

Whether Sri Lankan Constitution has adequate provisions to recognize custodial death as a violation of the right to life; A comparative analysis based on landmark judgments made by the Supreme Court of India.

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Abstract - Custodial death one of the worst crimes in civilized society which is governed by the rule of law. The deaths of accused/suspects remain a very controversial topic not only in a particular country or region, but in the world and it has been happening for a quite long time in Sri Lanka. Sri Lankan Criminal Justice system sorely lacks substantial legislative provisions to regulate the right to life due to the fact that it is questioned whether any specific provision to address custodial deaths in the constitution. Many other nations have already recognized this right as fundamental and adopted comprehensive legislative provisions for custodial deaths. The constitution of India and Supreme Court of India has forbidden custodial torture in progressive manner. But it is questioned whether Sri Lanka constitutional provisions are adequate to address this issue, Hence, there is an urgent requirement to address this issue and to fix this deficiency in our existing justice delivery framework in order to set legitimate principles for custodian deaths. This study aims to analyze the main theoretical debates within the academic field in order to identify the current lacks of custodial deaths in Sri Lanka, to analyze how custodial deaths cases are handled within the framework of the Indian Jurisdiction and Sri Lankan jurisdiction and to use the finding of the study to make proposals and recommendations to use it in the human rights field. The qualitative method, including primary data and secondary data were used for this research. The study concludes that there are less and no adequate constitutional provisions available in the current constitution of Sri Lanka to address issues pertaining to custodial death comparing to the Indian Constitution. Hence, an urgent constitutional amendment is required to address the issue.

Keywords - Custodial Deaths, Human Rights, Protection, right to life, torture.

1. INTRODUCTION

Custodial deaths are referred to those deaths, while in custody of the law enforcement including Police, Prison or other Law enforcement authorities. According to the joint committee on Human Rights (JCHR) when the state takes away a person's liberty, it assumes full

responsibility for protecting their basic human rights. The most fundamental right is known as right to life. There can be various reasons for custodial deaths, such as natural illness, infighting amongst prisoners, due to suicides, but in many reported cases in Sri Lanka it is law enforcement's brutality and torture that constitute the reason behind such instances. The leading case namely **Sriyani Silva V. Iddamalgoda, officer in-charge Police station(2013)** is the most important case that proved the custodial death in Sri Lanka that the court put forward new interpretation to the constitutional provisions of Sri Lanka and impliedly identified right to life as a fundamental rights, later on several judgments had been made by the Supreme Court of Sri Lanka and give effect to right to life in indirect means ,but custodial death is considered as the biggest violation of human rights and is a brutal attack on the right to liberty and right to life of any individuals which is not directly guaranteed by the constitution of Sri Lanka. Therefore, the obligation of protecting the life of a suspect or accused/convicts lies with the state under state responsibility. Many judgments in relation with right to life had been made under the provisions of Article 11 and Article 13 (4) of the constitution so does the custodial deaths, but problem has arisen whether these provisions are adequate to protect right to life of any accused/suspects who are subjected to custodial deaths, hence, this paper will discuss available provisions of constitution to address this issue and further a comparative analysis is conducted to check whether Indian constitution has adequate provisions to address this issue comparing to the Sri Lankan Constitution and recommendations to be made accordingly. The law which concerns with the death in custody can be found in Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and European Convention on Human Rights (ECHR). The Human Rights Act 1998 which states that; "Everyone's right to life shall be protected by law .No one shall be deprived of his life intentionally save in execution of a sentence of a

court following his conviction of a crime for which this penalty is provided by law". It is well-established that Article 2 clearly provides that state should deprive you of your life, except in very limited circumstances. As mentioned in this article whenever someone is killed by a Police, Army or prison officer ,the act will always link to "right to life" due to the fact that Sri Lankan Constitution does not expressly recognizes the right to life as a fundamental right. On the other hand, and the Supreme Court has held that some fundamental rights in the Constitution implicitly recognize the right to life, But it is not progressive as the judgments made by Indian Supreme Court of India, hence, many people have been killed and are still being killed while in governmental official's custody due to the lacuna of the statutory provisions available in the constitution of Sri Lanka. The state it is responsible for the protection of its every individual, hence, greater necessity has arisen to address this issue and make some initial actions to protect rights of the victims of custodial death within the framework of constitutional provisions.

II. RESEARCH METHODOLOGY

The qualitative method is used for this research in order to collect information, especially secondary data will be used (internet and exiting writers Books (case studies) may be referred. The researcher shall be relayed on Primary data as well as secondary sources of data .The primary data being the 1978 Constitution of Sri Lanka, Ceylon Penal Code, Criminal Procedure code of Sri Lanka and also Constitution of India, Indian Penal Code 1860 and Code of Criminal Procedure 1973. Additionally, the researcher has referred International Conventions, Bills of Human Rights and International Principles and guidelines (Human Rights) , books, magazines articles of various authors that are available in libraries, leading journals, and newspapers, blogs and on the Internet.

In this study, the provisions of Constitution of Sri Lanka ,1978, Ceylon penal code, Constitutions of India, Code of Criminal Procedure of India,1973 and the Indian Penal Code,1860 shall be evaluated.

III. FACTS AND FINDINGS

A. Custodial deaths and human rights issues

The most fundamental fragment of human rights is the right to life .These type human rights that protect people detained by state falls under the law of Human Rights Act 1988. Many scholars argue that a death penalty or even

custodial deaths violate these rights. States have prime obligation and ensures protection of its people having enforced laws. They have more responsibility about person's protection once they take into the custody of the police for their unlawful acts. Therefore, if a suspect/accused dies while in custody, it raises a major human rights issue.

B. Sri Lankan Supreme Court rules against custodial death.

In the landmark judgment namely *Rathnayake Tharanga Lakmali v. Niroshan Abeykoon, (2019)* the Supreme Court of Sri Lanka held that the extra-judicial killing of a suspect in Police custody violated the right to life of the victim. , despite the absence of an explicit right to life in the 1978 constitution of Sri Lanka the court awarded state to pay Rs. 1 Million as compensation to the petitioner. The petitioner ,the deceased wife had claimed that police arrest of the deceased and also the detention were illegal, so that the deceased was subjected to torture, cruel, inhuman and degrading treatment and that the victim was killed by the police during the custody, in this case several Police officials attached to the Embilipitiya police station were made responsible. In this case the court further argued that taking the deceased, without sufficient security, has contravened the Police standing order A20 which need police officials to provide sufficient security when there is a possible course that the suspect might escape or be hostile, due to the fact that the court found that scant disregard of these rules and sufficient evidence of torture during the custody led to the violation of deceased's 'RIGHT TO LIFE'.

Nevertheless ,the Sri Lankan Constitution ,1978 does not explicitly recognize a right to life ,it has been held that even though the absence of direct provision to claim right to life ,that the Article 11 which is freedom from torture read with Article 13(4) ,freedom from arbitrary punishment recognizes ,by necessary implication, a right to life, remarkably , the court also advanced this argument having stated that " The Constitution is a "living Document" and should not be construed in a "narrow and pedantic manner". Additionally, the court referred to the values embodied in the Constitution, one which is the dignity and also well-being of the people, and also Sri Lanka's obligations under various international treaties, in strengthening the right to life. This case proved that the Supreme Court has progressive approach to address the issues pertaining to right to life and custodial deaths to be declared as violation of right to life and the same time it

proves without having direct provision for the custodial deaths or the right to life it raises several concerns;

1. Though the court had the opportunity to expand on the right to life, it instead endorsed a previous statement by the Supreme court that the provisions of Article 13(4) recognized “*a right to life at least in the sense of mere existence, as distinct from the quality of life*” Accordingly, *the right to life was not recognized in its fullest sense as including the “enjoyment of a life with dignity”*.

2. This case proved that as the constitution lacking of direct provision to address this issue, the delay in deciding fundamental rights petition in relation to custodial deaths /right to life (it takes 9 years to make the judgment) It is well-established that the constitution guaranteed in Article 12(5) that such petition should be disposed of within two months of filing.

Additionally there are several cases has identified custodial deaths as violation of right to life ,in Badulla High Court Case no.01/2015 (SC/FR/157/2014) known as the Kandeketiya Judgment and this case the Supreme court awarded compensation to the deceased (Sandun) mother and had declared that six Police officers had violated deceased constitutional rights including not to be subjected to torture, cruel, inhuman or degrading treatment (Article 11) and also equal protection of law under Article 12(1) and also not to be arrested except following due procedure which has been ensured in Article 13(1) of the Constitution. According to the reports of Human Rights Commission of Sri Lanka (HRCSL) eight deaths in Police Custody since June 2021 and sixteen prisoners have been reported to have been killed in 2020 and more than 100 injured in four prison. This shows that in many cases justice for the victims seems to have very far and the prospects bleak. The Kandaketiya Police Murder and ***Rathnayake Tharanga Lakmali v. Niroshan Abeykoon and few others (2019)*** are among the small but importantly ,growing number of cases where determination and courage against the law enforcement officials ,of victims and their families ,significantly, many lawyers have attempted to some degree of justice against the custodial deaths and cruel inhuman and degrading treatment, but unfortunately many cases have not decided in favour of the victims /victims’ families due to lack of constitutional provisions against the custodial deaths even there is no direct provision for victims relations to claim for victims’ rights against violation under the Article 126(2) and it says “he may himself or by an Attorney-at – law on his behalf ,within one monthapply to the

Supreme court by way of petition addressed to such court praying for relief or redress in respect of such infringement.” in this Article there is no direct or plain meaning that victim’s relations (Wife/Husband/Children or parents) can file a petition on behalf of the victim other than following historical cases when making a ruling on a similar case (stare decisis) this means stare decisis ensures that cases with similar scenarios and facts has to be approached in the same way, hence, this practices simply put ,it binds courts to be followed legal precedents set by previous decisions after the landmark judgment made by the ***Sriyani Silva vs. Iddamalgoda ,Officer-in-Charge,Police Station Paliyagoda and Others (2003) 2 Sri LR 63.***, this could be identify as major lacuna while addressing the issues pertaining to custodial deaths in Sri Lanka. Importantly, the descending judgment made by Edusiriya J. of the case ***Somawathie v. Weerasinghe and Others,1990 2Sri LR 12*** meanwhile holds the view that the language which is contained in the Article 126(2) unambiguously excluded the beneficiaries or the dependents of the victim as person who could pursue redress. The right to relief and the right to apply for relief are vested in the victim alone and are personal rights that must necessarily die with the victim.

C. Other legal provision in Sri Lankan jurisdiction.

Section 24 of the Evidence Ordinance includes a confession made by an accused person is irrelevant in a criminal proceeding if the making of confession appears to the court to have been caused by any inducement ,threat, or promise having reference to the charge against the accused person.

Section 25 (1) of Evidence Ordinance includes No confession made to a Police officer shall be proved as against a person accused of any offence. Additionally section 25(2), 26(1) , 26(2) of the Evidence Ordinance guaranteed any accused being punished in the custody of law enforcements. But theses sections become less important as the sect 27 (1) of the Evidence Ordinance and in the implementation process of this section many accused had been tortured and killed and so many such incidents remains un-addressed. Additionally in the Section 4 (f) International Covenant on Civil and Political Rights (ICCPR) Act No.56 of 2007 has safe guarded the rights of an accused who is under custody.

D. Landmark judgments on custodial deaths in India..

1) ***J.Prabhavathiamma v. The State of Kerala & Others WP(C).No.24258 of 2007 (K) and CRL .RP 2902 of***

2007: In this landmark case, the two police Officers were awarded sentence CBI Court, in Thiruvananthapuram, India, over the death of Crap metal shop worker, The court concluded was murdered in custody. While sentencing the duo, the learnt judge **J. Nazar** had stated ;

“This is a brutal in nature and dastardly murder by accused 01 and twothe act of the police officers would in deed adversely affect the very institution of the Indian Police Department.....it is further said, if the faith of the people in the police institution is lost, that will directly public order and law and order, and it is very dangerous situation”.

2) Joginder Kumar v. State of Uthra Pradesh (UP) and Others 1994 AIR 1349: 1994 SCC (4) 260: In this case the learnt judge held *“The rights are inherent in Article 21 and 22(1) of the Constitution of India and require be recognizing and thoroughly protecting. In order for the effective enforcement of these fundamental rights the following guidelines were issued by the Court”* The Police officer/Law enforcement officer shall inform the arrested person when he is brought to the police station of this right. An entry shall be compulsory to be made in the diary as to who was informed of the arrest. These protections from power must be held to flow from provisions of the Article 21 and 22(1) of the Indian Constitution and enforced strictly. Additionally, it was directed that, it shall be the duty of the magistrate, before who the arrested person is produced, to highly satisfy himself that these requirements have been fulfilled with.

3) D.K Basu V. State of West Bengal (1997)(1) SCC 416: In this case the court issued 11 Guidelines in addition to the constitutional provisions and statutory safeguards to be followed in all cases of arrest and or detentions. It is guided, details of all individuals who handling the interrogations of the arrested person/s must be recorded in a register maintained by the police/prison. A memorandum of arrest at the time of the arrest must be prepared. The memorandum must also be signed by the detainee and must specially mentioned the date and time of the arrest. The law enforcement officers must notify a detainee’s time, place of detention, and place of custody. In addition to above, the Police of the affected area telegraphically informed within the period of 8 to 12 hours after the arrest. An entry regarding the place of detention must be made in the case Diary. The “inspection Memo” must be signed by both the detainee and also the arresting police officer and to a copy must be made available to the detainee. It is mandatory the detainee

must be undergone with a Medical Examination by a trained and qualified physician every 48 hours while in custody. Information about the arrest and where the detainee is held, within 12 hours after the arrest and in the Police Control Room Board, must be displayed on visible notice Board. It is further advised, copies of all documents, including the arrest memo, must be sent to the Magistrate for Registration.

4) Munshi Singh Gautam v State of Madhya Pradesh, Appeal (Crl) 919 of 1999: The Supreme Court stated that *“the degrading torture, assault and death in custody which have assumed alarming proportions raise serious questions about the credibility of the rule of law and administration of the criminal justice system. The anxieties which were revealed in the case namely Raghbir Singh case more than 20 years back seems to have fallen on deaf ears and the situation does not seem to be showing any noticeable change. The anguish expressed in the cases of Bhagwan Singh v.State of Punjab, Pratul Kumar Singha V.State of Bihar, Kewal Pati v. State of Uthtra Pradesh, Inder Singh v. State of Punjab, State of MP v.Shyamsunder Trivedi and the by now celebrated decision in the landmark case of DK Basu v. State of West Bengal seems not even to have caused any softening of attitude in inhuman approach in dealing with persons in custody”*

D. Remedies against custodial torture in India

1) Constitutional Safeguards: Article 32 of the Constitution :It has been held in several judgments that just because of a person is in the custody of police or under arrest or detained ,does not deprive of him of his very basic fundamental rights and its violation empowers the person to go for a Supreme Court Under Article 32 of the Constitution of India.

Article 20 of the Constitution of India : Article 20 primarily permits a person the rights against *“conviction of offences”* this also includes Principle of non-retroactivity of penal laws –it is established the principle of *“Nullum Crimen sine lege”* that means no crime, no punishment without a previous penal law i.e. Article 22 of the Rome Statute of the International Criminal Court (ICC) ex-post facto laws there by making it a violation of any person’s fundamental rights attempts are made to convict him/her and torture him/her as per some statute. **Article 20** also protects against double jeopardy (*Nemo Debet Pro Easdem Causa Bis Vexari*) this provision most prominently protects a person from self-incrimination. The police/law enforcement officials subject a person to

torture and brutal and continues torture to make him confess to a crime even if he has not committed the same.

Article 21 of the Constitution of India: In Article 21 it is included a guarantee against torture and assault even by the state and its functionaries to any person who is taken in custody and it is further safeguarded that no sovereign immunity can be pleaded against the liability of the state arising the fact that a such criminal use of force over the captive person. This article further understood” *“life or personal liberty”* This view is held the reason that “Right to life” is more than a simple right to live an animalistic existence.

Article 22 of the Constitution of India: This Article provides a basic fundamental rights in connection with to “conviction” .Under this it can be included being informed of the reason or the grounds of arrest, preventive detention laws and produce before the nearest Magistrate within 24 hours of the arrest of a suspect.to be defended with the assistance by a legal practitioner of his choice, it is well-established that this provision is intended to ensure that any person is not subjected to any kind of ill-treatment that is devoid of statutory backing or exceeds prescribed overindulgences.

2) *Other statutory safeguards* : Code of Criminal Procedure, 1973 Sec: 46 and 49 . The code protects those under custody from torture who are not accused of an offence punishable with death or imprisonment for life and also during escape. Additionally, **Sec 50 to 57** are in consonance with **Article 22. Sec.54** the Code is a provision that to an ample extent correspondence to any influence of custodial torture and also violence.

Indian Penal Code (IPC), 1860 : After the landmark controversial rape case namely *Mathura Rape case (1979) 2 SCC 143*. There was an amendment made in section 376 of the IPC. Section **376(1)(b)** penalizes rape which are committed in the Police custody (by Police officer/s) this change finally condemns the act of Police officers who said to have been taking the advantage of their authority. Importantly, sections **330,331,342 and 348** of the Indian Penal Code have ostensibly been designed to deter a Police officer, who is permitted to arrest a suspect and to interrogate him while the investigation of an offence from resorting to third degree methods of causing torture.

Indian Evidence Act,1872 , Sec:24 and 25 : A confession had been made to a Police officer cannot be proved as against a person accused of any offence

according to the **Sec: 25** Evidence Act confession caused by threats from a suspect in authority to avoid of a temporal nature would be irrelevant in Criminal proceedings as ,Inter-alia, provided in sec.24 . Accordingly, even though custodial torture is not expressly prohibited by India jurisdiction, the evidence taken by illegal means, including torture is not accepted in courts.

IV. DISCUSSION

While comparing both Indian and Sri Lankan Constitution it is evidenced that Indian Constitutional Provisions are adequately guaranteed the death of any accused victim while on Police Custody other than the Constitutional provisions which are available in the Sri Lanka. Specially Article 21 has guaranteed right to life of an accused and moving forward In the Landmark Case *Parmanand Katara V.Union of India in 1989* recognized that the right to Life, dignity and fair treatment, extended not only to a living person but also to a dead body and further confirmed that these rights have been derived from the Article 21 of the Indian Constitution. Additionally, Article 22 of Indian Constitution guarantees protection against arrest and detention in landmark case and provided that no person shall be detained in custody noting that without being informed of ground for such arrest (Similarly to Article 13(1) of the constitution of Sri Lanka but this could be restricted as may be prescribed by the law in the Interest of national security under Article 15(1)) and allowed them to have the right to consult and defend themselves by a legal practitioner of his/her choice. (Similarly to Article 13(3) of the constitution of Sri Lanka) and Article 22(2) of Indian Constitution directs that the person arrested and or detained in police custody shall be produced before the nearest Magistrate within 24 hours of such arrest (journey from the place of arrest to the Magistrate court has excluded) which is lack in Constitution of Sri Lanka and under Article 13(2) only included except that same proceedings has been included in detained person shall be brought before the judge of the nearest component court according to procedure established by law. As no exact time period have been mentioned in the constitutional of Sri Lanka and Article 13(2) grant authorizations to policy makers /law makers to make laws and define times frame that an accused bring before the judge of any nearest component court as according to the procedures established by the separate laws and which allows police or law enforcements

authorities to keep the suspects or accused more time under their custody as a result there is huge possibilities to suspects or accused will subject to any type of discriminations, torture, inhuman or degrading treatments and some instances up to the death of the accused as Sri Lankan law enforcements not having new techniques for interrogation and investigations ,new instruments or may be lacking of new investigative knowledge to interview/interrogate the accused so that they may make use of tortural, immoral ,illegal and ineffective approach during interrogations to reveal the truth. Such laws includes Section 115(1) , Section 37 of the Code of Criminal Procedure Act (no.15 of 1979) of Sri Lanka and also Section 43 A(1) and 43 A(3) of the Code of Criminal Procedure (Amendment) Act, No.28 of 1998 .Additionally Code of Criminal Procedure (Special Provisions) Act, No.2 of 2013 in Section (2) it has extended detention period up to 48 hours under special circumstances. Not only these Acts but also in the Prevention of Terrorist Act (PTA) ,in this act Section 7 (1)(2) and further any detainees may be held for up to 18 months. These provisions of aforementioned Acts have different time periods for suspects to be held in custody and this happens the Apex law of Sri Lanka which is constitution has not mentioned specific time periods for detention of any accused person except allowing other laws/Acts to define the detention periods based on the nature of the Acts or any Amendments/Special Provisions which may invites many types of custodial torture, discrimination inhuman and degrading treatments and even up to custodial deaths. Additionally, Article 20(3) of the Indian Constitution provides that a person Suspect/accused of an offence committed shall not be compelled to be witness against himself and this minimizes the custodial torture while in custody, which provision lacks in Sri Lankan Constitution. Specially Sec; 50, 176 , 53 ,54 and 167 of the Indian Code of Criminal Procedure ,1973 aimed at providing procedural safeguards to a arrested person by the Police. Article 21 of Indian Constitution guaranteed certain rights of prisoners/detainees against custodial torture and death in custody ,right against cruel and unusual punishment, right to a fair trial, right to free legal aid, right to speedy trial and rights of inmates of protective homes and further it has addressed beyond the life having guaranteed dignity of a dead body. More importantly, Article 14 guaranteed the rule of law.

V. CONCLUSION

The study concludes that there is less and no adequate constitutional provisions available in the current

constitution of Sri Lanka to address issues pertaining to custodial death comparing to the Indian Constitution, and constitutional provisions of Sri Lanka does not adequately provide for the widow or the other dependents of a deceased victim meeting with the death as a result of wrongful act of law enforcements ,to seek sufficient compensation based on loss of support or maintenance in which instance compensation will be calculated based on the evidence. The Indian Constitution is consist with Article 21 which guaranteed the right to life and other major provision like Article 14, 20,22 and 32 which also address the issues pertaining to custodial deaths. Additionally, Indian Supreme court has issued **11** Guidelines in addition to the constitutional and statutory safeguards to be followed in all cases of arrest and or detentions. Even Indian Penal Code sec No. Section 376(1)(b) penalizes rape which are committed in the Police custody (by Police officer/s) this change finally condemns the act of Police officers who said to have been taking the advantage of their authority. Importantly, sections 330,331,342 and 348 of the Indian Penal Code have allegedly been designed to deter a Police officer, who is permitted to arrest a suspect and to interrogate him while the investigation of an offence from resorting to third degree methods of causing torture which are directly claimed by the Article 21 of the Constitution of the India which is remarkable improvement of the constitutional safeguards for the custodial deaths. Hence it has become a greater necessity to amend the existing constitutional provision under funder mental chapter Article 13(4) having included additional provisions at least including guarantees for custodial torture and assault even by the state and its functionaries to any person who is taken in custody and it is further safeguarded that no sovereign immunity can be pleaded against the liability of the state arising the fact that a such criminal use of force over the captive person. Further, it is high time to amend Article 126(2) of the constitution having added a provision allowing next king of the deceased victim or any closer relation (Blood or rights given by the court to adopted children) to be applied to the Supreme court by way of petition addressed to such court praying for relief or redress in respect of such infringement. As in which the European Court has interpreted the meaning of “victim” in Article 25 of the European Convention so as to include the indirect victim, by that close relations of a direct victim had been characterized as indirect victims and allowed them standing before the European Court. Stare decisis could anytime be challenged in the court system as an older judgment of the supreme Court namely *Somawathie v. Weerasinghe and Others* in which a

majority judgment which had been held that Article 126(2) of the Sri Lankan Constitution, when construed allowing to the ordinary, plain, natural and grammatical meaning of its language permits rights of complaint to the victim himself or his/her Attorney-At –Law and no other person. It is proposed to amend the constitution of Sri Lanka having included same constitutional provision which is included in Article 22(2) and Article 20(3) of the Indian Constitution, which may limited or minimize making of different laws concerning detention time of a suspect/accused under Police Custody and Article 20(3) guaranteed unlawful confession which could be used against the accused by doing so constitutional guarantee against custodial death of accused could be guaranteed in Sri Lankan context.

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ABBREVIATIONS

ECHR - European Convention on Human Rights

PTA – Prevention of Terrorist Act

ICCPR – International covenant on Civil and Political Rights

JCHR - The joint committee on Human Rights

HRCSL - Human Rights Commission of Sri Lanka

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