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THE D. K. BASU CASE: REVISIT OR REFORM?!

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ABSTRACT:

Have you ever thought, what will happen if our saviours, i.e., the police become the slayers of the law, and abuse the power, they have been bestowed with, for our welfare and protection? Such blatant abuse of law and authority by the police is not as much a curious subject, as police are normally expected to use violence to counter crimes. There is a glaring presumption that police officers are bound to use counter violence to incapacitate criminals so as to prevent them from further harming innocent citizens. This presumption has not only led to a decay of the code of conduct among officers, but also to commit terrible breaches of such authority to assert their dominance over the public. If the conviction rate of such policemen was anything to go by, then today, the father-son duo, inhabitants of the Santhankulam district in Tuticorin, in the state of Tamil Nadu would not be victim to, the equally heinous crime, of custodial torture and death, as rape. This outrageous wrong-doing has led to revisiting the D. K. Basu judgement of 1996 and its guidelines.

This paper gives an insight into the continuous increase in custodial deaths, making its way to the headlines, despite national and international provisions. The author has tried to analyse the decree in brief along with presenting a discussion on its relevance being extant.

Key words: Custodial deaths and torture, D. K. Basu, father-son duo.

INTRODUCTION:

The English dictionary states the meaning of custody as- the legal right to take care of someone, especially children. But the word ‘custody’ in the legal field has a slightly different meaning. The term has not been defined under the Criminal Procedure Code (CrPC). Its core meaning is that the law has taken control of the person. This control does not mean a complete control or an absolute ownership of the person, like in cases of child custody, but a hold of their liberty, or retrenchment of a person’s freedom of action in a considerable manner. Yet, at the same time there is an implied responsibility for the protection and care of the person in custody. The person in custody is thus dependant on its custodian for care, attention and protection.
The term ‘custodial death/ torture’ has been heard quite frequently via the news channels and social media. ‘Custodial death’ is defined as the death of a person due to any form of torture or cruel, inhuman or degrading treatment by the police officers, whether it occurs during investigation, interrogation or otherwise. It is perhaps one of the worst crimes in a civilized society governed by the rule of law. ¹ In simple terms, any death, of a person, who is in police custody or judicial custody, amounts to Custodial Death. Custodial Torture, in any form, is a violation of the basic fundamental rights, i.e., Art. 21.² The recent cases from George Floyd to Jayra and Fenix, has raised eyebrows of every citizen and shaken their faith in democracy. The international pressure to observe Human Rights is mounting.

According to the National Crime Records Bureau (NCRB) India, a total of 1727 people have died in the police custody or under judicial remand from 2001-2018,³ with zero conviction of any of the police personnel by 2018. In 2019, a total of 247 deaths in police custody took place, included persons in remand and not in remand. ⁴ These figures stand witness to the fact that the crime of custodial torture and eventual death has gone unpunished over these years and continue to multiply till date. Thus, the D.K. Basu guidelines, via the landmark judgement DK Basu v State of West Bengal case of 1986, were issued, with a hope that the judicial mechanism would curb such arbitrary and illegal acts of police brutality on individuals in custody.

ABOUT THE JUDGEMENT:

- In this case, a letter was received by the Supreme Court of India in 1986 from D.K. Basu, the Executive Chairman of Legal Aid Services, West Bengal- a non-political organization, calling attention to certain news published in the Telegraph Newspaper about deaths in police custody and lock-ups in the state of West Bengal.
- The Indian judiciary is an integrated system, administering justice for both, central government and states. The Supreme Court, a part of this system, is the highest and final Court of Appeal. The Supreme Court, having original jurisdiction in matters of

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² Id
enforcement of civil and human rights, treated D.K. Basu’s letter as a “writ petition” invoking Court’s original jurisdiction. This has subsequently been called as ‘epistolary jurisdiction’ in law. Epistolary jurisdiction is an excellent example of how wide the powers of the Supreme Court could be when it identifies the need for it to exercise its jurisdiction. This was followed by another letter, about a death of Mahesh Bihari from Pilkhana, Aligarh in police custody in Uttar Pradesh. 

- This prompted the Court to issue notices to all state governments and the Law Commission of India to submit suggestions on how to combat this all-India problem.
- The letter led to a complete structure of the judgement with four crucial and comprehensive judgements in 1996, twice in 2001 and 2015, laying over 20 commandments.
- It also issued 5 additional guidelines relating to procedures, monitoring and coordination of judicial orders.

Almost every landmark judgement passed by the apex court has its own importance in the area of relevance. At times, the Supreme Court sets such precedents, that they have a substantial impact on the jurisprudential rights, and enrich the basic principles of democracy and the main law of the land- Indian Constitution. Similarly, the D.K. Basu judgement still holds relevance in way of obliging the guidelines, scenarios presented in the case, and expanding the horizons of the meaning of fundamental rights. Courts and judgements relating to police atrocities around the country rely on this famous judgement even today, urging for police reforms. Time and again the guidelines directed in D. K. Basu case has been highlighted in various other decrees passed, making it mandatory to be followed.

For instance, the court in 1996 observed:

"The importance of affirmed rights of every human being need no emphasis and, therefore, to deter breaches thereof becomes a sacred duty of the Court, as the custodian and protector of the fundamental and the basic human rights of the citizens. Custodial violence, including torture and death in the lock ups, strikes a blow at the Rule of Law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law.

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5 Constitution of India; art. 32
6 Sathe, Judicial Activism in India: Transgressing Borders and Enforcing Limits 201–09 (2002)
8 id
Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law enforcing officers is a matter of deep concern in a free society. These petitions raise important issues concerning police powers, including whether monetary compensation should be awarded for established infringement of the Fundamental Rights guaranteed by Articles 21 and 22 of the Constitution of India. The issues are fundamental.”

This still remains true in this day. In the case of Gyanesh Rai and Ors Vs State of U.P. and Ors, the young boy approached the court, opposing custodial violence suffered by him and requesting thus, monetary compensation for the physical as well as mental agony suffered by him.

"Torture" has not been defined in Constitution or in other penal laws. 'Torture' of a human being by another human being is essentially an instrument to impose the will of the 'strong' over the 'weak' by suffering. The word torture today has become synonymous with the darker side of human civilisation.

"Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone paralyzing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself."

In the same case, third degree methods, like electric shocks, severe beating and insertion of aluminium wires through his mouth, were used to torture him at the time of interrogation.

The latest judgement, titled Haryana Progressive Farmers Union – Sabka Mangal Ho vs. State of Haryana and another, directed the director general of police, State of Haryana, to adhere to the famous D. K. Basu guidelines. The bench dismayed that even after 23 years, these guidelines had failed to be implemented and complied with. Justice Arun Moga

9 Criminal Misc. Writ Petition No. 11158 of 2015
10 Sabka Mangal Ho vs. State of Haryana in CWP No. 14874 of 2020
reproduced the said guidelines for the police administration to follow mandatorily. In this instance, the 1996 judgement and guidelines were highly relevant since the police personnel resorting to lathi charge were unknown and no medical care was provided, which was against the 11 guidelines.

Thus, the 1996 judgement still stands affirm, being mentioned and referred to in various other cases.

**OBSERVATION AND DECREE:**

The judgement given by Justice Anand was made up of 2 parts: first being, establishment of procedural safeguards and second, elaborating a system of compensating the victims of police abuse.\(^{12}\) Emphasis was laid on the fact that torture as a status, was the main aim of the international conventions and declarations. And the fact that global efforts were being made against it. Observing the role of the police against torture and how the law saviours had turned into law slayers, the Court put forth the particular sections of the Indian constitution forbidding torture, abuse and detention in custody. Relying on Nilabati Behera v State of Orissa\(^{13}\), the Court stated that any form of torture, inhuman activity and ill-treatment to the ones in custody would fall within the ambit of Article 21. Article 21 provides that “[n]o person shall be deprived of his life or personal liberty except according to procedure established by law.”\(^{14}\) This right cannot be denied to anyone including under trials, convicts, detenus and other prisoners. Article 22 ensures basic rights of arrestees including the right to know reasons for detention and immediate access to legal counsel. The Supreme Court observed that despite such constitutional protections, and procedural guidelines being laid down in Joginder Kumar v State of U.P.,\(^{15}\) police seeking to secure evidence and confessions failed to record arrests and disguised such detentions as “prolonged interrogation.”\(^{16}\)

The Court opined that the only way to collect evidences against such police officers in the matters of detention and abuse would be by way of procedural accountability and transparency. In light of the above, the Court issued 11 guidelines, described below.

The judgement concluded with the apex court expanding its powers, establishing monetary compensation being permissible in appropriate cases for violation of fundamental rights,

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\(^{12}\) Id at Para 30  
\(^{14}\) Constitution of India; art. 21  
upon proof of infringement by the public servants of the state, the latter being held vicariously liable for their acts. The Court stated that the compensation was applicable on the principle of strict liability and that the defence of sovereign immunity was not available to the states, with the citizens having the right to be indemnified by the government.

**ANALYSIS OF THE DECREE PASSED:**

The judgement of the Supreme Court in D. K. Basu not only confirmed and expanded the basic rights attached to arrest and detention, but also compensated as a remedy for the violation of those rights. The Court drew its judgement from the precedents of the United States, United Kingdom, Ireland, Trinidad and Tobago, and New Zealand, and elaborated on the procedural framework to protect the rights of those arrested and detained, from police abuse.

- Relying on the United States: The Court opined that there needed to be balance between the flexibility of the police to investigate and prevent crime and conflicts of society to prevent its civil liberties.
- United Kingdom: Having drawn from the English experience, the Hon’ble Judge suggested that torture was a common practice in the earlier times to extract information, but they progressed with time and development of common law, and narrowed down the power of the state during an investigation of the crime.
- Ireland: The Courts of Ireland despite having a written constitution and no provisions of remedy for the violation of fundamental rights guaranteed by it, developed remedies including award of damages against individual and state. The Supreme Court of India, inspired by them, explored the legitimacy of the Supreme Court by ordering monetary damages for violation of constitutional rights, citing The State (at the Prosecution of Quinn) v. Ryan. The Supreme Court, citing Byrne v. Ireland also opined that the right created by the constitution ought to have certain provisions for remedies, for the benefit of the citizens.

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18 Police and Criminal Evidence Act, 1984, c. 60 (Eng.)
23 id at Para 14-16
24 id at Para 50
• Trinidad and Tobago: The Court further relied on the ruling of Maharaj v. Attorney General of Trinidad and Tobago\textsuperscript{27} for the proposition that the remedy for the infringement of the fundamental rights by the government or omission of acts of government, attracted a separate claim, as compensation, different from the normal civil causes of actions in case of tort, e.g., false imprisonment.

• New Zealand: Justice Anand lastly relied on the New Zealand Court of Appeal case, which included constitutional decisions from the UK, Ireland and the precedents of India. Justice Anand cited Simpson v. Attorney General [Baigent’s Case]\textsuperscript{28} stating that the Court of Appeal “considered the applicability of the doctrine of vicarious liability for torts like unlawful search, committed by the police officials which violate the New Zealand Bill of Rights Act, 1990.”\textsuperscript{29}

Hence, the principles of foreign constitutional law cited by the bench were used to expand the structural and remedial powers of the Court. It made itself appropriate the ability to identify, regulate and redress the wrongful actions of the police and their agents.

THE GUIDELINES AND ITS NATURE:

The Supreme Court issued 11 guidelines to be followed by the centre and state investigating and security agencies in all cases of arrest and detention in its 1\textsuperscript{st} commandment in 1996, popularly known as the D.K. Basu Guidelines and are enumerated in short as under:-

1. The police officials making the arrest and handling the interrogation of the arrestee must bear clear name tags of identification along with the designation mentioned.

2. Police officer making the arrest must prepare an arrest memo at the time of arrest, containing time and place of arrest and signed by at least one witness and the detainee himself.

3. Location of the arrestee and other details must be communicated to the nearest family member or friend at the earliest.

4. In case of the nearest family member of friend living outside the city or district, the location, time place of arrest and place of custody must be notified via the nearest ‘legal aid organization’ within 8 to 12 hours of arrest.

5. Arrestee must be made aware of his rights of being informed about the arrest and his right of notifying someone, as soon as he is arrested or detained.

\textsuperscript{27} Maharaj v. Att’y Gen. of Trin. & Tobago, [1979] A.C. 385

\textsuperscript{28} Simpson v. Att’y Gen. [Baigent’s Case] [1994] 3 NZLR 667 (CA)

\textsuperscript{29} D. K. Basu v. State of West Bengal., (1993) 2 SCC 746 at Para. 53
6. An entry must be made into the case diary at the place of detention mentioning the relevant details.

7. The person arrested must be physically examined upon request. Any minor or major injuries must be recorded at the time. The ‘inspection memo’ must be signed by arrestee as well as the respective police official.

8. The person arrested must have a medical examination by a qualified doctor every 48 hours during detention.

9. Copies of all documents including the arrest memo must be sent to the Area Magistrate for his record.

10. The person arrested has a right to meet his/her lawyer during interrogation.  

11. There should be a police control room in every District and State headquarters, where the arresting officer must send information regarding the arrest and the place of custody of the person. This must be done within 12 hours of the arrest.

These guidelines adhered to Articles 21 and 22 (1) of the Constitution and needed to be strictly followed, failure to which, would lead to departmental action of the official liable and also contempt of court. These were to be followed not only by the police department but also other law enforcement agencies like the Central Bureau of Investigation (CBI), Enforcement Directorate, CID, Central Reserve Police Force, etc.

THE RECENT CASE IN TAMIL NADU

This case has shocked the entire nation. On 19th June Jayraj was taken into custody for allegedly keeping his shop open beyond specified hours, according to the lockdown rules during the pandemic Bennix, his son, went after his father to the police station, where he saw the latter being physically harassed by the police officers. With an attempt to protect his elderly father, Bennix tried to stop the officers and pushed them aside, which provoked the team thrashing the father-son duo for hours. The doctors found their lower garments soaked in blood in the hospital. Their veshti was changed multiple times due to the constant bleeding in their nether regions. Having received some treatment at the hospital, they were taken to the Magistrate Court where the judge remanded them to police custody without proper investigation. The duo ultimately succumbed to their injuries on June 23.

A plea was filed in the Supreme Court in pursuance to the atrocious and dire custodial death of Jayraj and Bennix by renowned senior advocate Dr. Abhishek Singhvi, who was also

30 id at Para 36
amicus curiae in the D. K. Basu case. The plea stated that the country has witnessed an “increasing trend of normalizing of custodial deaths” which necessitates the need for a "robust, uniform, effective and working investigation and mortaring apparatus". It also stated that despite the guidelines of 1996, custodial deaths and torture is continuing unabated.

**APPLICABILITY OF THE D.K. BASU JUDGEMENT**

The police personnel in the Tamil Nadu case suggest that the DK Basu judgements are only applicable in matters of police custody and not judicial custody.

The judgement known to be landmark and change the dynamics of the police procedures was either misconstrued or ignored, leading to distortion of the case.

The DK Basu is all-encompassing, does not contain an escape clause and makes absolutely no such distinction amidst categories of custody.

**INDIA’S LEGAL POSITION**

Indian criminal laws too contain certain principles prohibiting the use of torture by the police.

- Section 21 of the IPC defines the term public servant” which includes Judges, Arbitrators, Police Officers, etc.
- Section 302 of IPC states that a police officer committing the murder of a suspect in custody shall be punished for the same under this section.
- A police officer can also be punished for custodial death under section 304 of the IPC for ‘culpable homicide not amounting to murder,’ i.e., death caused by ‘negligence’ can also be accounted for, if the case falls within its ambit.
- Section 330\(^{31}\) of the Indian Penal Code, 1860 is an appropriate example.
- Section 220 of the IPC is directly applicable in this case, because the fact that the police officers brought Jayraj in custody, after he allegedly made certain critical remarks\(^{32}\) about them.
- Section 166 of the IPC punishes a public servant who disobeys the law with the intent of causing injury to a person.

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\(^{31}\) Indian Penal Code, 1860, § (330). Voluntarily causing hurt to extort confession, or to compel restoration of property.

The 2005 Amendment replaced section 176(1) of the CrPC with Section 176(1A) - providing for a provision to conduct an inquiry by the judicial magistrate in matters of death, rape or disappearance in police custody. This is applicable in the above case, as the investigation was not carried out properly, even after being presented before the Magistrate Court.

Section 49 of the CrPC, 1973 explicitly mentions about the person arrested not being subject to more restraint than is necessary to prevent his escape.

The Supreme Court of India has interpreted the constitutional right to human dignity and liberty as “an inbuilt guarantee against torture or assault by the state or its functionaries.”

INTERNATIONAL POSITION/SOLUTIONS

Prohibition against torture is a *jus cogens* norm under international human rights law.

- Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights (ICCPR) state the same.
- It is the duty of the government under article 51(c) of the constitution of India to honour the rules and principles which are internationally recognized.
- With article 253 of the Indian constitution, 1950 read with Entry 14 of the Union List in Seventh Schedule of the Constitution, the parliament can enable to enact these laws to implement the international conventions and norms.
- India is a signatory to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).
- The International Human Rights Standards for Law Enforcement, Body of Principles for the Protection of All Persons under Any Form of Detention or
Imprisonment\textsuperscript{41}, Code of Conduct for Law Enforcement Officials\textsuperscript{42}, and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials\textsuperscript{43} are some of the other international human rights conventions. It deals with the question of use of force by law enforcement authorities, including the police. These conventions are in accordance to the human rights of people remanded in custody, highlighting the principles of ‘necessity’ and ‘proportionality’ concerning the use of force by the police.

- It is time that the Indian government must work towards their implementation at the domestic level too, since these principles have taken the form of customary international law.

**SUGGESTIONS**

- A 1985 Law Commission report directed enactment of section 114-B into the Evidence Act, which gave way for raising a rebuttable presumption of culpability (guilty) against the police if anyone in their custody dies or is found with torture. This has still not become law, despite a bill introduced as late as 2017. This should be processed soon.\textsuperscript{44}

- It is important to frame an anti-torture law in India, consisting of a proper definition of torture, punishments for the offender and an appropriate redressal mechanism.

- India is signatory to the UNCAT, which is a human rights treaty under the review of the UN, but India has not ratified the convention yet nor implemented laws in accordance to the convention.

\textsuperscript{40} Human Rights Standard for Police, UNITED NATIONS- HIGH COMMISSIONER FOR HUMAN RIGHTS-CENTRE FOR HUMAN RIGHTS, https://www.ohchr.org/Documents/Publications/training5Add1en.pdf, last visited 15\textsuperscript{th} November, 2:00pm

\textsuperscript{41} Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, https://www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx#:~:text=Principle%201,dignity%20of%20the%20human%20person, last visited 15\textsuperscript{th} November, 2:30 pm

\textsuperscript{42} Code of Conduct for Law Enforcement Officials, Id, https://www.ohchr.org/en/professionalinterest/pages/lawenforcementofficials.aspx, last visited 15\textsuperscript{th} November, 3:05 pm

\textsuperscript{43} Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Id, https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx, last visited 15\textsuperscript{th} November, 3:53 pm

\textsuperscript{44}DK Basu Judgements – Custodial Deaths, IAS PARLIAMENT, July 1, 2020, https://www.iaspparliament.com/current-affairs/dk-basu-judgments-custodial-deaths, last visited 17\textsuperscript{th} November, 7:26 pm
Media plays an important role in shaping the minds of the people. It is a key aspect in raising awareness. Hence it is the need of the hour to sensitize the media while reporting such instances.

Proper education and training should be given to the police officers.

The law enforcement authorities must look into such matters from time to time, and be held liable for the crimes and violation of the rules.

Every death in custody should be reported to the NHRC along with submissions of the FIR and other relevant reports.

A body of officers in civil uniform must be formed in each state, looking into matters of custodial death and torture at regular intervals by way of surprise checking.

Accountability and transparency are the two methods to curb such deaths and tortures.

CONCLUSION

Custodial death is probably the worst of crimes in a civilised society which is governed by Rule of Law. If the office bearers of the government become law breakers, it is bent to bring forth contempt of law, leading to lawlessness. A citizen does not shed off his fundamental right to life, nor can it be put to abeyance upon being arrested. In a democratic society, the police serve to protect, rather than impede, freedoms. The very purpose of the police is to provide a safe, orderly environment in which these freedoms can be exercised.

In this very context the D.K Basu judgements were laid down. The case and the judgement have not lost its relevance till date. Yet, the cases of custodial death and torture have been touching sky heights. The guidelines which were made binding, are still being violated and non-conformity of the same does not cause serious implications. Such directions are not sufficient to restrain the arbitrary and heinous acts of the police. Hence, in my opinion, it is time to start reforming and stop revisiting. Either reforms be introduced in the existing regime or these guidelines take the form of legislation or get inducted in the Code of Criminal Procedure.