REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (Crl.) NO. 77 OF 2007

In Re: Destruction of Public & Private Properties ....Petitioners

Versus

State of A.P. and Ors. ....Respondents

(With W.P. (Crl.) No.73 of 2007)

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Taking a serious note of various instances where there was large scale destruction of public and private properties in the name of agitations, bandhs, hartals and the like, suo motu proceedings were initiated by a Bench of this Court on 5.6.2007. Dr. Rajiv Dhawan, Senior counsel of this Court agreed to act as Amicus Curiae. After perusing various reports filed, two Committees were appointed; one headed by a retired Judge of this Court Justice K.T. Thomas. The other members of this Committee were Mr. K. Parasaran, Senior Member of the legal profession, Dr. R.K. Raghvan, Ex-Director of CBI, and Mr. G.E. Vahanavati, the Solicitor General of India and an officer not below the rank of Additional Secretary of Ministry of Home Affairs and the Secretary of Department of Law

and Justice, Government of India. The Other Committee was headed by Mr. F.S. Nariman, a Senior Member of the Legal Profession. The other members of the Committee were the Editor-in-Chief of the Indian Express, the Times of India and Dainik Jagaran, Mr. Pranay Roy of NDTV and an officer not below the rank of Additional Secretary of Ministry of Home Affairs, Information and Broadcasting and Secretary, Department of Law and Justice, Government of India, Mr. G.E. Vahanavati, Solicitor General and learned Amicus Curiae.

2. Two reports have been submitted by the Committees. The matter was heard at length. The recommendations of the Committees headed by Justice K.T. Thomas and Mr. F.S. Nariman have been considered.

3. Certain suggested guidelines have also been submitted by learned Amicus Curiae.

4. The report submitted by Justice K.T. Thomas Committee has made the following recommendations:

(i) The PDPP Act must be so amended as to incorporate a rebuttable presumption (after the prosecution established the two facets) that the accused is guilty of the offence.

(ii) The PDPP Act to contain provision to make the leaders of the organization, which calls the direct action, guilty of abetment of the offence.

(iii) The PDPP Act to contain a provision for rebuttable presumption.

(iv) Enable the police officers to arrange videography of the activities damaging public property.

The recommendations have been made on the basis of the following conclusions after taking into consideration the materials.

In respect of (i)

"According to this Committee the prosecution should be required to prove, first that public property has been damaged in a direct action called by an organization and that the accused also participated in such direct action. From that stage the burden can be shifted to the accused to prove his innocence. Hence we are of the view that in situations where prosecution succeeds in proving that public property has been damaged in direct actions in which accused also participated, the court should be given the power to draw a presumption that the accused is guilty of destroying public property and that it is open to the accused to rebut such presumption. The PDPP Act may be amended to contain provisions to that effect.

In respect of (ii)

Next we considered how far the leaders of the organizations can also be caught and brought to trial, when public property is damaged in the direct actions called at the behest of such organizations. Destruction of public property has become so rampant during such direct actions called by organizations. In almost all such cases the top leaders of such organisations who really instigate such direct actions will keep themselves in the background and only the ordinary or common members or grass root level followers of the organisation would directly participate in such direct actions and they alone would be vulnerable to prosecution proceedings. In many such cases, the leaders would really be the main offenders being the abettors of the crime. If they are not caught in the dragnet and allowed to be immune from prosecution proceedings, such direct actions would continue unabated, if not further escalated, and will remain a constant or recurring affair.

Of course, it is normally difficult to prove abetment of the offence with the help

of direct evidence. This flaw can be remedied to a great extent by making an additional provision in PDPP Act to the effect that specified categories of leaders of the organization which make the call for direct actions resulting in damage to public property, shall be deemed to be guilty of abetment of the offence. At the same time, no innocent person, in spite of his being a leader of the organization shall be made to suffer for the actions done by others. This requires the inclusion of a safeguard to protect such innocent leaders."

In respect of (iii)

"After considering various aspects to this question we decided to recommend that prosecutions should be required to prove (i) that those accused were the leaders or office bearers of the organisation which called out the direct actions and (ii) that public property has been damaged in or during or in the aftermath of such direct actions. At that stage of trial it should be open to the court to draw a presumption against such persons who are arraigned in the case that they have abetted the commission of offence. However, the accused in such case shall not be liable to conviction if he proves that (i) he was in no way connected with the action called by his political party or that (ii) he has taken all reasonable measures to prevent causing damage to public property in the direct action called by his organisation."

In respect of (iv)

"The Committee considered other means of adducing evidence for averting unmerited acquittals in trials involving offences under PDPP Act. We felt that one of the areas to be tapped is evidence through videography in addition to contemporaneous material that may be available through the media, such as electronic media. With the amendments brought in the Evidence Act, through Act 21 of 2000 permitting evidence collected through electronic devices as admissible in evidence, we wish to recommend the following:

i) If the officer in charge of a police station or other law enforcing agency is of opinion that any direct action, either declared or undeclared has the potential of causing destruction or damage to public property, he shall avail himself of the services of video operators. For this purpose each police station shall be

empowered to maintain a panel of local video operators who could be made available at short notices.

(ii) The police officer who has the responsibility to act on the information that a direct action is imminent and if he has reason to apprehend that such direct action has the potential of causing destruction of public property, he shall immediately avail himself of the services of the videographer to accompany him or any other police officer deputed by him to the site or any other place wherefrom video shooting can conveniently be arranged concentrating on the person/ persons indulging in any acts of violence or other acts causing destruction or damage to any property.

iii) No sooner than the direct action subsides, the police officer concerned shall authenticate the video by producing the videographer before the Sub Divisional or Executive Magistrate who shall record his statement regarding what he did. The original tapes or CD or other material capable of displaying the recorded evidence shall be produced before the said Magistrate. It is open to the Magistrate to entrust such CD/material to the custody of the police officer or any other person to be produced in court at the appropriate stage or as and when called for.

The Committee felt that offenders arrested for damaging public property shall be subjected to a still more stringent provision for securing bail. The discretion of the court in granting bail to such persons should be restricted to cases where the court feels that there are reasonable grounds to presume that he is not guilty of the offence. This is in tune with Section 437 of the Code of Criminal Procedure, 1973 and certain other modern Criminal Law statutes. So we recommend that Section 5 may be amended for carrying out the above restriction.

Thus we are of the view that discretion to reduce the minimum sentence on condition of recording special reasons need not be diluted. But, instead of "reasons" the court should record "special reasons" to reduce the minimum sentence prescribed.

However, we felt that apart from the penalty of imprisonment the court should be empowered to impose a fine which is equivalent to the market value of the property damaged on the day of the incident. In default of payment of fine, the offender shall undergo imprisonment for a further period which shall be sufficient enough to deter him from opting in favour of the alternative imprisonment."

The recommendations according to us are wholesome and need to be accepted.

To effectuate the modalities for preventive action and adding teeth to enquiry/investigation following guidelines are to be observed:

As soon as there is a demonstration organized:

(I) The organizer shall meet the police to review and revise the route to be taken and to lay down conditions for a peaceful march or protest;

(II)All weapons, including knives, lathis and the like shall be prohibited;

(III) An undertaking is to be provided by the organizers to ensure a peaceful march with marshals at each relevant junction;

(IV) The police and State Government shall ensure videograph of such protests to the maximum extent possible;

(V) The person in charge to supervise the demonstration shall be the SP (if the situation is confined to the district) and the highest police officer in the State, where the situation stretches beyond one district;

(VI) In the event that demonstrations turn violent, the officer-in-charge shall ensure that the events are videographed through private operators and also request such further information from the media and others on the incidents in question.

(VII) The police shall immediately inform the State Government with reports on the events, including damage, if any, caused .

(VIII) The State Government shall prepare a report on the police reports and other information that may be available to it and shall file a petition including its report in the High Court or Supreme Court as the case may be for the Court in question to take suo motu action.

So far as the Committee headed by Mr. F.S. Nariman is concerned the recommendations and the views are essentially as follows:

"There is a connection between tort and crime - the purpose of the criminal law is to protect the public interest and punish wrongdoers, the purpose of tort-law is to vindicate the rights of the individual and compensate the victim for loss, injury or damage suffered by him: however - the distinction in purpose between criminal law and the law of tort is not entirely crystal-clear, and it has been developed from case-to-case. The availability of exemplary damages in certain torts (for instance) suggest an overtly punitive function - but one thing is clear: tort and criminal law have always shared a deterrent function in relation to wrongdoing.

The entire history of the development of the tort law shows a continuous tendency, which is naturally not uniform in all common law countries, to recognise as worthy of legal protection, interests which were previously not protected at all or were infrequently protected and it is unlikely that this tendency has ceased or is going to cease in future. There are dicta both ancient and modern that categories of tort are not closed and that novelty of a claim is no defence. But generally, the judicial process leading to recognition of new tort

situations is slow and concealed for judges are cautious in making innovations and they seldom proclaim their creative role. Normally, a new principle is judicially accepted to accommodate new ideas of social welfare or public policy only after they have gained their recognition in the society for example in extra judicial writings and even then the decision accepting the new principle is supported mainly by expansion or restriction of existing principles which "gradually receive a new content and at last a new form".

Where persons, whether jointly or otherwise, are part of a protest which turns violent, results in damage to private or public property, the persons who have caused the damage, or were part of the protest or who have organized will be deemed to be strictly liable for the damage so caused, which may be assessed by the ordinary courts or by any special procedure created to enforce the right.

This Committee is of the view that it is in the spirit of the observation in M.C. Mehta v. Union of India (1987 (1) SCC 395) that this Court needs to lay down principles on which liability could be fastened and damages assessed in cases in which due to behaviour of mobs and riotous groups public and private property is vandalized and loss of life and injury is occasioned to innocent persons. These are clearly "unusual situations", which have arisen and likely to arise in future and need to be provided for in the larger interest of justice.

It is on the principles set out above that (it is suggested) that the Hon'ble Court should frame guidelines and venture to evolve new principles (of liability) to meet situations that have already arisen in the past and are likely to arise again in future, so that speedy remedies become available to persons affected by loss of life, injury and loss of properties, public or private, as a result of riots and civil commotions.

Damages in the law of torts in India include
(a) damages based on the concept of restituto in interregnum to enable total recompense; and
(b) exemplary damages”

The basic principles as suggested by Nariman Committee are as follows which we find to be appropriate:

(1) The basic principle for measure of damages in torts (i.e. wrongs) in property is that there should be 'restituto in interregnum' which conveys the idea of "making whole".

(2) Where any injury to property is to be compensated by damages, in settling the sum of money to be given for reparation by way of damages the Court should as nearly as possible get at that sum of money which will put the party who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

(3) In this branch of the law, the principle of restitution in interregnum has been described as the "dominant" rule of law. Subsidiary rules can only be justified if they give effect to that rule.

In actions in tort where damages are at large i.e. not limited to the pecuniary loss that can be specifically proved, the Court may also take into account the defendant's motives, conduct and manner of committing the tort, and where these have aggravated the plaintiff's damage e.g. by injuring his proper feelings of dignity, safety and pride - aggravated damages may be awarded.

Aggravated damages are designed to compensate the plaintiff for his wounded feelings-they must be distinguished from exemplary damages which are punitive in nature and which (under English Law) may be awarded in a limited category of cases.

"Exemplary damages" has been a controversial topic for many years. Such damages are not compensatory but are awarded to punish the defendant and to deter him and others from similar behaviour in the future. The law in England (as restated in Rookes v. Barnard affirmed in Cassell v. Broome) is that such

damages are not generally allowed. In England they can only be awarded in three classes of cases (i) where there is oppressive, arbitrary or unconstitutional action by servants of the Government; (ii) where the defendants conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the claimant; and (iii) where such damages are provided by statute.

In the decision in Kuddus v. Chief Constable of Leicestershire: (2001) UKHL 29 - the most recent judgment of the House of Lords, the Law Lords did not say that in the future the award of exemplary damages should be restricted only in the cases mentioned in

Rookes v. Barnard [1964] 1 All ER 367 (as affirmed in Cassell v. Broome [1972] 1 All ER 801.) Lord Nicholls in his speech at page 211 stated that:

"...the essence of the conduct constituting the Court's discretionary jurisdiction to award exemplary damages is conduct which was such as to be an outrageous disregard of the claimant's rights. "

In this committee's view, the principle that Courts in India are not limited in the law of torts merely to what English Courts say or do, is attracted to the present situation. This Committee is of the view that this Hon'ble Court should evolve a principle of liability - punitive in nature - on account of vandalism and rioting leading to damages/destruction of property public and private. Damages must also be such as would deter people from similar behaviour in the future: after all this is already the policy of the law as stated in the Prevention of Damage to Property Act, 1984, and is foreshadowed in the order of this Hon'ble Court dated 18-06-2007 making the present reference.

In a Winfield and Jolowicz **(on** Tort) Seventeenth Edition (at pages 948-949) the authors set out the future of exemplary damages by quoting from the decision in Kuddeus v. CC Leicestershie (supra) where two Law Lords Lord Nicholls and Lord Hutton expressed the view that such damages might have a valuable role to play in dealing with outrageous behaviour. The authors point out that the boundaries

between the civil and criminal law are not rigid or immutable and the criminal process alone is not an adequate mechanism to deter willful wrong-doing. The acceptability of the principle of compensation with punishment appears to have been confirmed by the Privy Council (in The Cleaner Co Ltd. Vs. Abrahams [2004) a AC 628 at 54) where it was felicitously said that "oil and vinegar may not mix in solution but they combine to make an acceptable salad dressing." The authors go on to say that exemplary damages certainly enjoy a continuing vitality in other common law jurisdictions, which, by and large, have rejected the various shackles imposed on them in England and extended them to other situations: thus punitive damages was held to be available in Australia "in cases of "outrageous" acts of negligence.

The Law Commission of Australia has also concluded - after a fairly evenly balanced consultation-that exemplary damages should be retained where the defendant "had deliberately and outrageously disregarded the plaintiffs rights."

In the absence of legislation the following guidelines are to be adopted to assess damages:

(I) Wherever a mass destruction to property takes place due to protests or thereof, the High Court may issue suo motu action and set up a machinery to investigate the damage caused and to award compensation related thereto.

(II) Where there is more than one state involved, such action may be taken by the Supreme Court.

(III) In each case, the High Court or Supreme Court, as the case may be, appoint a sitting or retired High Court judge or a sitting or retired District judge as a Claims Commissioner to estimate the damages and investigate liability.

(IV) An Assessor may be appointed to assist the Claims Commissioner.

(V) The Claims Commissioner and the Assessor may seek instructions from the High Court or Supreme Court as the case may be, to summon the existing video or other recordings from private and public sources to pinpoint the

damage and establish nexus with the perpetrators of the damage.

(VI) The principles of absolute liability shall apply once the nexus with the event that precipitated the damage is established.

(VII) The liability will be borne by the actual perpetrators of the crime as well as organisers of the event giving rise to the liability – to be shared, as finally determined by the High Court or Supreme Court as the case may be.

(VIII) Exemplary damages may be awarded to an extent not greater than twice the amount of the damages liable to be paid.

(IX) Damages shall be assessed for:

(a) damages to public property;

(b) damages to private property;

(c) damages causing injury or death to a person or persons;

(d) Cost of the actions by the authorities and police to take preventive and other actions

(X) The Claims Commissioner will make a report to the High Court or Supreme Court which will determine the liability after hearing the parties.

The recommendations of Justice K.T. Thomas Committee and Mr. F.S. Nariman Committees above which have the approval of this Court shall immediately became operative. They shall be operative as guidelines.

The power of this Court also extends to laying down guidelines. In Union of India v. Association for Democratic Reforms (2002) 5 SCC 294, this Court observed:

"...It is not possible for this court to give any directions for amending the Act or statutory Rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules. However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the court can necessarily

issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted." (pp.307)

This court has issued directions in large number of cases to meet urgent situations e.g.

- Lakshmi Kant Pandey v. Union of India, (1984) 2 SCC 244
- Vishaka v. State of Rajasthan, (1997) 6 SCC 241

- Vineet Narain v. Union of India, (1998) 1 SCC 226]
- State of W.B. v. Sampat Lal, (1985) 1 SCC 317
- K. Veeraswami (1991) 3 SCC 655

- Union Carbide Corporation v. Union of India, (1991) 4 SCC 584
- Delhi Judicial Service Assn. v. State of Gujarat, (1991) 4 SCC 406
- Delhi Development Authority v. Skipper Construction Co. (P) Ltd., (1996) 4 SCC 622;
- Dinesh Trivedi, M.P. v. Union of India, (1997) 4 SCC 306

Common Cause v. Union of India, AIR 1996 SC 929

- Supreme Court Advocates-on-Record Association v. Union of India;

(1993) 4 SCC 441

- **Positive Mandamus Cases**

(i) **Mandamus to enforce the law**

The situation in which a positive mandamus to do a particular act in a particular way, may be broadly classified in the following manner. First are the broad mandamus cases where this court has held that the court may issue a positive mandamus to enforce the law. Thus in Vineet Narain's case (supra) detailed orders were passed for the investigation of the Hawala transaction cases. It is laid down that positive directions can be issued where there is a power coupled with a duty. The situations under which this can happen are numerous. In Commissioner of Police v. Gordhandas Bhanji AIR 1952 SC 16 at pr.27, quoting from Julius v. Lord Bishop of Oxford, (1880) 5 A.C. 214, where the court said:

"There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. "

In Comptroller and Auditor General of India v. K S. Jagannathan (AIR 1987 SC 537) the court also explored the need to issue a positive mandamus where a power was coupled with a duty.

"18. The first contention urged by learned counsel for the appellants was that the Division Bench of the High Court could not issue a writ of mandamus to

direct a public authority to exercise its discretion in a particular manner. There is a basic fallacy underlying this submission-both with respect to the order of the Division Bench and the purpose and scope of the writ of mandamus. The High Court had not issued a writ of mandamus. A writ of mandamus was the relief prayed for by the respondents in their writ petition. What the Division Bench did was to issue directions to the appellants in the exercise of its jurisdiction under Article 226 of the Constitution. Under Article 226 of the Constitution, every High Court has the power to issue to any person or authority, including in appropriate cases, any government, throughout the territories in relation to which it exercises jurisdiction, directions, orders, or writs including writs in the nature of habeas corpus, mandamus, quo warranto and certiorari or any of them, for the enforcement of the Fundamental Rights conferred by Part III of the Constitution or for any other purpose. In Dwarkanath v. IT0 [(1965 3 SCR 536)] this Court pointed out that Article 226 is designedly couched in a wide language in order not to confine the power conferred by it only to the power to issue prerogative writs as understood in England, such wide language being used to enable the High Courts "to reach injustice wherever it is found" and "to mould the reliefs to meet the peculiar and complicated requirements of this country." In Hochtief Gammon v. State of Orissa [1976] 1 SCR 667 this Court held that the powers of the courts in England as regards the control which the Judiciary has over the Executive indicate the minimum limit to which the courts in this country would be prepared to go in considering the validity of orders passed by the government or its officers.

"19. Even had the Division Bench issued a writ of mandamus giving the directions which it did, if circumstances of the case justified such directions, the High Court would have been entitled in law to do so for even the courts in England could have issued a writ of mandamus giving such directions. Almost a hundred and thirty years ago, Martin, B., in Mayor of Rochester v. Regina said:

"But, were there no authority upon the subject, we should be prepared upon principle to affirm the judgment of the Court of Queen's Bench. That court has power, by the rerogative writ of mandamus, to amend all errors which tend to the oppression of the subject or other misgovernment, and ought to he used when the law has provided no specific remedy, and justice and good government require that there ought to be one for the execution of the common law or the provisions of a statute: Comyn's Digest, Mandamus (A).... Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable. "

The principle enunciated in the above case was approved and followed in King v. Revising Barrister for the Borough of Hanley. In Hochtief Gammon case this Court pointed out (at p. 675 of Reports: SCC p. 656) that the powers of the courts in relation to the orders of the government or an officer of the government who has been conferred any power under any statute, which apparently confer on them absolute discretionary powers, are not confined to cases where such power is exercised or refused to be exercised on irrelevant considerations or on erroneous ground or mala fide, and in such a case a party would be entitled to move the High Court for a writ of mandamus. In Padfield v.

Minister of Agriculture, Fisheries and Food, the House of Lords held that where Parliament had conferred a discretion on the Minister of Agriculture, Fisheries and Food, to appoint a committee of investigation so that it could be used to promote the policy and objects of the Agricultural Marketing Act, 1958, which were to be determined by the construction of the Act which was a matter of law for the court and though there might be reasons which would justify the Minister in refusing to refer a complaint to a committee of investigation, the Minister's discretion was not unlimited and if it appeared that the effect of his refusal to appoint a committee of investigation was to frustrate the policy of the Act, the court was entitled to interfere by an order of mandamus. In Halsbury's Laws of England, 4th Edn., vol. I, para 89, it is stated that the purpose of an order of mandamus:

"is to remedy defect of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

20. There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion."

This is especially important in giving directions in respect of mobilizing:

(a) The Prevention of Damage to Public Property Act (1984)

(b) The Police Act of 1861 and the duties of the police under the Criminal Procedure Code

In D.K. Basu v. State of West Bengal (1997) 1 SCC 416, directions were given to "Arrest and Detention" in criminal cases. The Court opined:

"28.Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of an offence but it must be remembered that the law does not permit use of third-degree methods or torture of accused in custody during interrogation and investigation with a view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purposeful to make the investigation effective. By torturing a person and using third-degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it."

29. How do we check the abuse of police power? Transparency of action and accountability perhaps are two possible safeguards which this Court must insist upon. Attention is also required to be paid to properly develop work culture, training and orientation of the police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the constitutional ethos. Efforts must be made to change the attitude and approach of the police personnel handling investigations so that they do not sacrifice basic human values during interrogation and do not resort to questionable forms of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time during the interrogation may deter the police from using thirddegree methods during interrogation.

30. Apart from the police, there are several other governmental authorities also like Directorate of Revenue Intelligence, Directorate of Enforcement, Coastal Guard, Central Reserve Police Force (CRPF), Border Security Force (BSF), the Central Industrial Security Force (CISF), the State Armed Police, Intelligence Agencies like the Intelligence Bureau, RAW, Central Bureau of Investigation '(CBI), CID, Traffic Police, Mounted Police and ITBP, which have the power to detain a person and to interrogate him in connection with the investigation of economic offences, offences under the Essential Commodities Act, Excise and Customs Act, Foreign Exchange Regulation Act etc. There are instances of torture and death in custody of these authorities as well. In In Re: Death of Sawinder Singh Grover, 1995 Supp. (4) SCC 450 (to which Kuldip Singh, J. was a party) this Court took suo moto notice of the death of Sawinder Singh Grover during his custody with the Directorate of Enforcement. After getting an enquiry conducted by the Additional District Judge, which disclosed a prima facie case for investigation and prosecution, this Court directed the CBI to lodge an FIR and initiate criminal proceedings against all persons named in the report of the Additional District judge and proceed against them. The Union of India/Directorate of Enforcement was also directed to pay a sum of Rs 2 lakhs to the widow of the deceased by way of ex gratia payment at the interim stage. Amendment of the relevant provisions of law to protect the interest of arrested persons in such cases too is a genuine need.

31. There is one other aspect also which needs our consideration. We are conscious of the fact that the police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals. Many hardcore criminals like extremists, terrorists, drug peddlers, smugglers

who have organised gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalisation and enforcement of **fundamental rights,** it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogation. It is felt in those quarters that if we lay too much of emphasis on protection of their fundamental rights and human rights, such criminals may go Scot free without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime. The cure cannot, however, be worst than the disease itself.

Thus the purpose of the guidelines in D.K. Basu was to effectuate a constitutional right within the framework of a statute. At paras 33 & 34, it was observed as follows:

"33. There can be no gainsaying that freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statutes has been upheld by the courts. The right to interrogate the detenus, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. The Latin maxim salus populi supremo lex (the safety of the people is the supreme law) and salus republicae supremo lex (safety of the State is the supreme law) coexist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be "right, just and fair". Using, .any form of torture for extracting any kind of information would neither be "right nor just nor fair" and, therefore, would be impermissible, being offensive to Article 21. Such a crime suspect must be interrogated - indeed subjected to sustained and scientific interrogation - determined in accordance with the provisions of, law. He cannot, however, be tortured or subjected to third-degree methods or eliminated with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons etc. His constitutional right cannot be abridged in the manner permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal. Challenge of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to "terrorism". That would be bad for the State, the community and above all for the rule of law. The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves. That the terrorist has violated human rights of innocent citizens may render him liable to punishment but it cannot justify the violation of his human rights except in the manner permitted by law. Need, therefore, is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the

challenge.

34. In addition to the statutory and constitutional requirements to which we have made a reference, we are of the view that it would be useful and effective to structure appropriate machinery for contemporaneous recording and notification of all cases of arrest and detention to bring in transparency and accountability. It is desirable that the officer arresting a person should prepare a memo of his arrest at the time of arrest in the presence of at least one witness who may be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. The date and time of arrest shall be recorded in the memo which must also be countersigned by the arrestee."

24. On this basis, detention guidelines were issued. In a sense, the guidelines in the Vineet Narain case (supra) also purported to be to enforce the statute - without more, even though the constitutional right to a corrupt free government under Article 21 was involved.

25. There are also several cases where guidelines may become necessary in the absence of a statutory framework.

26. The justification for this was given in Vishaka's case (supra) and approved in Vineet Narain's case (supra) at pr. 52:

Vishaka's paras 8.14,15

"8. Thus, the power of this Court under Article 32 for enforcement of the fundamental rights and the executive power of the Union have to meet the challenge to protect the working women from sexual harassment and to make their fundamental rights meaningful. Governance of the society by the rule of law mandates this requirement as a logical concomitant of the constitutional scheme. The exercise performed by the Court in this matter is with this common perception shared with the learned Solicitor General and other members of the Bar who rendered valuable assistance in the performance of this difficult task in public interest.

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14....The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction

that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in Minister for Immigration and Ethnic Affairs v. Tech 128 ALR 353, has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia.

15. In Nilabati Behera v. State of Orissa, (1993) 2 SCC 746, a provision in the ICCPR was referred to support the view taken that 'an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right', as a public law remedy under Article 32, distinct from the private law remedy in torts. There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity.

Vineet Narain Para 52

"As pointed out in Vishaka it is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field."

27. Thus, as we have noted, there are a number of cases in which guidelines have been given

- Lakshmi Kant Pandey v. Union of India, (1984) 2 SCC 244 [Guidelines for adoption of minor children by foreigners were laid down]
- Vishaka v. State of Rajasthan, (1997) 6 SCC 241 [Guidelines were laid down to set up a mechanism to address the issue of sexual harassment at the workplace]
- Vineet Narain v. Union of India, (1998) 1 SCC 226 [Directions were laid down to ensure the independence of the Vigilance Commission]
- State of W.B. v. Sampat Lal, (1985) 1 SCC 317
- K. Veeraswami (1991) 3 SCC 655

- Union Carbide Corporation v. Union of India, (1991) 4 SCC 584
- Delhi Judicial Service Assn. v. State of Gujarat, (1991) 4 SCC 406
- Delhi Development Authority v. Skipper Construction Co. (P) Ltd., (1996) 4 SCC 622;
- Dinesh Trivedi, M.P. v. Union of India, (1997) 4 SCC 306
- Common Cause v. Union of India, AIR 1996 SC 929 [Directions were issued for revamping the system of blood banks in the country]

28. The present case is one in which guidelines are necessary:

(i) to the police to enforce statutory duties

(ii) to create a special purpose vehicle in respect of damages for riot cases

29. This issue was examined by the Nariman Committee which considered:

"...where (in such cases) there is destruction/damage to properties and loss of lives or injuries to persons –

(i) the true measures of such damages
(ii) the modalities for imposition of such damages and..." (p.2 of the Report)

30. These guidelines shall cease to be operative as and when appropriate legislation consistent with the guidelines indicated above are put in place and/or any fast track mechanism is created by Statute(s).

31. So far as the role of media is concerned the Mr. F.S. Nariman Committee has suggested certain modalities which are essentially as follows:

a) The Trusteeship Principle

– Professional journalists operate as trustees of public and their mission should be to seek the truth and to report it with integrity and independence.

b) The Self Regulation Principles

- A model of self-regulation should be based upon the principles of impartiality and objectivity in reporting; ensuring neutrality; responsible reporting of sensitive issues, especially crime, violence, agitations and protests; sensitivity in reporting women and children and matters relating to national security; respect for privacy.

c) Content Regulations

- In principle, content regulation except under very exceptional circumstances, is not to be encouraged beyond vetting of cinema and advertising through the existing statues. It should be incumbent on the media to classify its work through warning systems as in cinema so that children and those who are challenged adhere to time, place and manner restraints. The media must also evolve codes and complaint systems. But prior content control (while accepting the importance of codes for self restraint) goes to the root of censorship and is unsuited to the role of media in democracy.

d) Complaints Principle

- There should be an effective mechanism to address complaints in a fair and just manner.

e) Balance Principle

- A balance has to be maintained which is censorial on the basis of the principles of proportionality and least invasiveness, but which effectively ensures democratic governance and self restraint from news publications that the other point of view is properly accepted and accommodated.

32. It is felt that the appropriate methods have to be devised norms of self regulation rather than external regulation in a respectable and effective way both

for the broadcasters as well as the industry. It has been stated that the steps constitute a welcome move and should be explored further. The proposed norms read as follows:

"The NBA believes that media that is meant to expose the lapses in government and in public life cannot be obviously be regulated by government, else it would lack credibility. It is a fundamental paradigm of freedom of speech that media must be free from governmental control in the matter of "content" and that censorship and free speech are sworn enemies. It therefore falls upon the journalistic profession to evolve institutional checks and safeguards, specific to the electronic media, that can define the path that would conform to the highest standards of rectitude and journalistic ethics and guide the media in the discharge of its solemn Constitutional duty. There are models of governance evolved in other countries which have seen evolution of the electronic media, including the news media, much before it developed in India. The remarkable feature of all these models is "self-governance", and a monitoring by a "jury of peers ".

33. The Committee has recommended the following suggestions:

(i) India has a strong, competitive print and electronic media

(ii) Given the exigencies of competition, there is a degree of sensationalism, which is itself not harmful so long as it preserves the essential role of the media viz: to report news as it occurs - and eschew comment or criticism. There are differing views as to whether the media (particularly the electronic media) has exercised its right and privilege responsibly. But generalisations should be avoided. The important thing is that the electronic (and print) media has expressed (unanimously) its wish to act responsibly.

The media has largely responsible and more importantly, it wishes to act responsibly.

(iii) Regulation of the media is not an end in itself; and allocative regulation is necessary because the 'air waves' are public property and cannot technically be free for all but have to be distributed in a fair manner. However, allocative regulation is different from regulation per se. All regulation has to be within the framework of the constitutional provision.

However, a fair interpretation of the constitutional dispensation is to recognize that the principle of proportionality is built into the concept of reasonableness whereby any restrictions on the media follow the least invasive approach. While emphasizing the need for media responsibility, such an approach would strike the correct balance between free speech and the independence of the media.

(iv) Although the print media has been placed under the supervision of the Press Council, there is need for choosing effective measures of supervision – supervision not control.

(v) As far as amendments mooted or proposed to the Press Council Act, 1978 this Committee would support such amendments as they do not violate Article 19(1) (a) – which is a preferred freedom.

(vi) Apart from the Press Council Act, 1978, there is a need for newspapers and journals to set up their own independent mechanism.

(vii) The pre censorship model used for cinema under the Cinematography Act, 1952 or the supervisory model for advertisements is not at all appropriate, and should not be extended to live print or broadcasting media.

(viii) This Committee wholly endorses the need for the formation of

(a) principles of responsible broadcasting
(b) institutional arrangements of self regulation

But the Committee emphasised the need not to drift from self regulation to some statutory structure which may prove to be oppressive and full of litigative potential.

(ix) The Committee approved of the NBA model as a process that can be built upon both at the broadcasting service provider level as well as the industry level and recommend that the same be incorporated as guidelines issued by this Court under Act 142 of the Constitution of India – as was done in Vishaka's case.

34. The suggestions are extremely important and they constitute sufficient guidelines which need to be adopted. But leave it to the appropriate authorities to take effective steps for their implementation. At this juncture we are not inclined to give any positive directions.

35. The writ petitions are disposed of. We express our appreciation for the members of both the Committees and the Chairman of each Committee Justice K.T. Thomas and F.S. Nariman who are to be complimented for the pains taken by them to make recommendations which will go a long way to meet the challenges posed.

.....J.
(Dr. ARIJIT PASAYAT)

.....J.
LOKESHWAR SINGH PANTA)

.....J.
(P. SATHASIVAM)

New Delhi
April 16, 2009