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Detention and Torture: Analysis of DK Basu's Impact on West Bengal

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Abstract: ***This article reviews the landmark case of D. K. Basu vs. State of West Bengal and the guidelines issued by the Supreme Court of India to curb custodial torture. The author examines the constitutional safeguards and statutory provisions related to custodial deaths, analyze relevant precedents, and evaluate the impact of the judgment on India's legal system. The article suggests ways to address the persisting issue of custodial torture and emphasizes the need for continuous efforts and updates to protect human rights effectively.***

Keywords: Custodial Torture, Human Rights, DK Basu Guidelines, Indian Constitution, Police Reforms

1. Introduction

"However good a constitution may be, if those who are implementing it are not good, it will prove to be bad. However bad a constitution may be, if those implementing it are good, it will prove to be good" [1]

Data shared by Union Minister of State for Home Affairs in Rajya Sabha stating the number of custodial deaths (669 deaths) in India past 5year reminds us about these words by *Dr B R Ambedkar*. Gujrat tops the list by 80 custodial deaths [2]. Ever after combined efforts from executive, judiciary and legislature we couldn't curb the menace of custodial torture. DK BASU V UNION OF INDIA case and guidelines issued by the court, widely appreciated by human rights organisations, are the milestones or path breakers in the field of custodial torture in India.

In light of the custodial deaths in India, executive chairman of Legal Aid service, a non - political organisation, submitted a letter, requesting that it should be considered as a writ petition under Public Interest Litigation, to Supreme Court of India. Considering this request along with other similar letter (filed by Ashok Kumar Johri based on the alleged custodial death of a person named Mahesh Bihari) a notice was issued by the supreme court to law commission and state governments and. Dr. AM Singhvi was appointed the principal counsel on behalf of the state governments. Affidavits from the respondents i. e. the state government stated that there no instance of custodial torture and situation was fine. However, the Supreme Court ruled in petitioner's favour and went on to issue 11 guidelines which, the court felt, would curb the menace of custodial torture.

2. Relevant Provisions

Constitutional Safeguards

- Article 21 of the Indian constitution, "No person should be deprived of his life and liberty except according to procedure established by law", upholds the right of personal liberty thus guaranteeing against torture by state.
- Article 22 right to consult legal practitioner, right to know the grounds of arrest
- Article 22 (2) arrested person to be produced before the nearest magistrate within 24 hours of the arrest.
- Article 20 (3) Accused person shouldn't be considered witness against himself.

Statutory Provision

- Section 41 arrest without warrant
- Section 50 Police to explain grounds of arrest if arrest made without warrant. And related provisions like Sec 49, 53, 56 - 58 (after arrest).
- Section 56 Present the arrested person in court without delay.
- Sec 166, 167 of IPC disobeying directions of law by public officer
- Section 176 magistrate's power to order an enquiry into the cause of death.
- Section 24 - 27 of the Indian Evidence Act

Law Commission Reports

- 113rd Law Commission Report **[3]**: The law commission recommended the amendment of the Indian Evidence Act by inserting Section 114 - B whereby change of burden of proof was advocated. Also, presumption that injury was inflicted by police is there is evidence to prove that such injury was caused at time of police custody

Issues Involved

- To curb the menace of Custodial torture (issuance of guidelines and suggestions)
- Whether vicarious liability can be attached to the state in case of custodial death
- Whether monetary compensation can be given to the deceased family in addition to the punitive measures or supplementary to the punishment.

Precedents and Impact

Custodial torture, having universal applicability, can be traced back to time immemorial. So it is important to analyse how other states have responded to this issue and how it was handled before.

In **Miranda v Arizona** Under fifth Amendment the constitution has detailed the right of individual when

encountered with the state i. e. cannot be compelled to be a witness against himself.

Supreme Court in **Andra Pradesh V N. Venugopal [4]** stated, there can be no assumption that any act done by the police to the suspect that inflict injury cannot be considered to be part of investigation and cannot get the protection under discharging of official duty. This presumption doesn't have a legal backing and is not covered under a provision of law

Joginder Kumar Case [5] Known as guidelines for arrested case. Supreme court held that police cannot arrest a person just because they have the right to arrest. In this case a practicing lawyer was called in to the police station for enquiry and was detained for a period of 5 days. Taking note of the human rights violation, court issued certain guidelines regarding the arrested person like Reasons for the arrest has to be recorded in the case diary, arrested person to be informed of his rights, a friend, relative or other person to be informed about the arrest etc. **Fundamental observation** by the honourable court was that the **citizens are not shread off the fundamental rights the moment they are arrested by the police**.

Nilabati Behera V State of Orissa Victim Suman was a victim of police Brutality Marks and injuries on his body signals the brutal use of lathi or similar things. Reiterated the liability on the state in case f custodial deaths. **Compensation to be paid by the state** in case of such atrocities. Right under Article 21 extends to arrested people. No infringement of right to life and liberty unless under the law.

State of MP V Shyamsunder Trivedi Case: Nathu Banjara was tortured at police station which resulted in his death. The stance of the police was that he was released from the police station prior to his death. Session courts acquitted the respondents (respondent 1 – SI Shyamsunder Trivedi) for the lack of direct evidence. High Court acquitted all respondents except Respondent 1. On further appeal supreme court observed that the lower courts had a strict adherence to principle of **"establishment of proof beyond reasonable doubt", ignoring the realities, facts and situations**. Supreme court also voiced the **need for implementation of 113th Law Commission Report** which is yet to be enacted, which states the need for insertion of Section 114B in Indian Evidence Act which would shift the burden of proof to the authority in case the person in custody sustains some injury. In **State of UP V Ram Sagar Yadav [6]** case, the court dealt with similar issue and voiced its concern stating that, since the police, one who inflicted injury, is only finding evidence victim will not be served justice. So legislature must re - examine burden of proof in such cases.

Facts important in holding the judgement & important text of the judgement

The right of preventive detention and arrest takes precedents over an individual's right to personal liberty. Both **salus populi suprema lex** i.e. the safety of the people is the supreme law and **salus republicae suprema lex** which means safety of the state is the supreme law should coexist. But torture as a way to extract information goes against the very idea of right, just and fair treatment ensured under Article 21 of the Indian Constitution.

State is liable to pay compensation to the victim as the **principle of strict liability** is applied. Nations across the world has agreed that **monetary compensation is the only possible way to redress the FR violation caused by the state**. Under strict liability the defence of immunity (sovereign immunity) not available.

D. K. Basu vs. State of West Bengal has laid down **11 specific requirements** that the police and other agencies like CBI, ED etc have to follow for the arrest and custody of any person. Mentioned below are few areas covered under those guidelines; Preparation of the arrest memo, opening a police control room in every district and state headquarters, right to request for a medical examination by the arrested person, information to the relatives of the arrested person, right to legal aid etc.

Impact of the judgement

DK Basu guideline are **binding not just for the police but also for ED, CBI, CID etc.** Guidelines issued in this judgement has been recognized as law in our country. So the violation of it i. e. any of these above mentioned guidelines will attract punitive provisions.

- Section 220 of IPC punishment to an officer or authority who detains or keeps a person in confinement with a corrupt or malicious motive.
- Section 330, 331 of IPC penalises the torture during interrogation to extract information, including monetary compensation.
- Article 9 (5) of International Convenant on Civil and Political Rights, 1966 (ICCPR) - Right of victim of unlawful arrest or detention to compensation.

3. Analysis & Conclusion

Despite Supreme Court giving elaborate guidelines cases of custodial torture continue to recur. On an application filed by Singhvi, amicus curaie in DK Basu case, he pointed out that **DK Basu guidelines only applies after a formal arrest**. However, torture can happen even before recording thee arrest. He also pointed out one issue in existing NHRC guidelines. According to the existing guidelines judicial or metropolitan enquiry is only required when there is reasonable suspicion of foul play or commission of offence and not in case of natural cause or by disease. Singhvi suggests that it is ideal to have magistrate or judicial enquiry for every custodial death.

There has been an order pertaining to the same issue in different years mainly constituting different bodies like State Human Rights commission and filling the vacant posts in existing bodies like NHRC. Even after decades of issuance of these guidance, custodial death is still prevalent in our society and accused manages to get away. But it would be injustice to say that this judgement is irrelevant. To a great extend it helped to curb perhaps the greatest human right violation "Custodial death". What we need is a continuous efforts and regular updates in this field to identify the loopholes and defects.

Latest victim of custodial torture, Khadeer Khan (Telangana) raised questions about **reliability of CCTV and face identification system**. Even after repeated notices by reputed organisations like Internet Freedom Foundation doubting reliability of technologies like CCTV and face recognition. Sadly, innocent citizens are to face the repucurtions.

The guidelines laid down in DK Basu guidelines is incorporated in Criminal Procedure Code by an amendment, with effect from Nov, 2010 namely, criminal procedure (Amendment) Act, 2008). The high courts should take **Suo Moto cognizance in case relating to custodial torture** (which was done in the recent Telangana incident) and order for speedy trial.

A **commission** to be set up (inunion and state) whereby, regardless of whether a public complaint was made, they could initiate investigations or instruct police to initiate investigations on misconduct by police. The union government has enacted the Protection of Human Rights Act (PHR), 1993 establishing NHRC and SHRC. National Human Rights Commission, monetary relief amounting Rs 5, 80, 74, 998 was recommended in 201 cases and disciplinary action was initiated in last 5 year. This commission should be given more power

What actually need to change is the **attitude of the police**. Proper guidance as to how mush force/power is to be excerted while the investigation and accused should be taught. For Example, In Feb 2023Gujarat police defended, in court, their action of public flogging of four persons and their illegal detention stating "even if the allegations mentioned in the petition are tilted to be correct and true, even then, the same were resorted to only with a view to deal with the petitioners in an efficient manner and to control the law and order situation. . "

As long as this attitude prevails, i. e. power and force (uncontrolled) will bring in peace and order, instance of custodial torture will continue no matter how efficient our legal system is. Police, mainly officers of lower cadre, should also be given awareness about provisions in law which they might not be using on a daily basis like S.25 of **Indian Evidence Act** which states that For FIR incrimination part of the confession is removed and is constructed in such a way that **police instead of starting a confession should gradually arrive at confession** by gathering evidence and literature & S.26 which talks about involuntary and irrelevant confession made in police custody. There is urgent need of **implementation of various international conventions** such as the CONVENTION AGAINST TORTURE (CAT) and ICESCR (political, social, economic rights).

Way forward would be accepting the **273rd Law commission report** which calls for the ratifying the **UN convention against torture and other Cruel, Inhuman or Degrading Treatment or Punishment**, India is a signatory, which would allow inquiry by them on matters of Torture. Other suggestion which could have an impact in a long run is changing the **attitude of people towards police**. Common man should be repeatedly reminded of the fact that state police machinery is constituted to serve the people and not vice verse. Small steps like **stop addressing Officers as Sir** (for its colonial imprints) and asking people to use post names, like inspector, can have positive impacts in long run. DK Basu Guidelines along with many existing provisions had a huge impact in raising the standard of functioning of police in our country and have reduced instances of custodial torture to a great extent. It is safe to say that custodial torture and death which once was a rule is now an exception. Taking note of the importance of these guidelines human rights organisations and states should make efforts to teach every citizen these 11 guidelines so as to curb one of the worst form of human rights violation 'Custodial torture'. Our fight should continue till the last person is saved from the menace of custodial torture. For this a strong and determined political movement is needed which could force legislature to adopt and enact updated guidelines like UN guidelines and conventions. EDUCATE, AGITATE AND ORGANIZE.

References

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[3] 113th law commission report; Injuries in Police Custody- Suggested section 114B, Evidence Act
[4] State of Andra Pradesh v. N. Venugopal (AIR 1964 SC 33)
[5] Joginder Kumar v. State of UP, (1994) 4 SCC 260
[6] State of U.P. v. Ram Sagar Yadav, (1985) 1 SCC 552