**Questionnaire**

*The Special Rapporteur would be particularly interested in receiving information on:*

1. *Existing practices for data gathering, analysis and reporting of deaths in custody, including the use of statistics and the disaggregation of data (e.g. by different categories and causes of deaths in custody; place of occurrence (e.g. on remand, in prison, in hospital, etc.); types and legal status of affected populations, etc.), including figures of deaths in custody documented in recent years;*

Custody-related death is an internationally key sensitive issue with respect to Human Rights. The causes of death and associated factors in this vulnerable population vary according to country and region. MASUM has been fact finding incidents of custodial deaths in the state of West Bengal and lodging complaint to different national and international forum for proper investigation of the custodial death and punishment of perpetrators in uniform. In the 2021 and 2022 MASUM did fact finding of 8 custodial death incidents among them 5 deaths were in police custody, 1 death in jail custody and 2 deaths in armed forces (BSF) custody.

Our fact finding investigations have showed that deaths in police and BSF custody were commonly the result of torture of suspects, which is part of routine policing practice in India. Instances of custodial torture, we found, were rarely directly reported, given the power of the police over torture survivors. The brutal truth remained that it was through their deaths in police custody that we learnt of most victims of custodial torture – as many custodial deaths were the unintended consequence of torture in police custody. The repetitive nature of custodial deaths in the state of West Bengal, have shown the systemic and rampant nature, deep pervasiveness and centrality of custodial violence and torture in the practice of policing in the state of West Bengal.

It is significant that this remained so despite the Supreme Court of India’s judgment in D.K. Basu vs. State of West Bengal [1997 (1) SCC 416] that laid down norms for arrest and like several others Constitutional safeguards and laws and judgments, issued strictures against torture in custody.

<https://indiankanoon.org/doc/235756/#:~:text=592%20OF%201987%20O%20R%20D%20E%20R%20On,measure%20to%20prevent%20custodial%20violence>.

Most of the cases we found that how justice eluded the victims as criminal proceedings against the accused perpetrators in uniform and their conviction by the judiciary are less in number in case of custodial death. This was because investigation into custodial deaths were often scuttled from the very beginning, with police using all kinds of delaying tactics to suppress the matter, from denying that it was a custody death, to setting up an internal inquiry and not registering any First Information Report, with higher ranking police officers often defending the policemen involved at the local police station. Systematic and continued impunity was the institutional answer to custodial deaths.

Further, the whole process of inquest and inquiry lacked transparency. Post-mortem reports of the victim were not easily accessible to even their family members. Mandatory judicial magistrate inquiries took years to complete, and even then the inquiry reports were not made public. In addition to this denial of justice from the criminal justice system, there was no institutional mechanism for speedy and automatic award of compensation in custodial death cases, leaving the hapless families of victims without even a financial support. An extreme fact is that the socio-economic vulnerability of the majority of the victims in cases of custodial deaths. Most of them are from marginalized sections (Dalits – untouchables, tribes and religious minorities – Muslims) whose deaths, like their lives, seemed to be of little importance to the wider society.

Further, in the state of West Bengal, the police did not obey the guidelines of National Human Rights Commission about custodial deaths and inquiries into such incidents are being not conducted by the Judicial Magistrate.

National Crime Records Bureau (NCRB), Union government’s record keeping agency in its official website publishes a list where they revealed there is not a single case of custodial death in the year of 2018 and 2019, but we lodged complaint before NHRC regarding 3 custodial death cases in correctional homes and 5 custodial deaths in the year 2019 among which one in police custody, one in jail custody and other three in BSF custody. In 2020 we complained of four cases of custodial deaths among which one died in police custody and three others in correctional homes. We are working in little space in the State of West Bengal and many such incidents are happening every day without our notice. However, the number of cases we have complained to NHRC, National Crime Records Bureau has not mentioned in their report. We are seeing that the number of deaths in custody is increasing day by day in the State of West Bengal.

Except police officials there are Border Security Force personnel in the porus border of Indo-Bangladesh border area where they in the name of security and safety of the country and stop smuggling activities apprehend smugglers or even sometime apprehend any innocent person out of suspicion and after that committed brutal torture upon them to confess their guilt or to teach a lesson, which leads to their death. But these types of cases were not categorized and NCRB did not publish how many people were victimizing of custodial violence by the armed officials. From 2015 to till date we lodged complaint of more than hundred cases where people were victimizing custodial violence by BSF and three deaths in their custody.

For Your ready reference,

* There are about 16700 regular police stations in India. There are also another 20000+ stations / interrogation chambers of other police forces and armed forces in India.
* Those lock-ups does not have CCTV installation
* Incidents of Torture / Deaths / Rapes in the custody of armed forces are not reported, as they are excluded from RTI (Right To Information) Act
* NHRC India has no power to investigate in the cases of abuse of human rights alleged done by armed forces (Section 19 PHR Act, 1993)
* The Criminal Procedure Code, Penal Code, Police Act, the criminal justice system of India, all were established when India was under colony.
* The medical officers attached to government hospitals are reluctant to record medico legal aspects an injured / dead prisoner to avoid police harassment and / or to attend proceedings at court.
1. *Measures in place, including policies and good practices for investigating, documenting and preventing deaths in custody, in particular:*
* *Which legal provisions and requirements exist for cases of deaths in custody? (e.g. is an investigation into a death in custody mandatory or discretionary? Who is responsible for the decision and for the investigation?) Investigation procedures and accountability mechanisms for deaths in custody (e.g. administrative, judicial or other investigatory body?*

One of the worst crimes in a civilized society under the Rule of Law is perhaps the death in custody. The Constitutional inherent rights, outlined in Articles 21 and 22 (1) must be diligently and fiercely preserved. The right to live with dignity has been interpreted to include “life or personal liberty”. As a result, it would also include a prohibition on torture and other forms of physical violence by the State or its representatives. Even the priceless right protected by Article 21 enshrined in the Constitution of India cannot be denied to convicts, under trials and other prisoners in custody.

International laws with Constitutional provisions

Article 7 of the ICCPR is reflected in Article 21 of the Indian Constitution, a non-derogable right. Torture is a well-established tool used by the police or forces in uniform for investigation. In tune with International Human Rights instruments against torture, the Constitution emphasizes respect and honour for human dignity and fundamental rights. Torture has not been well defined in the Constitution or other penal laws. Article 21 of the Constitution only provides that “no person shall be deprived of his life or personal liberty except according to procedure established by law.” Life and personal freedom has been held to include the right to live with human dignity and include within its ambit a personal guarantee against torture or cruel, inhuman, or degrading treatment or punishment that can move to the higher courts for judicial remedies under Article 32 and 226 for deprivation of Fundamental Rights. Article 22 guarantees protection against illegal arrest and detention by police or other state personnel in uniform. It declares that no person shall be detained in custody without being informed about the grounds of such arrest. It cannot be denied to consult and defend by a legal practitioner of his choice. Article 22 also directs that person arrested and detained in custody shall be produced before the nearest Judicial Magistrate within 24 hours of such arrest. Article 20 (3) provides that the accused shall not be compelled to witness against himself as this would amount to self-incrimination.

Legislative safeguards

Section 330 and 331of the Indian Penal Code provides punishment for injury inflicted for extorting confession. The former is in case of simple hurt and the latter for grievous hurt. Crime of custodial torture against prisoners can be brought under section 302 (Murder), 304 (Culpable homicide amounting to murder), 304A (Causing death by negligence) and 306 (Abetment of suicide).

Section 54 of the Code of Criminal Procedure 1973 confers upon the arrested person the right to examine himself medically.

A confession made to the police officer is not admissible in evidence under section 25 and 26 of the Indian Evidence Act, 1872

Section 162 of the Code of Civil Procedure also states that a police officer may not use a witness’s statement recorded for any reason other than to contradict his testimony in Court.

Section 24 of the Indian Evidence Act also provides that confession must be made voluntarily when admissible. If it is made under inducement, threat or physical abuse, it is inadmissible in criminal proceedings.

Investigatory provisions of Custodial deaths

The “brotherhood of the police and the state officials” would hinder the investigation as the police officials would prefer to remain silent on the same and not break the underlying ties of companionship. Even though in very few cases, the cases may be transferred to higher investigation authorities like CBI or SIT, but the prima facie evidence like the post-mortem reports may be destroyed in the procedure which would render the transfer futile. To counter this facet of the issue Section 176(1A) was introduced in the Code of Criminal Procedure, 1973 through the amendment of 2005.

With the addition of Section 176(1A) in the Code, custodial violence has been recognised in legal parlance as one of the brutal forms of crime. The Section stipulated that if:

* A person dies or disappears or,
* A woman is alleged to have been raped,

while such a person or woman was in the custody of the police or in any other custody as authorized by the court, then it is mandatory for the judicial magistrate or metropolitan magistrate, having competent jurisdiction, to conduct an inquiry into the matter in addition to the inquiry or investigation conducted by the police.

This provision is a special provision dealing only with the custodial offence. Therefore some of the essential characteristics of the provision are:

1. The inquiry to be conducted by the judicial or the metropolitan magistrate will run parallel to the inquiry or the investigation undertaken by the police authorities.
2. The provision poses a mandate on the magistrate to conduct the concerned inquiry. The word “shall” has been used instead of “may” which indicates the obligation imposed on the authorities.
3. Further, through the amendment, the executive magistrate ceased to be the relevant authority to conduct such inquiries. Rather the judicial magistrate or the metropolitan magistrate has been granted the duty to conduct the inquiry.

Registering an FIR even in case of custodial violence was held to be mandatory in nature under Section 154 of the Code which discloses that if any information is received regarding the commission of a cognizable offence then it should be reduced into writing. Similarly, Section 176(1A) deals with cognizable cases whereby death has occurred in the custody of the police or any other government authority. Therefore, it is requisite for the authorities to register an FIR in the case of custodial deaths.

National Human Rights Commission (NHRC) issued certain guidelines regarding video-filming and photographing the post-mortem examination if the death has occurred in police and jail custody. The recording must be then sent to the Commission for further inquiry.

The NHRC should be intimated about the custodial deaths within 24 hours of occurrence. Further, the NHRC has also set a deadline for submitting all the relevant documents and reports including the post-mortem report and magisterial enquiry report, after the completion of the inquiry, within 2 months of the incident.

Present situation

Though there are procedures laid in the statutory laws in the country, those procedures were not strictly followed by the investigating authority. Most of the custodial death cases where MASUM intervened there we found that for a rare amount of cases of custody related to death concerned Judicial Magistrate did inquire the case. Most of the enquiry was done by one executive magistrate along with police personnel and they were in joint nexus to suppress the issue.

While the Judicial Magistrate’s inquiries are now mandatory, a few key problems remain in this:

* The Magistrate’s report is not a public document, and there is no way for citizens to enquire if the report is completed.
* Further, the fundamental problem that remains is that the Judicial Magistrate is substantially dependent on the police for gathering evidence. While the Judicial Magistrate can call the families of victims and hear their testimonies independently, the police can influence the investigations in many ways.
* In most of the cases, families of victims were poor and otherwise under privileged and deprived as well. Relative to the power that the police can and do exercise on the families of victims on the ground, their ability to resist this kind of pressure, whether it be threats or bribery, is extremely limited. There was not any Victim and Witness Protection law present in the country which are able to give protection to families from local police.
* Given the shroud of secrecy around the judicial magistrate’s inquiry, it is difficult for the victim’s family to even communicate to the Judicial Magistrate any anxieties about and information of pressure by the perpetrators in uniform.
* Judicial delay is another problem and Judicial Magistrate cannot be held accountable by citizens for delays in their report.

We also found that in most cases of deaths in custody there are no independent (non-police/non-BSF) witness. In all of this type cases the police or the authority of the perpetrators in uniform are the sole witnesses. The need to collect evidence properly and ensure an independent investigation into these incidents is crucial to establish guilt in any offence. In incidents of deaths in custody, this seems nearly impossible under the present system.

According to the National Crime Records Bureau (NCRB), out of 76 total cases of custodial deaths in 2020, 31 were recorded as suicides and 34 as being caused by illnesses. Only one death was recorded due to physical assault in police custody.

<https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/TABLE%2016A.2.pdf>

Similarly, almost 90% of deaths in police custody have been attributed to illness, suicide or death from natural causes. But the family members of the victim knew the originality of the fact. Since there is no concrete evidence in the hands of the victim’s family, therefore, police version wins over. These police officials are the main source of information for the Judicial Magistrate and also wide power and authority in the local area where the family members of the victim still stay. Therefore, at last the police version might unfairly prevail in the official conclusion about the custodial death.

Most importantly, if we assume that the ‘suicide theory’ is not a cover up and that these persons did actually commit suicide then too this points to a very disturbing dimension of police functioning. It exposes the relentless pressure and trauma, apart from physical pain, that police inflict on those it detains, the experience or fear of which is so unbearable that it is enough to drive the accused to think of ending their lives. ‘Suicide theory’ have repeatedly given not only evoke the possibility of police complicity in these custodial deaths but their easy circulation and acceptance in official circles points to the lack of any institutional accountability.

Section 197 of the Code of Criminal Procedure which supports the ‘sanction theory’ is another obstacle to prosecute the perpetrator in uniform. The Supreme Court, in Devinder Singh and others vs State of Punjab through CBI, held that protection of sanction under Section 197 Code of Criminal Procedure was not available for offences which have no connection with official duties.

<https://indiankanoon.org/doc/71777130/>

In this case, a bench comprising Justices V Gopala Gowda and Arun Mishra upheld the argument of prosecution sanction for prosecution was not required in cases of fake encounter and custodial torture but in many cases lower courts rejected the petition of the victims family for the requirement of sanction to start prosecution against one government servant. As the families of the victim are from poor financial background, therefore, they cannot challenge the decision of the lower court to the upper judicial forum. Quasi-legal forum such as National Human Rights Commission or State Human Rights Commission either transferred the matter to the same police or called for report which was not an independent enquiry report or disposed the case ultimately. The quest for justice of the victim’s families cries out in silence.

Under 113th and 273rd reports of Law Commission of India, it was suggested that the burden of proof must be lies on prosecution i.e., police alleged that bodily injury occurs on arrested person were given in police custody or not. Moreover, suggestion was made to insert section 114B under Indian Evidence Act 1984, which provide safeguard to defence as presumption would made if in case evidence were found that such body injury cause during police custody. Law Commission, a statutory body of India and headed by Judges of Supreme Court of India, also suggested to ratification of UNCAT without further delay. But surprisingly, this suggestion is not implemented till date.

* *What is the level of forensic medical involvement in the investigation of deaths in custody (e.g. is a full post-mortem investigation required in every death in custody)? Availability and use of national or international protocols? (e.g. do investigations follow the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary or Summary Executions (1989) and/or The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)?)Are there procedures in place for facilitating the participation of victims’ families and their access to effective remedies?*

The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016) issued detailed guidelines on the investigation of the unlawful death but the present government did not show any interest to follow the guidelines of Minnesota Protocol for investigation of unlawful death. Even most of time post mortem of the victim’s body was performed by the DOMs (dead body carriers, who are *DALITs,* untouchables by caste) morgue attendants.

National Human Rights Commission, after ascertaining the views of the States and discussing with the experts in the field and taking into consideration the U.N. Model Autopsy protocol, has prepared a Model Autopsy Form for custodial death cases but ultimately this model form was not filled by the concerned autopsy surgeon most of the time. NHRC also became reluctant to use this form by the autopsy.

State actors like police, prison staff, military officers including their intelligence wing and non-state actors like criminal syndicates could be perpetrators. At times role of health professionals being passively involved cannot be ruled out. National Human Rights Commission of India has prepared specific guidelines to deal with all custodial torture and death cases. Role of a medical professional in documentation of various medico – legal aspects in a specified manner which they did not do.

It is most unfortunate that the police, local administration including district administration and doctors in concerned districts of West Bengal, Bihar, Jharkhand, Odisha, Andhra Pradesh, who are very integral part of investigation of a custodial death case did not documented properly of the injuries happened in the custody of police or armed forces and never implement the procedure which was recommended by the Istanbul Protocol, NHRC. Implement means to bring down incidents of custodial death and punish the truant officials, but it is evident from the number that the custodial violence and death either in police custody or jail custody or BSF custody are rampant in the State of West Bengal.

India should sign the UN convention against torture and should formulate domestic laws to deal with this issue. Police reforms guidelines should be formulated for the educating the police officers during training session specially on the matter of deprivation of personal liberty and such heinous practice can only be possible with the anticipation of the senior police officer so if such situation is trace then immediate reorientation of police officer should be done. In case of the imprisonment of the accused is done then his or her relatives should be permitted to access the accused for the inspection. CCTV cameras should be installed in every prison shell and in the interrogation rooms to access the activities of the police / armed force officers so their illegal action can be controlled. Senior police officer should visit surprisingly so that real face of the police officer can be trace out and this should be mandatory as it was suggested in the landmark D.K. Basu case[1997 (1) SCC 416]. There should be strict implementation of the 273rd law commission report. Police officer who commits custodial torture should be prosecuted criminally and deterrent action should be taken and held liable instead of taking administration action against such officers. The state is liable to pay the compensation in case of custodial death and in state should recover the compensation amount from the offender who commits this offence and separate tribunal/Board to deal with this matter. The most important thing is to introduction of monthly pension to the dependants of the victim of the custodial death. Section 30 of Protection of Human Rights Act, 1993 provides for establishment of Human Rights Court in every district of the country; which not implemented by the governments.