nature of the nature of the allegation against him/her.

The judicial interpretation accorded to such an amendment should that the requirement Stipulated in the case of judicial confession be mandatory and not directory. There should be a written statement to the effect that the accused has been appraised of the nature of the allegation against him by legal counsel, before such a confession is deemed relevant and admissible. Moreover, this would allow true confessions by accused who may in a state of remorse want to make amends for their crimes and confess. Such an amendment will allow the burden on the Courts to be eased and speed the trial process. As a consequence of the amendment, the scope for debate in trial as to the: relevancy of a confession made will be minimized. More importantly, such an amendment would incorporate the "legal counsel" test, which has been incorporated in the American justice mechanism after the Miranda ruling.

Section 27 L How much information received by the accused may be proven. Provided that. when any fact is ; deposed to as discovered as a consequence of information received by a perso in the custody of the police, so much of such information, whether it amounts or a confession or not, as related directly to a fact thereby discovered, which would have a tendency to expose him to a criminal charge, may not be proved.

Such an amendment will take away the requirement of the applicability of Section 27 that the person has to be an accused, as per the dictum in Suresh v. Stat. Under the Indian accusatorial system an individual is an accused only after the suspects formally charge-sheeted. This will allow a protection provision to individuals under investigation.

The insertion of Section 114B in the Indian Evidence Act as per the recommendations of the 113th Law Commission of India.

Section 114B. (1) In a prosecution (of a police officer) for an offence constituted by an act alleged to have caused bodily injury to the person, if there Is evidence that the injury was caused during a period when that person was in custody of the police, the Court may presume that the injury was caused by the police officer during that period.

(2) The Court, in deciding whether or not to draw a Presumption under sub-section (1), shall have regard to all the relevant circumstances. Including in particular, (a) the period of custody, (b) statement made by the victim as to how injuries were received, being a statement admissible into evidence, (c) the evidence of any medical practitioner who may have examined the victim, and (4) evidence of any Magistrate who may have recorded the victim's statement or attempt to record it.

This recommendation by the 113th Law Commission was prompted by the case of State of U.P. v. Ran Sagar Yadav", where a police officer accused of a death caused by injuries in custody was acquitted for lack of direct evidence even after logical complicity with the cause of death was proved. Thus, the principle of reversal of the onus of proofs in investigation of alleged incident of Custodial torture as accepted by the Supreme Court in the Syamsunder Trivedi case would receive legislative sanction, which is imperative to sustain the democratic set up of the Indian State.

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