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# Custodial Torture A Blatant Infraction of Human Rights and its Reparations

## Nilabati Behera V. State of Orissa [AIR 1993 SC 1960]

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### ABSTRACT

*THE MOST dangerous cocktail in a democracy is when those who are meant to enforce the law take the law into their own hands. The most unfortunate aspect of custodial violence is that it ambushes at the very root of the ethos of the rule of law which shatters the confidence of citizens towards democracy and criminal justice system. If a person is maliciously confiscated by police, the court can order his release. But what if the remedy loses its meaning even before the court gets an opportunity to hear the case? What if the person cannot be presented in court because he has died while in police custody? A writ petition in such a case would be meaningless. Howbeit, things turned out differently after the compensatory case.*

### I. INTRODUCTION

Deaths of a father-son duo, P Jeyaraj, 62 and J Bennix, 32 from alleged police brutality during judicial custody in Tamil Nadu stirred outrage in the country. This was not a stand-alone case of police brutality during custody, the number of reported custodial deaths are increasing in the country at an alarming rate. As per a report published by the National Campaign Against Torture,<sup>2</sup> around 1,731 people died in custody in India. Most of these deceased belonged to the marginalized sections of the society and more often than not custodial torture is used as a weapon to suppress the individual and when things go out of hand they are often disguised as the previous injuries or go unreported. Though a criminal trial awaits the accused police officials for these deaths and justice shall be served in due course of time. But one must wonder about the family that has just lost a beloved family member (often the bread bearer of the family) at the hands of protector of law. Though the loss of life can't be calculated in terms of money, but monetary compensation is needed for the survival of the families.

The Constitution of India does not expressly mandate the granting of compensation for

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<sup>2</sup> Report published by National Campaign Against Torture, available at <http://www.uncat.org/wp-content/uploads/2020/06/INDIATORTURE2019.pdf> (accessed on 18-07-20)

unlawful detention or custodial death. For this purpose, article 21 of Indian Constitution<sup>3</sup> is considered of widest amplitude as it imbibes within itself the right to compensation. This “compensatory jurisprudence” is a paradigm of Supreme Court’s judicial creativity which has been evolved to discharge the burden of vulnerable section of the society from “long drawn out legal proceedings”<sup>4</sup> Nevertheless, this right is included in International Covenant on Civil and Political Rights, 1966 (the ICCPR). According to article 9(5) of the ICCPR:

“Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

India is the largest democratic country who, owes its obligation to the international community acceded to the ICCPR in 1979. Albeit, Indian judiciary in the early decades after independence recognized illegal detention and custodial torture to be violative of fundamental “right to life”, the remedy for breach of public trust was confined to the following<sup>5</sup>: Firstly, if the complaint pertained to illegal detention, the court ordered that the detained person be set free. Secondly, if there was evidence of illegal detention or custodial violence, the court directed the concerned state government to hold an enquiry. Thirdly, if the court was not satisfied by the enquiry conducted then it can transfer the case to the Central Bureau of Investigation (CBI). Slowly but surely, the Indian judiciary recognized the need for granting price (compensation) for breach of public confidence caused by custodial torture.

## II. CRYSTALLIZATION OF RIGHT TO COMPENSATION

The Supreme Court acknowledged the need for granting compensation to the victim of custodial torture via a *habeas corpus* petition for the first time in the case of *Khatri v. State of Bihar* (also known as *Bhagalpur blinding case*)<sup>6</sup> In 1979 – 80, police officials at Bhagalpur Central Jail in Bihar cruelly blinded thirty-one undertrial prisoners by pouring acid into their eyes. As a reaction to this barbaric incident, the Supreme Court observed that it is high time, state authorities must prepare to “forge new tools and devise new remedies” for the meaningful enforcement of the right to life, else the right would be reduced to a “mere rope of sand”. It took another equally disturbing scenario to prompt the Supreme Court to award compensation for the violation of fundamental rights for the first time in *Rudul Sah v. State*

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<sup>3</sup> No person shall be deprived of his life or personal liberty except according to the procedure established by law.

<sup>4</sup> J.L. Kaul and Anju Vali Tikoo, ‘Revisiting Award of Compensation for Violation of Fundamental Human Rights: An Analysis of Indian Supreme Court Decisions’, [http://ailtc.org/publications/revisiting\\_award\\_of\\_compensation.pdf](http://ailtc.org/publications/revisiting_award_of_compensation.pdf) (accessed on 18-07-20)

<sup>5</sup> *Sube Singh v. State of Haryana* (AIR 2006 SC 1117)

<sup>6</sup> *Khatri v. State of Bihar* (AIR 1981 SC 928)

of Bihar<sup>7</sup>. In 1968, Rudul Sah was acquitted of a murder charge by a criminal court in Muzaffarpur, Bihar, yet he was detained in jail for fourteen years after that. The Supreme Court vociferously observed that any denial to grant compensation to him would constitute a grave injustice, tantamount to mere lip service to personal liberty<sup>8</sup> under article 21 of the Constitution. Consequently, the court awarded 30,000 rupees as a “palliative” for the illegalities done by the state. In the decade following, the Supreme Court awarded small sums of compensation as redress for the violation of the right to life under the Constitution. In *Bhim Singh v. State of Jammu and Kashmir*,<sup>9</sup> the Supreme Court with the zeal to balance the ideals of the liberation of an individual from illegal detention and subsequent payment of compensation was of opinion that a wrong done in illegal detention cannot be retracted by freeing the person. This implies, the illegality could not be “washed away or wished away” merely by freeing the person, in such a situation granting of compensation can improve the condition of the sufferer to some extent. In another series of incidents ranging from torture inflicted on female tenants<sup>10</sup> to that inflicted on undertrial handcuffed prisoners<sup>11</sup> by police officials, the Supreme Court through progressive judgements compensated helpless people. Finally, it was in the case of *Nilabati Behera v. State of Orissa*<sup>12</sup>, which is considered as one of the few accolades earned by the highest court of the land in the field of rights of undertrial prisoners, that the court systematically analyzed the right to seek compensation under article 21.

### III. FACTS OF THE CASE

In the instant case, the Supreme Court took a *suo moto* action on the basis of a letter sent by Nilabati Behera to Supreme Court, asserting that her twenty-two-year-old son (Suman Behera) had died in police custody.

On the infelicitous day of 1<sup>st</sup> December 1987, a police constable of Orissa police arrested Suman for allegedly committing the offence of theft. Barely a day after he was taken into custody, his dead body was found near a railway track. The respondents while discharging their responsibility for deceased’s death vociferously contended that the deceased had died because of the train which ran over him during the course of his escape from police custody. Howbeit, the medical evidence dismissed the possibility of injury in a train accident. The

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<sup>7</sup> AIR 1983 SC 1086

<sup>8</sup> Zia Mody, ‘Ten Judgements that Changed India’, Published by Penguin Random House, Gurugram, India: p.142

<sup>9</sup> AIR 1986 SC 494

<sup>10</sup> *Saheli v. Commissioner of Police, Delhi Police Headquarters* (AIR 1990 SC 513)

<sup>11</sup> *State of Maharashtra v. Ravikant Patil* ((1991) 2 SCC 373)

<sup>12</sup> AIR 1993 SC 1960

“lacerations” on his body depicted that he had died an unnatural death. The autopsy report further highlighted that all of Suman’s injuries were caused by “blunt objects” and could have been the result of lathi blows. As a consequence of this, his mother sought compensation, claiming that there exists an infringement of his son’s right to life under article 21.

Thereby, providing an opportunity to the Supreme Court to systematically analyze the right to seek compensation for infraction of article 21.

#### **IV. JUDGEMENT**

The three-judge bench comprising of Justice Jagdish Sharan Verma, Justice AS Anand and Justice N. Venkatachala, asserted that the nature of the remedy or award of compensation in a proceeding under article 32<sup>13</sup> by the Supreme Court, or by the High Court under article 226<sup>14</sup>:

“is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort.<sup>15</sup>”

Therefore, it can be construed that the sovereign immunity defence would not be available in public law proceedings under article 32 and 226 of the Constitution, though it could apply to proceedings in private law involving torts committed by the state. The court while elucidating the importance of awarding compensation for infraction of the right to life stated that it was an “acknowledged remedy for enforcement and protection” of fundamental rights. It stressed that it would be highly inequitable and unjust to expect a socio-economically disadvantaged person who did not possess the financial capability for enforcement of his rights in the tort of law – to pursue ordinary civil proceedings.

Consequently, the court awarded a compensation of 1.5 lakh rupees to Nilabati Behera and ordered the State of Orissa to initiate criminal proceedings against perpetrators. Until, this judgement, compensation was granted on an *ad hoc* basis, without any systematic and structured manner. However, after this stupendous progressive judgement, the court started putting efforts for granting compensation to victims in a judicious manner.

#### **(LAW)GICAL COMPENSATION**

No human life can be weighed in terms of money. However, granting of compensation to the victim is a small step for the greater good of mankind. Ever since the Supreme Court granted

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<sup>13</sup> Article 32 of the Indian Constitution guarantees the right to move the Supreme Court for the enforcement of fundamental rights.

<sup>14</sup> Article 226 of the Indian Constitution guarantees the right to move the High Court for the enforcement of fundamental rights.

<sup>15</sup> *Supra* note 11 at 1966

compensation in Rudul Sah, the quantum of compensation has been a vexed legal issue. After all, granting “inadequate or paltry sums of money” would only aggravate the wrong committed against an individual<sup>16</sup>. In the case of Lakshmana Naidu v. State of Tamil Nadu<sup>17</sup>, the court misconstrued the *modus operandi* for calculation of quantum of compensation. The petitioners claimed compensation of 5 lakh rupees for each of the three persons who died at the hands of forest officials. However, using the “multiplier method”<sup>18</sup> the court calculated the amount of compensation which was ought to be granted as 7 lakh rupees, but surprisingly, paid 5 lakh rupees (as the petitioners themselves claimed only 5 lakh rupees). This was viewed by many social activists as a regressive judgement as it went against the very philosophy of rule of law.

In spite of the dozens of cases acknowledging the right to award compensation as a facet of article 21, there is ambiguity as to the kind of case relating to custodial torture the compensation requires to be paid. The Supreme Court, in the case of Sube Singh v. State of Haryana,<sup>19</sup> tried to remove this ambiguity to some extent. The Supreme Court took the opportunity to define the range of cases where compensation would be awarded on an allegation of custodial torture. It specified three questions that any court must pose when debating whether or not to grant compensation for violation of fundamental rights: Firstly, was the violation of the right to life patent and incontrovertible? Secondly, was the violation gross and of a magnitude to shock the court’s conscience? Thirdly, did the custodial torture allegedly result in death or was the custodial torture supported by a medical report or visible marks or scars or disability?

Unfortunately, despite the socially motivated judgements by the courts, there is no uniformity yet in calculating the compensation amount. Different judicial benches across different courts have applied different approaches and methodologies. But one needs to ponder, whether the conferment of compensation amount serves the justice to the victims of custodial torture?

### **PRISONER’S WAITING FOR THE LIGHT AT THE END OF A LONG AND DARK TUNNEL**

Ironically, in spite of the vehement decisions by the Supreme Court condemning custodial violence, cases of custodial deaths are increasing at an alarming rate. In August 1986, DK Basu wrote a letter to the Chief Justice of India, requesting that:

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<sup>16</sup> *Supra* note 7 at p. 151

<sup>17</sup> (2006) 3 MLJ 764

<sup>18</sup> In multiplier method, the court for calculating the amount of damages take into consideration varied factors such as – number of dependents, age, nature of profession and future prospects of the deceased.

<sup>19</sup> *Supra* note 4

“the court should prescribe some strong modalities, for the manner in which India’s citizens should be treated in police custody”.

The Supreme Court taking a *suo moto* action in the famous case of DK Basu v. State of West Bengal<sup>20</sup> issued eleven commandments against custodial violence. These included conducting regular medical examinations of the person in custody, the right to inform a friend or relative of the arrest, access to a lawyer during interrogation and so on.

This reflects how seriously the judiciary wants to respond to the aspirations of the people and become a sentinel of human rights in India. However, it is very disappointing to know that despite of these guidelines the condition of prisoners in custody is deplorable. According to the statistics mentioned in “India: Annual Report on Torture 2019” published by “National Campaign Against Torture (NCAT)” approximately 1606 deaths happened in judicial custody and 125 in police custody, during 2019, thereby, logically speaking five such deaths per day<sup>21</sup>. (Let us not forget that these numbers do not reflect a large number of deaths that go unreported!)

## V. CONCLUSION

The Constitution of India does not incorporate any explicit provision which acknowledges the prisoner’s right to seek compensation for the custodial violence inflicted upon her/him. It was through judicial activism that courts through a catena of judgements reflected this aspect of the rule of law. When an individual is ravished in prison a tangible monetary compensation is awarded as an attempt to “undo the injustice done unto an innocent man”. Unfortunately, those in power used to dispense with this obligation by paying a meagre amount which indeed, is a blow on the very notion of dignity and human rights. What’s more miserable is that there is still no clarity on the amount of compensation – there is still a preponderant element of chance or “waywardness”<sup>22</sup> to it. Therefore, the need of the hour is – development of a unified jurisprudence for determining the quantum of compensation for violation of the right to life, otherwise, victims and their families might contemplate compensation case as a lottery (wherein amount will be determined by chance)!

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<sup>20</sup> AIR 1997 SC 610

<sup>21</sup> ‘Five Custodial Deaths in India Daily, says report’, [https://www.thehindu.com/news/national/five-custodial-deaths-in-india-daily-says-report/article31928611.ece#:~:text=A%20total%20of%201%2C731%20people%20died%20in%20custody%20in%20India%20during%202019.&text=Of%20the%20125%20cases%20in,\) %20and%20injuries%20\(one\)](https://www.thehindu.com/news/national/five-custodial-deaths-in-india-daily-says-report/article31928611.ece#:~:text=A%20total%20of%201%2C731%20people%20died%20in%20custody%20in%20India%20during%202019.&text=Of%20the%20125%20cases%20in,) %20and%20injuries%20(one).). (accessed on 19-07-20)

<sup>22</sup> *Supra* note 7 at p. 155