

2023

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Recommended Citation

Navaneeth SS, 'Policing the Police: Scrutinizing Police Brutality and Rethinking Right to an Attorney' (2023) 2 IJHRLR S.I. 114-118.

Available at www.humanrightlawreview.in/vol-2-special-issue/.

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POLICING THE POLICE: SCRUTINIZING POLICE BRUTALITY AND RETHINKING RIGHT TO AN ATTORNEY

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*They should enforce the law firmly and impartially, without fear or favor,
malice or vindictiveness²*

- Code of Conduct for the Police in India

Police, as an institution and a regulatory body, is an essential part of social structure. However, their role in maintaining law and order gives them copious if not a surplus of power with little to arguably the least oversight. These roles and police work, in general, are inconsistent, and arguably, the defining factor is their ability to use force to enforce the law.³ The need to maintain a balance between individual liberty and societal order while exercising the power of arrest is imperative. The capacity of using force to maintain law and order is only to be practiced after methods of persuasion, advice, and warning.⁴ However, there have been instances where this force used is rather excess and at times entirely unnecessary. Ever since the inception of the Police force, such heinous instances of police brutality, have existed in many forms, varying degrees and even in most developed countries. And while some of them are held accountable, there is a wide array of servicemen who are unfit for the force and fail to carry out what the institution stands for. As the Supreme Court said in *Prem Chand v. Union of India*,⁵ the

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² Guidelines to the Indian Police, Ministry of Home Affairs, available at <https://police.py.gov.in/MHA%20-%20Model%20Code%20of%20Conduct%20-%20Indian%20Police.pdf>, last seen on 26/06/2020.

³ C.F. Klahm & R. Tillyer, Understanding Police Use of Force: A Review of the Evidence, 7(2) Southwest Journal of Criminal Justice 214, 215 (2010), available at https://www.researchgate.net/publication/256255286_Understanding_police_use_of_force_A_review_of_the_evidence, last seen on 26/06/2020.

⁴ Supra 1.

⁵ Prem Chand v Union of India, MANU/SC/0191/1980.

need for Policing the Police is imminent and an absolute requisite. In this article, I will argue the viable alternatives to the status quo in police undertrials as well as the urgent need to reconsider the right to an attorney in India.

While most countries recognize their detainee's rights, a vast majority of nations implicitly lays the responsibility of deciding whether or not a person remanded is guilty upon the Police and fail to prevent them from being judge, jury, and executioner. Even in India, after almost seven decades of Independence, there has been little to no change in the criminal jurisprudence procedures meted out by the Britishers from the Pre-Independent or even the Victorian era. The 78th Law Commission of India Report states that almost 55 percent of all prison inmates are undertrials.⁶ While keeping undertrials among convicts, innocent people are subjected to a variety of difficult circumstances, most of which lead to a criminal path later on. It is, therefore, important that the undertrials be kept in either a separate facility altogether or in a manner that speaks to the possibility of them being innocent and treating them in that respect. In 2018 alone, there have been 147 custody deaths, an increase of 19% from 2009-2010⁷. The NHRC alone had compensated a sum of ₹8,52,95,000 for torture and custodial deaths⁸, however, all of these measures fail miserably as a deterrent and the number of cases only sees a drastic increase after every year. Unless and until a new, effective national law against torture is enacted and ratified, which can hold wrongdoers even within the force to be held accountable for their inhumane actions, these numbers and sickening practices will only increase over time. The Supreme Court in *Prakash*

⁶ 78th Law Commission of India Report, Congestion of Under-Trial Prisoners in Jails, 1882, 8 (1979), available at <http://lawcommissionofindia.nic.in/51-100/Report78.pdf>, last accessed on 27 June 2023.

⁷India: Annual Report on Torture 2018, Torture in Police Custody, 15 (2018), available at, <http://www.uncat.org/wp-content/uploads/2019/05/IndiaTorture2018.pdf>, last accessed on 27 June 2023.

⁸ Ibid.

*Singh v. Union of India*⁹ inter alia said every state must have a Police Complaints Authority where any citizen can file a complaint against policemen for any act of abuse of power. But only a few states have adhered to the direction. Being stripped naked, beating while handcuffed, beating after hanging upside down, pricking body with needles, and so forth are a few of the techniques police use very common to the point that it is normalized. The list goes on to grotesque crimes such as pouring petrol, applying chilli powder, penetrating needles to private parts, forcing to perform oral sex, urinating in mouth, and even kicking the abdomen of pregnant women.¹⁰ A majority of these heinous acts have been committed by police officers in states where the Police Complaints Authority has been established as directed by the Supreme Court. All these points to the urgent need for national legislation on police brutality and regulating custodial procedures, which is effective enough to prevent inhumane actions such as these and hold those who commit accountable.

A person may be asked to present in a police station through a notice to appear, either as a potential witness¹¹ or a suspect¹², either way, one's right to counsel is not given the least importance in Indian police stations. Even though the Indian Constitution grants every person arrested the right¹³ to know the grounds of said arrest and consult, a legal practitioner of his choice to defend him, people are unaware of said right. And there have been countless incidents across the nation where this right is prevented by police officers themselves. Especially those in rural areas, where people, much less, officers are unaware of the right to counsel. This calls out to the pressing need for a

⁹ Prakash Singh v. Union of India, (2006) 8 SCC 1.

¹⁰ Five custodial deaths in India daily, says report, The Hindu (27/06/2020), available at <https://www.thehindu.com/news/national/five-custodial-deaths-in-india-daily-says-report/article31928611.ece>.

¹¹ S. 160, The Code of Criminal Procedure, 1973.

¹² S. 41(A), The Code of Criminal Procedure, 1973.

¹³ Art. 22(1), the Constitution of India.

fundamental restructuring in the *status quo*. In *Miranda v. Arizona*¹⁴, the Supreme Court of the United States laid down that prosecutors cannot use statements made by suspects during interrogation as evidence during the trial if the said suspect was not made aware of his right to an attorney. This was the foremost decision in the American Jurisprudence which paved the way to a concrete Right to consult an attorney. However, this same right is not given the importance it deserves in India till date. This is arguably the main reason behind the failing regime that is, the Police Force. The failure to recognize, comprehend and accept the rights of suspects or even convicts apropos the right to consult an attorney, has given the citizens, especially those from marginalized sections, an unnerving feeling of fear and oppression while granting the Police, an unwarranted and inapposite Power. Hence a viable solution to put an end to police brutality in custody would be to ensure that every detainee, from the point of their arrest, is to make sure that they can pursue their right to an attorney and if they cannot afford one, they are given a competent one on behalf of the state. And if said right to an attorney is being refused by a police officer, then they shall be punished appropriately to ensure deterrence.

¹⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966, Supreme Court of the United States).