

D.K. Basu Judgement

C) Supreme Court Guidelines on Lawful Arrest

Torture of ordinary criminal suspects and political prisoners by police has long been widespread in India. Torture and ill-treatment are used to extract confessions, to extort money and to punish detainees. Methods of torture and ill-treatment include electric shocks, suspension from ceilings, severe beating with *lathis* (long wooden sticks) and kicking. Most torture occurs during periods of illegal detention following arrests that are unrecorded.

Torture persists despite official acknowledgment of the problem and a series of positive judicial and administrative initiatives in recent years.¹

In September 1996 the Supreme Court of India made a landmark judgment condemning custodial violence and making several recommendations (see below). This allowed the development of practical mechanisms for preventing torture during arrest and detention and has had a significant impact on the manner in which individuals can be arrested and detained. Although levels of custodial violence have continued to be high, the judgment has forced police to rethink their widespread use of illegal detention and torture, and has provided human rights activists with a stronger legal position from which to challenge such practices. Crucially, the Supreme Court has treated custodial violence as an ongoing concern and continues to monitor implementation of its recommended safeguards and to issue further orders to protect detainees.

Background to the 1996 judgment

The origins of the 1996 judgment lie in the state of West Bengal 10 years earlier. On 26 August 1986 the Executive Chairman of the Legal Aid Services, D.K. Basu, wrote to the Chief Justice of the Supreme Court of India highlighting concerns about custodial violence in the state and reported deaths in custody.² He argued that it was vital to examine the issues, develop “custody jurisprudence”, formulate steps for awarding compensation to the victims or their relatives, and ensure accountability of police officers found responsible for torture.

The Supreme Court accepted D.K. Basu’s request that his letter be treated as a Public Interest Litigation and asked the respondents – the State of West Bengal – to reply to the charges made in the petition. The state government of West Bengal replied that the police were not covering up deaths in custody and that wherever police personnel were found to be responsible, action was being taken against them.

On 14 August 1987 the Supreme Court stated that there were increasing allegations of custodial violence in almost every state and a rising number of reported deaths in custody. The Court noted that there appeared to be no machinery to deal effectively with such allegations. It issued an order requesting all state governments to provide their response to the allegations, and further requesting the Law Commission of India to make suitable suggestions in relation to the question of custodial violence. In response to this order, affidavits were filed by several state governments, by the central government and by the Law Commission of India concerning custodial violence. The Court appointed

¹ Torture is not explicitly prohibited by Indian law. India signed the Convention against Torture in 1997 but had not yet ratified it at the time of writing of this manual.

² D.K. Basu was, in the 1970s, an advocate practising in the West Bengal High Court, where he spent much of his time defending victims of torture. He founded the Legal Aid Services–West Bengal, a state-level social action group based in Calcutta.

a Supreme Court lawyer, Dr A.M. Singhvi, to act as *amicus curiae* (friend of the court) to help it gather information on custodial violence.

In 1992 D.K. Basu – by this time a judge with the West Bengal High Court – gave a comprehensive judgment in his court on the issue of custodial violence. He set out in full the processes he thought should be followed to prevent custodial violence, to ensure independent investigations leading to prosecution of those responsible, and to provide compensation for victims.

In the meantime, between 1986 and 1996, newspapers reported cases of torture and deaths in custody, human rights organizations raised such cases and pursued them in the courts, and Amnesty International conducted a major international campaign on human rights violations in India, putting forward detailed recommendations on arrest and custody procedures to combat torture and other abuses of human rights.

The 1996 judgment

In 1996 the Supreme Court finally issued its judgment in the case of *Basu v. State of West Bengal*.³ The judgment expressed the Supreme Court's concern that "torture is more widespread now than ever before". It stated that "[c]ustodial torture' is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilization takes a step backward."

The judgment referred to international human rights standards and to the fact that Article 21 of the Constitution of India protects the right to life, a provision that has been held by the Indian courts to include a guarantee against torture. It also made general recommendations relating to amendments to the law on burden of proof and the need for police training, and put forward arguments against the right to sovereign immunity for agents of the state responsible for torture and in favour of compensation.

The judgment's most far-reaching legacy is its 11 "requirements" to be followed in all cases of arrest and detention (para. 35). The "requirements" would, the Court hoped, "help to curb, if not totally eliminate, the use of questionable methods during interrogation and investigation" (para. 39). Briefly (and paraphrased), the requirements set out by the Supreme Court are as follows:

1. Police arresting and interrogating suspects should wear "accurate, visible and clear" identification and name tags, and details of interrogating police officers should be recorded in a register.⁴
2. Police making an arrest should prepare a memo of arrest to be signed by a witness and countersigned by the arrested person, giving the time and date of arrest.
3. Anyone arrested should be entitled to have a friend or relative informed of their arrest and place of detention "as soon as practicable".⁵
4. If such a friend or relative lives outside the district, the time and place of arrest and place of detention should be notified to them by police through the Legal Aid Organization within eight to 12 hours.

³ AIR 1997 SC 610.

⁴ Plainclothes police officers have regularly arrested and interrogated people in India, making it difficult for victims to identify their torturers.

⁵ This is an important safeguard against unacknowledged illegal detention, particularly crucial in areas of armed conflict in India where "disappearances" are common.

5. Anyone arrested should be informed of their right to inform someone of their arrest and detention “as soon as” they are arrested.
6. Information about the arrest and the details of the person informed of the arrest should be kept in a diary at the place of detention along with names of police officers supervising custody.⁶
7. On request, anyone arrested should be examined at the time of arrest and any injuries recorded. This “inspection memo” should be signed by the arrested person and the arresting police officer, and a copy given to the arrested person.⁷
8. Anyone arrested should be medically examined by a doctor every 48 hours during detention.⁸
9. Copies of all the documents referred to above should be sent to the magistrate.⁹
10. Anyone arrested should be permitted to meet their lawyer during interrogation “though not throughout the interrogation”.
11. A police control room should be established at all district and state headquarters with information regarding details of those arrested and their place of custody displayed on a notice board.

Although the Supreme Court commented that these requirements should be followed until “legal provisions are made in that behalf” (para. 35), it was no doubt aware of previous judicial directions along similar lines which had still not led to amendments in law. The Court could not direct the government to enact legislation, but stated that in its opinion it was clearly desirable that existing legislation should be amended to incorporate the “requirements”. This view was supported in November 2000 by the Law Commission of India, which in its Consultation Paper on Law Relating to Arrest recommended incorporation of the “requirements” into law. As of June 2002 the Indian government had not given any commitment that it intended to do so.

To reinforce the “requirements”, the judgment stated that “Failure to comply with the requirements herein above-mentioned shall, apart from rendering the concerned official liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country having territorial jurisdiction over the matter” (para. 36). The judgment further ordered that the requirements be issued to the Director Generals of Police and Home Secretaries of all states who in turn are obliged to circulate them to every police station under their jurisdiction and to have them posted in a conspicuous place in every police station. It also recommended that the requirements be broadcast on radio and television and distributed in pamphlets in local languages “creating awareness... transparency and accountability” (para. 39).

SOURCE: Largely borrowed from Amnesty International, *Combating Torture: A Manual for Action with modifications*.

Available at <http://web.amnesty.org/library/Index/ENGACTION400012003?open&of=ENG-ZAF>

⁶ The practice of keeping a “general diary” of arrests at police stations has fallen into disuse, so there are often no records that people have been detained. Lawyers or judicial authorities depend on these records if there are complaints of ill-treatment or other abuses during detention.

⁷ Police in India have often claimed that detainees were injured before arrest or were unwell at the time of arrest and that their condition subsequently deteriorated, thereby arguing that deaths in custody were not the result of police violence.

⁸ In issuing this requirement, the court was seeking to ensure evidence of the medical condition of detainees as a means of guarding against conflicting allegations of torture, etc.

⁹ Under section 57 of the Code of Criminal Procedure, all detainees in India must be brought before a magistrate within 24 hours of arrest. The magistrate then decides whether to remand them to further police or judicial custody. By requiring that these initial custody records are forwarded to the magistrate at the time of the detainee’s appearance before the magistrate, the Supreme Court was attempting to provide checks for the magistrate to ensure that proper legal procedures had been followed. Under normal circumstances the magistrate would only have the word of the detainee or their lawyer against that of the police if there were allegations of illegal detention.

Vishaka Judgement

B) Supreme Court Guidelines on Sexual Harassment at Workplace

The Supreme Court's judgment in Visakha's case¹⁰ is a landmark for more than one reason. Not only was sexual harassment at the work place recognized under the Indian jurisprudence as a crucial problem faced by women workers, it also set out detailed guidelines for prevention and redressal of this malaise. The judgment was delivered by J.S.Verma. CJ, on behalf of Sujata Manohar and B.N.Kirpal, JJ., on a writ petition filed by 'Vihksa'- a non Governmental organization working for gender equality by way of PIL seeking enforcement of fundamental rights of working women under Article.21 of the Constitution. The immediate cause for filing the petition was the alleged brutal gang rape of a village-level social worker of Rajasthan who tried to stop a child marriage taking place in her village.

Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognized basic human right. The common minimum requirement of this right has received global acceptance. The International Conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose.

In view of this and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, the Supreme Court in this case incorporated various provisions of 'Convention on the Elimination of All Forms of Discrimination against Women' into the Indian law laying down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This was done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution.

The guidelines and norms pre-scribed herein are as under:

Having regard to the definition of 'human rights' in Section 2(d) of the Protection of Human Rights Act, 1993.

Taking note of the fact that the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in work places and that enactment of such legislation will take considerable time.

It is necessary and expedient for employers in work places as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women:

1. Duty of the Employer or other responsible persons in work places and other institutions:

It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

¹⁰ Vishaka and others v. State of Rajasthan and Others, AIR 1997 SC 3011.

2. Definition:

For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

- a) physical contact and advances;
- b) a demand or request for sexual favours;
- c) sexually coloured remarks;
- d) showing pornography;
- e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances whereunder the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in Government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

3. Preventive Steps:

All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

- a. Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.
- b. The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.
- c. As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.
- d. Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. Criminal Proceedings:

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

5. Disciplinary Action:

Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

6. Complaint Mechanism:

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

7. Complaints Committee:

The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counselor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its member should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the Government department concerned of the complaints and action taken by them.

The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department.

8. Workers' Initiative:

Employees should be allowed to raise issues of sexual harassment at workers' meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings.

9. Awareness:

Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.

10. Third Party Harassment:

Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in Private Sector.

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993.

The court ordered directed that:

“...the above guidelines and norms would be **strictly observed** in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field.”