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Fair Trial Manual for Judges & Magistrates

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CHRI 2019

Fair Trial Manual

A Handbook for Judges and Magistrates



CHRI

Commonwealth Human Rights Initiative
working for the practical realisation of human rights in
the Commonwealth

COMMONWEALTH HUMAN RIGHTS INITIATIVE

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Fair Trial Manual

A Handbook for Judges and Magistrates

**2019
Second edition**

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CHRI started its judicial reform programme in collaboration with INTERIGHTS, London in 2001. From holding judicial colloquia with judges across the Commonwealth, it narrowed down to colloquia with High Court judges in India. However, soon realising the need for training and sensitisation of the cutting-edge lower judiciary CHRI began a concentrated training and sensitisation programme on human rights in the administration of justice for district judges and magistrates. A series of workshops were held in Andhra Pradesh, particularly between 2006 and 2009.

Specially designed for the subordinate judiciary, which is the backbone of the system and carries the heavy burden of fulfilling the public's expectation of fair and speedy justice, the exchanges provided an opportunity for judges and judicial officers to discuss the problems they grapple with and listen to their experiences.

This is the second edition of the Fair Trial Manual that was first published in 2010. The first edition was an outcome of several such exchanges which discussed at length the elements of a fair trial, the obstacles to justice and judges' role in addressing inadequate remedies and poor court craft. The manual was originally developed along with the International Human Rights Clinic, Cornell Law School. CHRI felt the need to update the earlier volume following new developments in the law. This edition has benefited hugely from close collaboration with the Centre for Constitutional Law, Policy and Governance, National Law University (NLU), Delhi.

We are grateful to Mr. Neeraj Tiwari, Assistant Professor of Law, NLU Delhi, who reviewed and provided inputs for the manual. We would also like to express our gratitude to the student coordinators Aradhana C. V. and Sanya Sud. Finally, we would like to thank the student research team consisting of Aarushi Mahajan, Anamika Mishra, Akshaya Parthasarathy, Aradhana C.V., Devanshi Saxena, Kavya Tangirala, Kuhuk Jain, Pritika Malhotra, Sanya Sud, Shruti Arora, Saumya Bhatt, Tishta Tandon and Yashika Jain for their help in updating the manual.

As we bring out this second edition it would be remiss not to recall with thanks Sital Kalantry, Associate Clinical Professor of Law and Director of the Cornell International Human Rights Clinic who helped us develop the early concept and framework of the Manual. Our gratitude also goes to Sheila Chitran and Richard Jamgochian both at the time at the Human Rights Clinic of Cornell who conducted the research and structured the chapters. We remain grateful to Vrinda Grover, Hon'ble Justice Ajit Bharioke and Hon'ble Justice Ramakrishna who took time out to advise on technical inputs and offered valuable suggestions to the first edition.

Maja Daruwala

Senior Advisor



ABOUT THE CENTRE FOR CONSTITUTIONAL LAW, POLICY, AND GOVERNANCE (CLPG):

The Centre for Constitutional Law, Policy, and Governance is a Research Centre at National Law University, Delhi. It focuses on foregrounding rights, rightslessness, and other vulnerabilities in understanding, critiquing, and reforming laws, legal institutions, and modes of governance, so that they reflect the constitutional ideals of justice. The Centre focuses on data-driven approaches to law reform, and has engaged in the past with the Executive, Legislature, the Judiciary, and civil society organisations. The Centre has worked on issues of gender, reproductive justice, prison reforms, the death penalty, criminal justice reform, amongst others. It has collaborated with the Delhi High Court Legal Services Committee (DHCLSC), the Center for Reproductive Rights, Daksh India, the Human Rights Law Network, and the Lawyers Collective Womens Rights Initiative on its projects. The Centre has also assisted the Law Commission of India in its work. Dr. Aparna Chandra is the Director of the Centre. Prof (Dr.) Mrinal Satish was the Executive Director of the Centre when this project was undertaken.



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FOREWORD

Fairness in the conduct of trial of offences is a critical index of a society professing to be a liberal, egalitarian and civilized member of the comity of nations. It is therefore the duty of the court, every court, as the sentinel on the *qui vive* to keep the scales of justice even, to live up to the mandate of “equality before the law and equal protection of the laws”, a guarantee of our Constitution that is not subject to the wealth, influence or station of those who come or are brought before our courts.

To recall the stately admonition of Felix Frankfurter: “It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end”.

The second, revised and updated edition of *Fair Trial Manual: A Handbook for Judges and Magistrates* is a much needed guide for judges, magistrates and lawyers to ensure that the constitutional vision of justice is understood and respected at every stage of a criminal trial, regardless of the political, denominational, social, economic, or cultural identity of persons perceived to be in conflict with law.

The 2019 version has been revised by Dr Mrinal Satish of the Centre for Constitutional Law, Policy and Governance, NLU Delhi and Maja Daruwala and brought out by Commonwealth Human Rights Initiative (CHRI), an independent, international, non-governmental body engaged in practical realization of human rights throughout the Commonwealth; nurturing better respect for the protection and promotion of international human rights standards and access to justice and information.

The Handbook is designed to be a precise, comprehensive and accessible advisory for judicial officers. Everywhere it emphasizes the value of procedure and due process and its close connection in operationalizing constitutional guarantees for both accused and victim. Essentially, it points out the connection between the Constitution and the criminal codes; why procedure is designed the way it is and what the judge’s role and duty is in upholding it. All relevant stages of legal processes culminating in prosecution and trial for offenses are covered in four topically organized chapters, commencing with *General Principles of a Fair Trial*.

Arrest and Pre-Trial Detention as components of fair and equitable due processes are covered in Chapter 2, with detailed guidance on the substantive constitutional and legal rights involved, the processual requirements legislatively prescribed; the domestic and international law and jurisprudence, with the statutory provisions referenced; the functions and responsibility of the court in ensuring compliance with the detailed provisions designed to ensure fair process; and appropriate case law mandating the duty of courts in this area.

Chapter 3 covers other protections/rights available to the accused during the pretrial stage, such as rights to: be free from torture, respect for privacy and private life; and the duty of law enforcement authorities to keep records of investigation.

The last chapter covers the law and best practices relevant to the several stages of a trial to the final judgment to be recorded by the court. Core attributes of competence, independence and impartiality, of the presiding officer of the court; the right to a public hearing and exceptions to that normal rule; the duty to ensure speed with efficiency; the problematic of treatment and rights of under-trial prisoners; free legal aid as an integer of access to justice of the under and un-empowered; framing of charges; recording of evidence including oral evidence; the raft of processual and substantive rights integral to a fair trial and the several opportunities the accused is entitled to; witness protection protocols; plea bargaining; entitlement to assistance of an interpreter; the constitutional and statutory provisions pertaining to double jeopardy; rights to a reasoned judgment and to a copy of it, are amongst several areas of trial processes covered.

Each chapter refers to relevant domestic and international law, the appropriate case-law governing the aspect and a brief guide for judicial enforcement. The treatment of the themes in this Handbook is precise and serves as a useful tool for the day-to-day work of the judicial officer, providing an invaluable checklist of best practices for ensuring a fair trial; a handy guide on the bench in the chamber and at home. Adherence to the practices outlined in the Handbook can transform criminal trials from mere mechanical law enforcement rituals into fair, therapeutic, and constitutionally compliant justice delivery services, ensuring equality before the law and equal protection of the laws.

I compliment Ms. Maja Daruwala, former Director and currently the senior advisor of CHRI, and Navaz Kotwal who conceptualized, researched and wrote the Handbook in the original and Prof. Mrinal Satish who has substantially contributed to revising this very well-researched, organized and updated edition of the Fair Trial Manual. I urge all judicial officers to keep this guide close, study it well and refer to it often. It will serve as an invaluable tool and ready reckoner for all our trial judges and will be of immense utility in judicial education and training at State Judicial Academies, as well. It is heartening to note that this revised edition is readily available for immediate use in judicial education and training.

Hon. Mr Justice G. Raghuram (Retd),
Director, National Judicial Academy, Bhopal
May 2019





DIRECTOR'S MESSAGE

True to style, Maja Daruwala has laboured with great diligence and detail, long and hard over this Fair Trial Manual. It is the second edition and CHRI is proud to have this rich addition to its growing list of publications.

This a true handbook – styled as such with loose leaves for judges to make notes and go back and forth between issues and concerns quickly – as much as a real tool for consultation, advocacy and innovation. It lays the ground and places opportunities as well as challenges before the judicial system itself. The facts and the public perception underline the fact that our clogged and often closed, opaque criminal justice system needs oxygen and help if it is to provide fair trails and true justice to the needy.

By pointing out the constitutional standards that procedure and decision making must follow, it gifts judges a standard by which to test their decisions and the knowledge of whether the justice they are delivering or seek to deliver is in keeping with the Constitution's foremost requirements.

Those who suffer the most are the poor, the vulnerable and the marginalised. If justice is to be delivered, I would argue, that it is the right of this group to receive it at first instance, for they – unlike the wealthy, well-connected and influential – cannot afford appeals and delays.

The wealthy and the freebooters, as well as many in government, appear to thumb their nose at the system which in turn seems helpless. The process is often used to protect the strong (as if they need such protection) through special laws which blunt the sharp tools that justice carries. Justice Raghuram refers in his striking foreword to the challenges before the system and sets goals as well as process for how judges should function.

If judges are to be committed – whether at the initial trial stage or later during appeals to the highest court – they must be committed to the principles of a fair trial: which lies in ensuring that the weak and vulnerable are strengthened and built to become the pillars of society and the powerful and wealthy are brought to account. Justice cannot be blind and the scales must be tipped in favour of those who suffer the most – not the privileged few. Implementing a decision cannot be left to the slothful ways of systemic bureaucratic process; should not judges, benches and courts have the right to review progress in cases where they have issued verdicts and haul up those who have fallen short of delivering? That could serve as a necessary corrective.

We are not lacking in fine judgments – we lack in fair implementation of those verdicts.

To me, one of the pillars of justice and constitutional law lies in Article 21, which affirms the right of every person living in the territory of India to due process – and the right not to be deprived of their life and liberty without such due process.

May that be the talisman for those who read this labour of love that Maja Daruwala and her co-editor Mrinal Satish have put together with such care, diligence and commitment to the rule of law and the role of judges in ensuring a free and fair criminal justice system, starting with fair trial.

Sanjoy Hazarika

International Director, Commonwealth Human Rights Initiative, Delhi

September 2019





INTRODUCTION

Judges are only human and come with all the failings of other human beings. Personal predilections and preferences, socialised behaviour, political beliefs, and egos all factor into their behaviour as judges along with the pressures of a very imperfect system. Nevertheless, by virtue of their office, judges are required to be absolutely honest, absolutely fair, and absolutely objective to reach the truth with an unimpeachable verdict at the end of the process of delivering justice. Fair trial norms assist this outcome and are an extremely practical means of reaching as logical and as objective a conclusion as human frailty permits.

The policy, practice, procedure and precedent relating to fair trial have evolved over decades of experience to assist the judge to run his/her court to the highest standards of probity. They are an aid to objectivity through strict adherence to procedural safeguards and are recognised as vital to justice not only being done but also being seen to be done.

Fair trial is not a favour afforded to the supplicant at law, but a bundle of legally enforceable rights guaranteed by the state to its citizens, for whom the state itself exists. The principle of a fair trial is put in concrete terms of certain rights such as the right to remain silent, the prohibition of double jeopardy, the right to legal counsel, the right to be notified of charges, and so on. However, the principle is broader than the sum of these individual guarantees. Each right has been crafted to ensure that every person coming before our courts is afforded – from the moment investigation or detention begins till the final disposition of the case – equal protection no matter what their birth or national origins; their social or economic status; their religious or political beliefs; and no matter how grievous the alleged crime. This means that the right to a fair trial encompasses the notion that each individual must be able to make use of his/her procedural rights regardless of his/her individual capabilities. Seeking to refine the quality of justice at every turn, fair trial norms are nuanced to afford particular protection to the more vulnerable and greatly disadvantaged who may come before the law, whether as witnesses, victims or accused. The application of fair trial norms to every single instance and at every stage of the criminal law, is recognised both internationally, and nationally in India, as a Fundamental Right. These rights, constitutionally guaranteed, compel and cast a legal duty on the judge to ensure that they are respected, realised and never violated.

The Fair Trial Manual is the outcome of several interactions with district court judges and magistrates, listening to their concerns and dilemmas. It is limited to identifying and explaining in succinct terms those international standards that India has agreed to abide by, ratifying specifically the International Covenant on Civil and Political Rights (ICCPR), the mandates of the Indian Constitution and the provisions of Indian criminal procedural law and evidence that are woven together to promote fair trial.

The manual is intended for use in judicial education and to provide busy judges with a ready set of minimum standards to keep by their elbow for use in their daily work. We hope they will find it valuable and use it as a basis from which to build best practices in the courts they command.

Fair Trial Manual

A Handbook for Judges and Magistrates

CHAPTER 1

**GENERAL PRINCIPLES OF A FAIR TRIAL
APPLICABLE AT ALL STAGES**



CHAPTER I

General Principles of Fair Trial Applicable at all Stages

INTRODUCTION

All principles discussed in this chapter are relevant for ensuring a fair trial and are required to be upheld at every stage of the judicial proceeding. Illustratively, fair trial norms include the right to be presumed innocent, the right to be defended by a lawyer, and the right to be informed of charges. The rules that ensure protection of all parties in the criminal justice process—the defence, the prosecution, the accused, victims and witnesses—are laid down in the Constitution of India, 1950 (Constitution), the Code of Criminal Procedure, 1973 (Cr.P.C) and the Indian Evidence Act, 1872 (IEA). The idea is to create a level playing field between the State/complainant and the accused.

As the judge has complete control of a case as soon as it comes to court, it is his/her paramount duty to ensure that fair trial norms that have been assured by the Indian Constitution, as well as internationally agreed upon are adhered to. Non-compliance with any single norm at any stage can subvert all further proceedings, taint the entire process, and gravely impinge on the rights of parties involved.

A trial has to be fair to all concerned which includes the accused, victims and society at large. Each person has a right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as it is to the victim and society.

1.1 General Principles of a Fair Trial

The meaning and scope of “fair trial” was discussed by the Supreme Court in *Zahira Habibulla Sheikh v. State of Gujarat*.¹ The Court ruled that fair trial entailed a trial before an impartial judge, conducted by a fair prosecutor, in an “atmosphere of judicial calm,”² without any bias or prejudice against the accused, the witnesses, or the cause being adjudicated upon.³ Noting the role of the presiding judge in guaranteeing a fair trial, the Court held that the judge should not be a mere spectator in the trial, but must become “a participant in the trial, evincing intelligence [and] active interest.”⁴ He/she should “elicit all relevant materials necessary for reaching the correct conclusion.”⁵ It held that not only should there be “technical observance of the frame and forms of law, but also... recognition and just application of its principles in substance to... prevent miscarriage of justice.”⁶ Subsequently, in *Kalyani Baskar v. M.S. Sampooranam*,⁷ the Supreme Court held that “[i]t is essential that rules of procedure designed to ensure justice should be

¹ (2004) 4 SCC 158.

² *Zahira Habibulla H. Sheikh v. State of Gujarat*, (2004) 4 SCC 158, 184.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*, 187.

⁷ (2007) 2 SCC 258

scrupulously followed, and the courts should be jealous (sic) in seeing that there is no breach of them.”⁸

1.2 The Presumption of Innocence

“It is better that ten guilty escape than one innocent suffers.”⁹ This quote reflects the principle, known in criminal law as Blackstone’s Formulation (named after English jurist William Blackstone), “that there is hardly anything more undesirable in a legal system than the wrongful conviction of an innocent person.” This is because the consequences of convicting an innocent person are so significantly serious that its reverberations are felt throughout a civilised society.¹⁰ For example, the sentence served by an innocent person cannot be erased by any subsequent act of annulment.¹¹ Thus, to ensure as far as possible that no court will wrongfully convict an innocent person, an accused person is presumed innocent until proven guilty, with the prosecution bearing the burden of establishing the facts necessary to prove guilt.

1.2.1 Domestic Law

All criminal trials are based on the principle that the accused is innocent till proved guilty. The presumption of innocence is a cardinal principle of our legal system and a basic human right of the accused person.¹² The presumption must be the guiding principle right from the moment of suspicion, through investigation, throughout the trial process and till the delivery of the verdict. The Supreme Court has held that the presumption of innocence applies in the context of bail as well. A statute that mandates the court to certify that the accused is not guilty of the offence before granting bail violates the presumption of innocence.¹³

Criminal procedure is built around the principle of “innocent until proven guilty” and is designed to protect this right. When it is said that a defendant to a criminal charge is presumed to be innocent, what is really meant is that the burden of proof of proving his guilt lies on the prosecution.¹⁴ This means that it is the duty of the accuser to show not merely the general probability of guilt in the circumstances, but requires him/her to prove every element of the offence beyond reasonable doubt.

It is frequently argued that the rights afforded to the accused are somehow bought at the cost of the victim, the state and society at large, but that is not so. The scheme of the Indian Evidence Act and the Cr.P.C are designed not to favour one party over the other, but to protect and safeguard the rights of all the parties concerned, and to ensure a level-playing field. The state, in the form of its law enforcement agencies and prosecution machinery safeguards the interests of the victim and must investigate, prepare and present its case to the fullest to satisfy that trust. On the other hand, fair trial norms – including the presumption of innocence – are the individual’s shields of justice provided by law to protect the accused against any unfair, biased or illegal acts of a powerful state. The judge’s role is to hold the scales balanced by his/her assessment of what is brought before him/her and to actively intervene when he/she suspects or knows of danger to any of these rights by the flouting of these rules.

⁸ *Id.*, 262.

⁹ Letter from Benjamin Franklin to Benjamin Vaughan, 14 March 1785.

¹⁰ *Kali Ram v State of Himachal Pradesh*, AIR 1973 SC 2773.

¹¹ *Id.*, para 28.

¹² See: *Noor Aga v. State of Punjab*, (2008) 16 SCC 417; *Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1.

¹³ *Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1.

¹⁴ William Glanville, *The Proof of Guilt*; 3rd edn., 1963, pp. 184-85.



Over time, the pronouncements of the Supreme Court have consistently reaffirmed that the presumption of innocence is a human right.¹⁵ That the accused, however unpleasant and unattractive he or she may be and however deplorable the alleged crime is, must be afforded *all* the protections required for the realisation of this right. This presumption of innocence must condition his/her treatment and the procedure of the trial throughout.

The Supreme Court in *P. N. Krishna Lal v. Government of Kerala*,¹⁶ clarified that the principle of presumption of innocence is entrenched in the Indian Constitution. The Universal Declaration of Human Rights and the International Convention on Civil and Political Rights, to which India is a party, also guarantee fundamental freedoms and liberties to an accused person. The procedure prescribed for trial, must in spirit also stand the test of the rights guaranteed by those fundamental human rights.¹⁷ In criminal jurisprudence, the settled law is that the prosecution must prove all the ingredients of the offences for which the accused has been charged. The proof of guilt of the accused is on the prosecution and must be proved beyond reasonable doubt. At no stage of trial is the accused under an obligation to disprove his innocence. “Unlike in a trial of civil action, the burden of proof of a case always rests on the prosecution and it never gets shifted... To place the entire burden on the accused to prove his innocence, therefore, is arbitrary, unjust and unfair infringing, violating the guarantee under Article 21.”¹⁸

Section 101 of the Indian Evidence Act further reinforces the presumption of innocence by providing that whoever desires a court to give judgment as to any legal right or liability dependent on the existence of facts which he/she asserts, must prove those facts. Thus, if the State wishes to convict an individual of an alleged crime, the State carries the burden of firmly establishing and proving each fact. To protect this right to be presumed innocent, Section 161(2) of the Cr.P.C permits persons questioned by the police to refrain from answering questions that might expose them to criminal penalty.

It is often wrongly believed that the burden of proof is completely reversed and on the accused where state policy has brought in stringent legislation as a means of dealing with well-recognised evils, illustratively, dowry deaths. Here the statute (Section 304B, IPC) clearly states: “When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry; the court shall presume that such person had caused the dowry death.” The Law Commission of India and the Supreme Court in several cases have both clarified that it is the prosecution that must show, to a high level of proof, that each element that makes up what amounts to a dowry death is in fact made out. It is only after this that the presumption arises that the accused has “caused the dowry death.” However, even this is just a rebuttable presumption and the accused has the right to show that there were other circumstances that displace the prosecution’s case.

15 For a discussion of the Indian Supreme Court’s jurisprudence on presumption of innocence, See: *Noor Aga v. State of Punjab*, (2008) 16 SCC 417.

16 1995 Supp (2) SCC 187.

17 *Id.*, 207.

18 *Id.*, 203.



Ram Gopal v. State of Maharashtra, (1972) 4 SCC 625

The appellant Ram Gopal was charged with the murder of Zingrooji Sita Ram. It was established that Sita Ram was poisoned and died on his way to the hospital. The prosecution argued that Ram Gopal had administered the victim an insecticide in kerosene oil either with tea or in water and Sita Ram died as a result of the poisonous insecticide. The post mortem report stated that death was by poisoning and a chemical analyst's report confirmed the presence of an organo-chloro compound in the viscera of the deceased. The prosecution argued that the defendant's motive to murder Sita Ram was established by the fact that prior to his death, Sita Ram had sold a piece of land to Ram Gopal. Ram Gopal had promised to pay the full amount within six weeks of the execution of the sale deed. Despite constant pestering, Ram Gopal kept putting off Sita Ram on some pretext or the other. The prosecution argued that the deceased had fallen ill and died after a visit to the accused. Opportunity and the means of death had been established. Ram Gopal was sentenced to death by the Sessions Judge, Nagpur and this was confirmed by the High Court of Bombay (Nagpur Bench).

In appeal to the Supreme Court against the death sentence the Apex Court stated that the prosecution's case had too many gaps. First, there was no evidence to show that the accused was ever in possession of any organo-chloro compound. Second, it was improbable that such a large dose of a kerosene-based poison that was fatal could have been consumed by the victim without noticing it and thirdly, other possibilities such as suicide had not been ruled out. This was sufficient to give the accused the benefit of doubt, and the Apex Court reversed the verdict of the lower courts.

The case is illustrative of the need to keep in mind that not only must every fact be established along with the *mens rea* required, but that the prosecution must be able to link the sequence of events and rule out other probable causes for the occurrence. Here, the Supreme Court felt that there may have been other causes for the death of the victim, and therefore the "beyond reasonable doubt" degree of proof had not been met.



Kali Ram v. State of Himachal Pradesh, AIR 1973 SC 2773

Kali Ram was convicted of two murders. He appealed his conviction to the Supreme Court. The prosecution's case rested on three pieces of evidence. First, a witness testified that Kali Ram had spent the night near the victims' residence, and on the evening of the crime was seen heading toward the victims' house. Second, the prosecution asserted that they had a written confession from Kali Ram which he had mailed to the police station. Third, the prosecution asserted that Kali Ram had made an oral confession to a witness.

Noting that the accused was entitled to the presumption of innocence requiring the prosecution to establish guilt beyond a reasonable doubt, the Supreme Court reviewed the prosecution's evidence. First, the Court concluded that the evidence that Kali Ram was headed toward the victims' house on the night of the crime was unreliable because the testifying witness had waited for over two months to come forward, despite knowing of the incident since the crime's occurrence. The Court found that the prosecution did not offer a cogent explanation as to why the witness was silent for so long. Second, the Court held that the prosecution had not verified the authenticity of the letter of confession nor displaced the possibility that it could have been fabricated. It was necessary for the prosecution to do that before the letter of confession had evidentiary value. Third, the Court found the testimony of the witness regarding the oral confession highly questionable. Having found all the prosecution's primary evidence untrustworthy, the Court reversed the conviction, explaining that the prosecution did not rebut the accused's presumption of innocence.

1.2.2 International Law

India is part of the international community of nations. It has contributed significantly to the building of international norms and has long accepted their validity. In fact, its Constitution mirrors many of the fundamental rights and norms agreed to at international law.

A considerable amount of international law has developed during the last seven decades, which has resulted in the creation of internationally accepted standards and guarantees for human rights. The Universal Declaration of Human Rights (UDHR) adopted by the United Nations in 1948 was intended to set a common standard that ought to be met by all nations. Although the UDHR is not a legally binding document, it represents the will of the international community, including India, that human rights and dignity must be protected. Much of its principles have been turned into binding norms through inclusion in specific multilateral covenants and treaties that obligate states to bring their own policy, practice and legal standards into conformity with these principles.

The main instrument dealing with the pre-eminent international legal standards on the subject of fair trial rights is the International Covenant on Civil and Political Rights (ICCPR). The ICCPR is a United Nations treaty created in 1966 and entered into force on 23 March 1976. Nations that ratified this treaty are bound by it. The ICCPR is monitored by the Human Rights Committee, a group of experts who meet thrice a year to consider periodic reports submitted by member states on their compliance with the treaty.¹⁹

¹⁹ The Human Rights Committee is a body of independent experts that monitors the implementation of the International Covenant on Civil and Political Rights by its state parties. All state parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Covenant and then whenever the Committee requests (usually every four years). The Committee examines each report and addresses its concerns and recommendations to the state party in the form of "concluding observations."



India ratified the ICCPR in 1979, meaning that India is committed to upholding all the rights the ICCPR guarantees. Many of the rights contained in the ICCPR relate to the criminal justice system – whether in relation to the pretrial, trial or post-trial stage. Many of the safeguards provided in Indian law are also mandated by international law. However, it is to be noted that India has not signed the First or Second Optional Protocol to ICCPR. The First Optional Protocol provides for an individual complaint mechanism and the second one pertains to the death penalty.

Treaties, agreements and covenants signed and ratified by the Government of India do not automatically become a part of our domestic law unless incorporated into our laws by Parliament. Nevertheless, the Supreme Court has often discussed the effect of international covenants or agreements signed and ratified by India and whether these are enforceable by Indian courts. In relation to human rights norms, the Supreme Court has held that insofar as the rights declared in such international instruments are consistent with the Fundamental Rights guaranteed by Part III of the Constitution, they can be read as facets of, and an elucidation of the content of the Fundamental Rights guaranteed by our Constitution.²⁰ Any international convention consistent with the Fundamental Rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantees.

The UDHR lays down the common standard to be met by all nations. Article 11(1) states that: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.” Indian law is precisely in line with Article 14(2) of ICCPR which states: “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”

In its General Comment No. 13, the Human Rights Committee reiterates in unambiguous terms that the presumption of innocence is fundamental to the protection of human rights. “By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused gets the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt.” Further, all accused persons must be treated in accordance with this principle and it is the duty of all public authorities to refrain from prejudging the outcome of a trial.²¹ This is particularly important for adjudicating authorities to keep at the forefront of their minds, and indicates once again the need to ensure that procedure is meticulously followed so that there is little room for the play of private prejudice, personal bias, socialisation, or public pressure to invade or colour a trial’s outcome.

1.2.3 Guide for Judicial Enforcement

Judges need to bear in mind that suspicion, however grave, cannot take the place of proof, and strong pieces of circumstantial evidence cannot establish guilt unless each piece links to another and every link in the chain is proved.

In arriving at a verdict, the court should keep in mind that the burden of proof lies with the prosecution; it should satisfy itself of the degree to which the burden of proof has been shown to be beyond reasonable doubt or been left wanting; it should indicate the point in the trial when the onus of proof shifted, if at all it did,

²⁰ *People's Union for Civil Liberties v. Union of India*, (1997) SC 1203, *Vishakha v. State of Rajasthan*, (1997) 6 SCC 241.

²¹ General Comment No. 13 (Article 14), in UN Compilation of General Comments, p.124.



and the extent to which the other side could displace it; and the effect of the whole on the outcome of the trial.

The cardinal rules are:

- The burden of proof always rests on the prosecution.
- The prosecution must establish guilt beyond reasonable doubt.
- The benefit of the doubt belongs to the accused.
- High probability is not enough to convict—where there are several possible accounts, the account supporting the accused should be upheld.

The Supreme Court in *Sharad Birdhichand Sarda v. State of Maharashtra*,²² stressed the following “five golden principles”²³ that must be fulfilled before the case against an accused can be said to be fully established and called it the “Panchsheel” of the proof of a case based on circumstantial evidence:

The circumstances from which the conclusion of guilt is to be drawn should be fully established. Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.

The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

The circumstances should be of a conclusive nature and tendency.

They should exclude every possible hypothesis except the one to be proved.

There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

Judges must always honour these rights of accused persons. Their own predilections, the force of the prosecution’s arguments or the weakness of the defence is not adequate to ground a conviction. These elements may factor in, but it is not sufficient proof of guilt. There may be certain factors that could create bias against the accused and the court must remain cautious of that. For instance, the Supreme Court in *Sujit Biswas v. State of Assam*,²⁴ noted that an accused absconding does not lead to a firm conclusion of his/her guilt. An innocent person may also abscond in order to evade arrest and such an action may be part of the natural conduct of the accused. The Court held that the fact that the accused absconded should only be taken as a minor item in evidence for sustaining a conviction.²⁵

The objective evidence that is put forward, and the unbroken chain of events that lead to an irresistible conclusion are factors for grounding a conviction. Extraneous factors such as public pressure, media reports, a judge’s own biases or popular opinion cannot influence the judicial verdict.²⁶ Sometimes cases may appear to present a clash between the public’s outcry for conviction and the rights of the accused individual. However, the benefit of reasonable doubt cannot be withheld from the accused.²⁷ In giving the benefit of doubt to the accused, the judge must

²² (1984) 4 SCC 116.

²³ *Id.*, para 153.

²⁴ AIR 2013 SC 3817.

²⁵ *Id.*, para 23.

²⁶ *Kali Ram v. State of Himachal Pradesh*, AIR 1973 SC 2773, para 27.

²⁷ *Id.*



keep in mind that a reasonable doubt is not an imaginary trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense.²⁸

The Supreme Court has also discussed circumstances under which an appellate court should interfere with the judgment of acquittal of a lower court, keeping in mind the presumption of innocence. The Court has held that while handling a judgment of acquittal at the appellate stage, the appellate court must bear in mind that acquittal by the lower court further strengthens the presumption of innocence.²⁹ Thus, interference in a routine manner where another view is possible should be avoided, unless there are good reasons for such interference.³⁰ The appellate court must interfere with the order of acquittal only in exceptional cases of compelling circumstances where the judgment is found to be perverse due to mis-appreciation of evidence,³¹ or unreasonable on account of being based on erroneous factors.³²

1.2.3.1 Shifting the Burden of Proof and the Presumption of Innocence

There are various statutes such as the Negotiable Instruments Act, 1881; the Prevention of Corruption Act, 1988; the Terrorist and Disruptive Activities (Prevention) Act, 1987; Narcotic Drugs and Psychotropic Substances Act, 1985; and the Protection of Children from Sexual Offences Act, 2012 that provide for presumption of guilt and shifting of the burden of proof on the accused. The Supreme Court has held that judges must not interpret such presumptions to be contradictory to the fundamental fair trial principle of presumption of innocence. A presumption of guilt can only be raised when certain foundational facts are established by the prosecution and the circumstances provided in the statutes are found to be fulfilled.³³

1.2.3.2 Media Trials – A Caution to the Bar and the Bench

The proliferation of media, the speed at which news travels, and the ability of every person to opine in public across multiple platforms has created the possibility of strong public opinion pre-judging an issue quite outside of the formal due process by which guilt and innocence must be established. Concerned that this can unconsciously influence outcomes inside court, the Supreme Court addressed the issue of “trial by media,” meaning “the impact of television and newspaper coverage on a person’s reputation by creating a widespread perception of guilt or innocence regardless of an objective evaluation of the case before the court.”³⁴ The Law Commission of India also noted that although the media has the right to report topical events, in recent times sensational reporting has posed a threat to the right to a fair trial, guaranteed to the accused by the Constitution of India.³⁵

There are multiple cases where media trials have adversely impacted court proceedings. In *State of Maharashtra v. Rajendra Jawanmal Gandhi*,³⁶ the Supreme Court cautioned judges against being influenced by trials by media. It warned that judges must guard themselves from such external pressures and ensure that the rule of law is upheld.³⁷ In *M.P. Lohia v. State of West Bengal*,³⁸ in an anticipatory bail hearing in a dowry death matter, the Court noticed that two articles in a magazine

28 *Sujit Biswas v. State of Assam*, AIR 2013 SC 3817, para 13.

29 *State of U.P. v. Mohd. Iqram*, (2011) 8 SCC 80, para 28; *Chandrappa & Ors v. State of Karnataka* (2007) 4 SCC 415, para 42.

30 *Id.*

31 *State of Rajasthan v. Abdul Mannan and Anr.*, AIR 2011 SC 3013, para 15-17.

32 *Id.*, para 13.

33 *Babu v. State of Kerala*, (2010) 9 SCC 189, para 27.

34 *R.K. Anand v. Delhi High Court*, (2009) 8 SCC 106, para 293.

35 200th Report of the Law Commission of India, p. 3.

36 (1997) 8 SCC 386.

37 *Id.*, para 37.

38 (2005) 2 SCC 686.



had set out the allegations against the accused entirely from the perspective of the victim's family. Since the trial was yet to commence, the Court observed that such articles hamper the course of administration of justice and cautioned journalists from indulging in a media trial when the matter was *sub judice*.³⁹ In a similar vein, the Bombay High Court in *Leena Anil Devastnali v. State of Maharashtra*,⁴⁰ frowned on police officers divulging details of cases to the media to get "cheap and objectionable publicity." The court pointed out that the right to information must not be confused by the officers with the right to inform: a high degree of secrecy must be maintained during the investigative process.⁴¹

The Supreme Court has developed certain techniques to avoid possible prejudice caused by media reporting of trials. One of these is postponement of reporting of orders.⁴² The Court has held that subject to the test of necessity and proportionality, wherever a trial court feels that reporting of the trial would give rise to substantial risk of prejudice to later or connected trials, a court may order postponement of reporting of proceedings to safeguard the presumption of innocence.⁴³

1.3 Right to Equality before the Law and Equal Treatment by the Law

The principle of equality encompasses all areas of India's governance and society. The Constitution is unequivocal that equality is a fundamental mandate by which both state and individual are bound. In one stroke of the pen it removes immoral and iniquitous practices such as untouchability and begar. Through positive discrimination, it makes clear that there is no place for discriminatory societal divisions or practices such as caste, the historic disadvantages of sections such as women, and the vulnerability of minorities and children. It decrees that "we the people" shall be equal in our freedoms, have equality of opportunity and shall, first and foremost be equal before the law. Furthering this principle and making equality a reality, is part of the judge's mandate. Equality before the law requires that there must be equal access to the law and equal treatment before the law.

The right to equality before the law and equal treatment by the law means that discrimination is prohibited throughout the judicial proceedings. Judges and officials may not act in a discriminatory manner when enforcing the laws and they must ensure that the rights of all are equally protected.

1.3.1 Domestic Law

Article 14 of the Constitution states: "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Article 15(1) lays down the principle of non-discrimination according to which: "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

In terms of justice delivery, the principle of equality basically has two aspects: equal access to the courts and equal treatment at law. In its application, this means that irrespective of religious identity, gender, caste, class, or regional identity every citizen appearing before a court has a right not to be discriminated against in the course of the proceedings or the manner in which the law is applied.

39 *M.P. Lohia v. State of West Bengal*, (2005) 2 SCC 686, para 10.

40 2009 (111) Bom L.R. 3981.

41 *Id.*, para 120.

42 *Sahara India Real Estate Corporation Ltd. and ors. v. Securities and Exchange Board of India and Anr.*, (2012) 10 SCC 603.

43 *Id.*, para 34.



Equality, however, does not always mean the same treatment to everyone. It recognises that there are pertinent differences that require persons to be treated differently to the extent that there is a relevant difference between them. It is also settled law that discrimination can arise through the application of different rules to comparable situations or the application of the same rule to different situations. To treat persons the same when they are in fact already unequal is to perpetuate rather than to eliminate inequality. Equality, therefore, prohibits both direct and indirect discrimination. The European Court of Justice (ECJ) has explained these concepts of direct and indirect discrimination in the following terms:⁴⁴

Direct discrimination...involves treating people differently when they are in a comparable situation and should be treated the same. It occurs when someone is disadvantaged or favoured in comparison to someone else by reference to some characteristic such as colour or religion when there is no good reason for distinguishing between them on this basis or the distinguishing characteristic does not justify the extent of the disadvantage or favour. Indirect discrimination involves treating people the same when they are in different situations and should be treated differently. It is determined by the differential impact of the same treatment on the members of one group of persons in comparison to the members of another. If such differential impact operates to the advantage or disadvantage of the members of one group rather than the other, then, unless such differential is capable of objective justification, the apparent equal treatment amounts to indirect discrimination. Both these dimensions of discrimination have been acknowledged by courts and other bodies in their interpretation of constitutional and international guarantees of equality before the law.

Equality is, however, more than the absence of discrimination, whether direct or indirect. The statement of equality is not solely a matter of individual effort. It involves the development of strategies which would actively promote a civil society based on principles of social, economic and political inclusion. This embraces taking positive measures to enable a person to overcome disadvantage and to afford them real equality of opportunity; and it is important to recognise that such measures do not constitute discrimination but rather promote equality.

The Supreme Court explained in *Maneka Gandhi v. Union of India*,⁴⁵ that the right to equality guaranteed by Article 14 not only prohibits the state from applying the law in a discriminatory manner, but also mandates that the law is not applied unreasonably, arbitrarily, fancifully or oppressively.⁴⁶ The Court explained that Article 14 interacts with Article 21, thereby making any unreasonable or arbitrary proceeding a violation of Article 21.⁴⁷

1.3.2 International Law

Although domestic law is consistent with international law on this standard, international law is more descriptive, articulating specific types of discrimination that are prohibited. Article 7 of the UDHR provides that: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

⁴⁴ C-279/93 *Finanzamt Köln-Alttstadt v. Schumacker*, (1995) ECR I-225.

⁴⁵ (1978) 1 SCC 248.

⁴⁶ *Mrs. Maneka Gandhi v. Union of India (UOI) and Anr.*, (1978) 1 SCC 248, para 56.

⁴⁷ *Id.*



Article 26 of the ICCPR states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The specific right to equality before the courts is also expressly provided in Article 14(1) of the ICCPR which states: “All persons shall be equal before the courts and tribunals.”

1.3.3 Guide for Judicial Enforcement

A major challenge before any judge is the existence, risk or even appearance of bias in the courtroom. This segment is restricted to indicating some of the common concerns at court from the point of view of the court user. It does not deal with all aspects of equality; just a few which judges might benefit from, whilst on the bench.

It is not out of place to say that the adage “justice must not only be done, it must be seen to be done” has stood the test of time. Nothing done by the judge in his/her court must damage the integrity of the proceedings. Firstly, no justifiable doubts must arise on the impartiality of the judge himself. Occasionally, bias is open; it manifests on the face of the record and is clear for all to see.

Bhanwari Devi was a grass-roots government worker whose job included reporting on child marriages. She duly reported the marriage of the one-year-old daughter of a Women’s Development Programme official to the authorities. Though the police tried to stop the marriage the family proceeded secretly with the ceremony. A few months later, in retaliation for her intervention, Bhanwari was gang raped in the presence of her husband. The trial judge acquitted the accused on the reasoning that “...rape is usually committed by teenagers, and since the accused are middle aged and therefore respectable, they could not have committed the crime. An upper caste man could not have defiled himself by raping a lower caste woman”.

At other times, it is important for the judge to be aware that religious, class, caste, gender, language and other group identities in India are deep-seated and considerably more difficult to recognise in the self and in officers of the court as it is unconscious and not reflected on. Personal prejudices often go unnoticed by the ones harbouring them and remain unchallenged because they reflect commonly held stereotypes, or are assertive of one’s own group identity, social orientation or personal proclivity. If allowed, however unwittingly, to come into play or go unchecked, they can taint the proceedings and skew outcomes to the disadvantage of one or other protagonist in the case.

Being free from personal prejudice or bias must necessarily include detachment from one’s own inner prejudices. If in reality this is difficult to apply, the judge or magistrate should recuse himself or herself.

Being aware of one’s own socialisation and those of others towards lay people who come to court, accepting how the court appears to others, and understanding the circumstances of those who come to court can go a long way to create a sense of



confidence and fairness. For instance, simple considerations such as recognising that some witnesses and victims will lose vital daily wages each time they are required to be in court, and designing dates and times to minimise ineffective hearings indicates fairness and an understanding of economic differentials, which if unattended can affect the outcome of a case

In guarding against bias, judges are not expected to treat every person in the same manner. In fact, ensuring fairness and equality of access and a level playing field at court may mean providing special or different treatment where these are merited. Judicial decision-making must be informed by objectivity. However, this objectivity should be tempered by the constitutional premise that every person has the right to be treated equally and that individuals and groups that are historically and socially disadvantaged should be provided equal opportunities and their rights should be secured.

Bias – if ever it is to exist – must be in favour of constitutionalism, protection of human rights and the interests of the poor and underprivileged.

Women, minorities, Scheduled Castes and Scheduled Tribes, and the poor in general, as well as children require the court's special consideration as a protector of rights. Many who come to court may suffer multiple disadvantages. People who are socially and economically disadvantaged have a more difficult time coming to court as witnesses, victims or accused persons. It is far more difficult for them to comprehend the proceedings and find legal counsel of quality or at all. It is important for the judge to notice this and remedy it, so that traditional disadvantage does not turn into serious obstacles to achieve a fair outcome. Judges have a duty to ensure that a disadvantage is not permitted to become an obstacle to the attainment of justice.

Violence against women remains rife across all communities. Despite significant law reform in this area and other interventions, justice cannot be ensured without a change in mindset of those who make up the criminal justice system. Women are often wrongly accused of misusing penal provisions that address cruelty towards them – both mental and physical – and for making unwarranted demands for maintenance and matrimonial rights. In cases of rape and sexual molestation, women often find themselves being objectified and treated with disdain. Instead of being treated with consideration and sensitivity, they are sometimes blamed – even by the court – for having contributed to the commission of the offence. This leaves a large majority of women unable to secure effective protection from the criminal justice system.

One way to maximise the integrity of the proceedings is to ensure that procedures are strictly adhered to, as procedures are designed to assure an even playing field between contesting parties. The responsibility for adhering to due process rests on everyone involved in the administration of justice. Nevertheless, the judge, because he/she has absolute control of his/her court, has a paramount responsibility to ensure that the process inspires confidence, ensures impartial treatment and is seen as transparently fair by all who approach it.

Awareness of “where people are coming from” – their background, culture, special needs and concerns, and the potential impact of these on each person, whether a party in a suit, a victim, witness, or accused will nuance the judge's response.



While civil suits carry an element of voluntarism this is not present in criminal cases where the State makes the choice of prosecuting on behalf of the victim and society. The victim may be traumatised, witnesses afraid and uncertain and the accused in the custody of the State. While the rights of the victim are protected by the State, the accused is often completely dependent on the judge to ensure his/her rights. Witnesses too may be looking for assurances of safety from the court. Ultimately, they all rely on the judge to assure the protection of their rights.

The majority of those who appear before the courts, whether in civil suits or criminal proceedings, know little law, and less about proceedings. The hierarchies of the court, its officers and their duties, the local language and the language of law are alien, the very structures and physical set-up engender fear and anxiety, and are deeply intimidating. An accused, for instance, will often not know the duty of care his/her lawyer owes him/her, or that the prosecution must aid the court in arriving at the right conclusion, or that the judge is not a punishing authority, but an active umpire bound to ensure that the playing field is level, and that fairness and impartiality rule. Indeed, given the profile of most undertrials lodged in jails across the country, it is safe to assume that few know how to differentiate the court clerks from the bar and the bench, as all appear alien and fearsome. The fine points of procedure, the right to silence, challenging charges, mounting the best defence, insisting on disclosure, the concepts of shifting evidentiary burdens, balance of probabilities, reasonable doubt, interim applications, right to bail, parole and probation, are all foreign to most people. Initially, even knowing why he/she is before a court may be totally outside the ken of the accused, and later, awareness of the importance of being brought to court within certain, strict time limits or at all, may not be in his/her knowledge. In these common situations, it is the judge's duty to ensure that the underprivileged, in particular, are provided with information and assistance to access their fair trial rights.

Where procedures are strictly followed and challenged, they work to ensure fairness. Sloppy procedures and lower general standards create bad practices. Allowing habitual slippage and breaches of safeguards written into law, incentivises illegality in policing and poor standards in prosecution and defence. It wastes the time of the court, ensures that the victim is kept away from remedies, or the accused is severely prejudiced by long periods of incarceration and deprived of just treatment. Lax procedures also affect the functioning of the State by creating cascading obstacles to the administration of justice that in turn generate huge backlogs and unnecessary appeals.

This is why the court is expected to inquire and challenge the police in relation to the necessity of an arrest,⁴⁸ the completeness and accuracy of investigations, the rationale for remand, and the custodial treatment of the accused. In *Arnesh Kumar v. State of Bihar*,⁴⁹ one of the important directions given by the Court was that the Magistrate while authorizing detention should carefully look at the report submitted by the police and make sure that all the requirements laid down by the Supreme Court in that judgment have been complied with. It is only after being fully satisfied that the procedures have been strictly followed and recording this that remand should be granted.⁵⁰

48 See: *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.

49 *Id.*

50 *Id.*, 281.



The judge is required to go beyond merely noting the presence of the accused. He/she must carefully enquire about the presence of ill-treatment, making sure his/her questions rule it out or take steps to prevent and punish ill-treatment. Given the asymmetry of power between police and prisoner, mere silence in the face of a judge's quick questions or even seeming acquiescence cannot be taken to mean there has been no ill-treatment in custody when the norm of ill-treatment is well known and widely documented. Routine questions asked by a judge in the presence of the police are not sufficient fulfilment of his/her duty to enquire into the custodial situation of the accused.

Similarly, explaining carefully to the accused that he/she has the right to a competent lawyer of his/her choice and assisting him/her in getting one through legal aid if necessary is a vital early part of fulfilling the fairness doctrine.⁵¹ Absence of this knowledge and right of the accused immediately deprives him/her of the ability to mount an effective defence and contaminates the proceedings at the very outset.

If liberty is to be treated as a prime constitutional value it is also important for trials to come to quick outcomes. The willing practice of granting maximum remands of 15 days without questioning its necessity reinforces police laxity in investigation. Similarly, the arbitrary setting of next dates for appearance once the trial has begun, and habitually agreeing to adjournments, favours court authorities and legal professionals over litigants, witnesses, victims and accused. It under-values their freedom and the cardinal, constitutional principle of liberty. Trials that continue for long periods of time severely prejudice at least one party. Constant adjournments favour and therefore privilege lawyers over litigants or one party over the other. Routinely agreeing to adjourn cases and accepting excuses for non-production of the accused because of lack of adequate police escort, favours the police over undertrials and creates an uneven playing field, so that malfunctioning systems are perpetuated. Any lack of action in the face of procedural breach and misbehaviour is an indication of bias. Recognising this and remedying it is the judge's duty.

1.4 Right to Remain Silent

*It is a generally accepted principle that the suspect/accused cannot be forced to incriminate himself/herself. Therefore, any coercion exerted by the authorities with the aim of compelling the suspect/accused to make a statement or confess guilt is prohibited during all stages of the proceeding. The right to be presumed innocent is impaired if authorities draw adverse inferences from the silence of the suspect/accused. Under no circumstances may the silence of the accused be considered as proof of guilt. The burden of proof rests solely on the prosecution. The U.S. Supreme Court in *Miranda v. Arizona* (1966) held that the right to remain silent is supported by three related underlying policies. First, it ensures that the government is according respect and dignity to its citizens.⁵² "To adequately respect the inviolability of the human personality, an accusatory system of criminal law requires that the government attempting to punish an individual must do so by producing its own evidence through its own independent efforts, rather than by the cruel, shortcut, practice of compelling inculpatory statements from the accused's mouth."⁵³ Second, the right to remain silent safeguards the accused by deterring police coercion and forced statements.⁵⁴ Third, by deterring coerced statements, the right to remain silent helps ensure that the statements made by the accused are reliable.⁵⁵*

51 See: *Hussainara Khatoon v. Home Secretary, State of Bihar*, AIR 1979 SC 1377.

52 *Miranda v. Arizona*, 384 U.S. 436 (1966).

53 *Id.* See also: 8 Wigmore, *Evidence* (1961).

54 *Miranda*, 384 U.S. 436 (1966).

55 *Id.*



1.4.1 Domestic Law

1.4.1.1 Protection with respect to Conviction of Offences/Privilege Against Self-Incrimination

Article 20(3) of the Constitution protects the right of the accused to remain silent by providing that: “No person accused of any offence shall be compelled to be a witness against himself.”

1.4.1.2 Examination of Witnesses by Police

Section 161(2) of the Cr.P.C leaves no room for doubt when it states that an accused is bound to answer all questions of a state official truthfully except “questions the answers to which would have a tendency to expose him/her to a criminal charge or to a penalty or forfeiture.”

1.4.1.3 Further Statements of the Accused to the Court

Section 313 of the Cr.P.C further protects the right to silence. It protects the accused from liability for refusing to answer or falsely answering questions by a judge during a court proceeding. It says: “the accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.”

1.4.1.4 The Accused is a Competent Witness for the Defence

At the time of trial, the accused can be a witness for the defence but cannot be called on to give evidence except at their own request.⁵⁶ If the accused chooses not to give evidence, the court cannot draw any adverse presumption against them.⁵⁷ Additionally, the accused can choose not to answer questions put to him/her by the court.⁵⁸ Except as a condition requisite to a tender of pardon, no influence by means of any promise or threat or otherwise can be used on the accused to induce him/her to disclose or withhold any matter within his/her knowledge.⁵⁹

Thus, Sections 161, 313, 315 and 316 of the Cr.P.C. raise a presumption against guilt and in favour of innocence, grant a right to silence both at the stage of investigation and trial, and also preclude any party or the court from commenting on the silence.

The Supreme Court views Section 161(2) as a type of “parliamentary commentary”⁶⁰ on Article 20(3). Along with many other jurisdictions, Indian courts recognise the right of persons not to answer questions that would tend to lead to a criminal charge against them. This protection is closely linked to ensuring that there is no incentive to the police to coerce or torture confessions and to “prevent police interrogations from devolving into an antagonistic inquisition”.⁶¹ The Court has also said that no adverse inference against the accused can be drawn because he/she refuses to answer questions.

⁵⁶ Section 315, Code of Criminal Procedure, 1973 (Cr.P.C.).

⁵⁷ *Id.*

⁵⁸ Section 313, Cr.P.C.

⁵⁹ Section 316, Cr.P.C.

⁶⁰ *Nandini Satpathy v. P.L. Dani*, AIR 1978 SC 1025, para 46.

⁶¹ *Id.*, para 45.



1.4.1.5 The Evidence Act and the Right to Remain Silent

The Indian Evidence Act, 1872 also provides protection to the accused from incriminating himself/herself through Sections 24-26. Section 24 clearly states that where any confession made by the accused is caused by inducement, threat or promise, it is irrelevant to the proceedings, and thus cannot be used as evidence. Section 25 goes on to state that confessions made to a police officer cannot be proved in court and used against the accused. Further, Section 26 requires that all confessions be made before a magistrate, and only then can they gain relevance in a criminal trial.

1.4.1.6 Exceptions to the Right to Silence

Section 27 of the Evidence Act makes an important exception to the general scheme of the right to remain silent as embodied in criminal statutes. Section 27 states that where the accused provides any information while in the custody of a police officer, and any fact is discovered in consequence of such information, so much of the information can be proven in court and used against the accused as relates to the discovery of the fact. However, it is important to note that if the information given by the accused as referred to in Section 27 is extracted as a result of compulsion, then neither direct nor derivative use of that statement is permitted.⁶² Thus, if compulsion is used to extract a statement, then not only is the confession obtained inadmissible, but also any discovery made on the basis of such compelled statement under Section 27.⁶³

Special legislations such as TADA (Terrorists and Disruptive Activities (Prevention) Act, 1987) also make exceptions to the admissibility of confessions before the police.⁶⁴ The Supreme Court held in *State v. Nalini*,⁶⁵ that confessions made under TADA will continue to be admissible for trials going on under other laws even if an offence under TADA is eventually not made out.

62 *Selvi and Others v. State of Karnataka*, AIR 2010 SC 1974.

63 *Ashish Jain v. Makrand Jain*, 2019 SCC OnLine SC 37, para 27.

64 See Section 15, TADA (Terrorists and Disruptive Activities (Prevention) Act, 1987).

65 (1999) 5 SCC 253.



Nandini Satpathy v. P.L. Dani, AIR 1978 SC 1025

Nandini Satpathy was accused of embezzling funds while serving as Chief Minister of Orissa. She was made to present herself before the Deputy Superintendent of Police (Vigilance) and provide answers to written questions. She refused to answer the questionnaire on the grounds that it was a violation of her Fundamental Right against self-incrimination. Upon refusing to answer, Ms Satpathy was charged under Section 179 of the Indian Penal Code, 1860 (IPC), which prescribes a punishment for refusing to answer any questions asked by a public servant authorised to ask that question.

The issue before the Supreme Court was whether Ms Satpathy had a “right to silence” and whether people can refuse to answer questions during investigation that would point towards their guilt.

The Supreme Court held that Ms Satpathy had to answer all questions that did not materially incriminate her. For questions she refused to answer, she was required to provide, without disclosing details, her reasons for fearing that answering such questions would result in self-incrimination. Her reasons for invoking her right to remain silent would then be examined and she would be liable for prosecution under Section 179 if it was determined that she refused to answer a question under the false pretence of self-incrimination.

The Supreme Court accepted that there is a rivalry between social interest in crime detection and the constitutional rights of an accused person. However, the protection of Fundamental Rights enshrined in the Constitution is of utmost importance and in the interest of protecting these rights “we cannot write off fear of police torture leading to forced self-incrimination.”

Simply put, the protection against self-incrimination is undoubtedly quite extensive in criminal law, extending as it does to almost all people, at nearly all stages of a criminal trial.

1.4.2 International Law

Similar to domestic law, Article 14(3)(g) of the ICCPR guarantees the right of the accused “not to be compelled to testify against himself or to confess guilt.” This protection is also found in the UN Body of Principles for the Protection of All Persons and in the Rome Statute of the International Criminal Court.

1.4.3 Guide for Judicial Enforcement

The right to silence has various facets. One is that the burden is on the State/ the prosecution, to prove that the accused is guilty. Another is that an accused is presumed to be innocent till he/she is proved to be guilty. The third is the right of the accused against self-incrimination, namely, the right to be silent and that he/she cannot be compelled to incriminate himself/herself. There are also exceptions to the rule. An accused can be compelled to submit to investigation by allowing his/her photographs to be taken, voice recorded, his/her blood sample tested, his/her hair or other bodily material used for DNA testing, etc.⁶⁶

⁶⁶ See: Sections 53, 53A, 54, Cr.P.C.



The Supreme Court has laid down the following directives with regard to the right to silence:

- An accused person cannot be coerced into giving a statement pointing to his/her guilt.
- The accused person must be informed of his/her right to remain silent and also of the right against self-incrimination.
- No adverse inference may be drawn from anyone availing this right to silence.
- An accused person must be informed of his/her right to consult a lawyer at the time of questioning, irrespective of whether he/she is under arrest or in detention.
- The person being interrogated has the right to have a lawyer by his/her side during the interrogation but not throughout.

This right is violated if the following four elements are satisfied:

- (i) The individual must be accused of a crime.
- (ii) The individual must be asked a question the answer to which would incriminate the accused.
- (iii) Such a question can be asked at any stage of the process including during the investigation.
- (iv) The individual must be compelled to answer such a question.

Given these elements, many issues arise regarding the breadth of the right to remain silent.

(1) To What Individuals Does the “Accused of a Crime” Standard Apply?⁶⁷

- Individuals formally charged of an offence.
- Suspects who have been accused of an offence.
 - o The scope and nature of the police officer’s inquiry must indicate that an accusation has been made.
 - o The right thus does not apply merely during the beginning of the general investigatory stage.
- The person must have been accused before he/she is asked to make a statement. It is not sufficient that he/she became accused after the statement was made. The statement of a person who is brought in for questioning but is not yet an accused, is not affected by Article 20(3) of the Constitution. A general enquiry has no specific accusation before it and therefore, Article 20(3) stands excluded. A person stands in the character of an accused when a First Information Report is lodged against him/her with respect to an offence before an officer competent to investigate it, or when a complaint is made relating to the commission of an offence before a magistrate competent to try or send the accused to another magistrate for trial of the offence.

(2) To What Statements/Questions Does the Right to Silence Apply?⁶⁸

- The right extends to any compulsory process for production of evidentiary documents that are reasonably likely to support a prosecution against the accused.

⁶⁷ *Nandini Satpathy v. P.L. Dani*, AIR 1978 SC 1025, para 50.

⁶⁸ *Id.*, paras. 57-61.



- To be witness against oneself is not confined to the particular offence regarding which the questioning is made. It extends to other offences about which the accused has reasonable apprehension of implication from his/her answer. This conclusion also flows from the “tendency to be exposed to a criminal charge.” “A criminal charge” covers any criminal charge other than those under investigation or trial or those imminently threatening the accused.
- Incriminatory statements:
 - o Statements which have a reasonable tendency to point to the guilt of the accused.
 - o Statements which will furnish a real and clear link in the chain of evidence to bind the accused with the crime become incriminatory and offend Article 20(3) if drawn by pressure from the accused.
 - o Answers that would, in themselves, support a conviction are confessions. But answers that have a reasonable tendency to strongly point to the guilt of the accused are incriminatory. An answer acquires confessional status only if all the facts which constitute the offence are admitted by the offender. If a statement also contains self-exculpatory matter it ceases to be a confession. Article 20(3) strikes at confessions and self-incriminations but leaves other relevant facts untouched.

For example, A dies and B is suspected of the murder. In such a case, B is asked several questions. B may describe the scene giving relevant evidence of the landscape. This may be relevant but has no incriminatory force. However, an answer stating that B was at or near the scene, at or about the time of the occurrence or had blood on his clothes would be incriminatory.

(3) What amounts to being “a witness” as envisioned in Article 20(3) of the Constitution?

Article 20(3), which is the bedrock of the right to silence in India, uses the phraseology no one shall be compelled “to be a witness” against oneself. The interpretation of the words “to be a witness” by the Supreme Court has changed over time and this has important legal consequences, such as whether an accused can be compelled to give a fingerprint or handwriting sample; whether he/she can be compelled to be photographed or measured, whether his/her premises can be searched, and so on.

• Erstwhile Position of Law: *M.P. Sharma v. Satish Chandra*

A broad meaning was formerly attributed to the phrase “to be a witness”. The Supreme Court in the case of *M.P Sharma v. Satish Chandra*⁶⁹ interpreting the scope of this right held that:

“To be a witness,” is nothing more than “to furnish evidence,” and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes... [E]very positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the, negative attitude of silence or submission on his part... [The guarantee under Article 20(3) therefore] would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against [an accused individual].⁷⁰

69 AIR 1954 SC 300.

70 *Id.*



Thus, the Supreme Court initially held that “to be a witness” has a broad import, and refers to any act compelling the accused to “furnish evidence” which meant that samples of handwriting, fingerprints and other identification means could not be taken from the accused without his/her consent.

- **Change in the Legal Position: *State of Bombay v. Kathi Kalu Oghad***

The question in *State of Bombay v. Kathi Kalu Oghad*⁷¹ was whether an accused could be compelled to give samples of his/her hair, blood etc. The Supreme Court held:

*The giving of finger impression or of specimen signature or of handwriting, strictly speaking, is not “to be a witness”. “To be a witness” means imparting knowledge with respect to relevant facts, by means of oral statements or statements in writing, by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge. When an accused person is called upon by the court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a “personal testimony.” The giving of a “personal testimony” must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression “to be a witness.”*⁷²

Thus, the Court made a distinction between “being a witness” and “furnishing evidence.”

- **General and Specific Search Warrants**

The question of whether a court may issue a general search warrant or a specific search warrant to an accused was further clarified by the Supreme Court in the case of *V.S. Kuttan Pillai v. Ramkrishna*.⁷³ The Court analysed Section 93 of the Cr.P.C under which a search warrant may be issued by a court. It was held that search warrants under Section 93(1)(b) and 93(1)(c) are valid, even if they are issued against an accused and do not violate the right against self-incrimination. However, it was also held that while issuing a search warrant, the magistrate must not do so mechanically and must give reasons that reflect application of the mind.

(4) At What Stage Does the Right to Silence Apply?

- The right to remain silent is not merely restricted to the trial stage and courtroom proceedings where the accused is a witness.
- The right also applies to police and custodial interrogations and other elements of the investigation process that might compel incriminating information.

71 AIR 1961 SC 1808.

72 *Id.*, Para 11.

73 (1980) 1 SCC 264.



(5) What is Compulsion?

- Duress:
 - o Duress applies to statements obtained through physical threats or violence. It also includes threatening, beating or imprisonment of any family member of the accused.
 - o Statements obtained through psychological torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidating methods, also constitute “duress.”
- Compulsion does not include the prospect of prosecution.
- A police officer investigating a crime against a certain individual merely telling the person to do a certain thing is not compulsion.
- Merely being in police custody is not compulsion. However, it is open to an accused person to show that while he/she was in police custody he/she was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was, in fact, exercised. It will be a question of fact in each case to be determined by the court on weighing the facts and circumstances disclosed in the evidence before it.

A lawyer’s presence is a constitutional guarantee and in the context of the right to silence, it is an assurance of awareness and observance of this right. Given the various elements surrounding the right to remain silent, the Supreme Court had stated that it would be “prudent,” but not required, for the police to permit the accused’s legal counsel to be present during police examinations.⁷⁴ Moving on from *Satpathy*, the Supreme Court in *D.K. Basu v. State of West Bengal* went on to say that the arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation. However, in *Director of Revenue Intelligence v. Jugal Kishore Samra*,⁷⁵ the Supreme Court held that the accused is not entitled to have his/her counsel present during the interrogation. The counsel can watch the interrogation from a distance or from beyond a glass partition, but not within hearing distance.⁷⁶ Another case where the issue arose was *Ajmal Kasab v. State of Maharashtra*,⁷⁷ where the Supreme Court held that not having counsel present at the time of confession does not lead to the violation of the right against self-incrimination.⁷⁸

When a suspect is first brought before the court, or when he/she is before the court while on police remand, the judge must attempt to elicit from the suspect whether there has been violence, coercion or threats during interrogation. Courts must be especially aware that many accused, including indigents and illiterates, can often be confused or tense by the police process, and consequently, unable to protect themselves against overbearing questioning.⁷⁹ Thus, courts should carefully protect a citizen’s right to remain silent in the face of compulsive police questioning tactics. In determining whether a statement was given out of compulsion, all the circumstances surrounding the questioning should be considered, including the manner in which the question was asked.⁸⁰

⁷⁴ *Nandini Satpathy v. P.L. Dani*, AIR 1978 SC 1025, para 74.

⁷⁵ (2011) 12 SCC 362.

⁷⁶ *Id.*, para 29.

⁷⁷ (2012) 9 SCC 1.

⁷⁸ *Id.*, paras. 453-456.

⁷⁹ *Nandini Satpathy v. P.L. Dani*, AIR 1978 SC 1025 para 5.

⁸⁰ *Id.*, para 69.



The setting of the case will be critical in determining whether an accused's response to questions should be viewed as incriminatory. The court should not focus on whether the accused subjectively perceived that his answer would be incriminatory, but whether the setting and circumstances surrounding the questioning objectively indicate that the accused's response would serve to incriminate him.⁸¹

NARCO ANALYSIS

Narco analysis, polygraph and brain mapping tests were hotly contested issues in India. Various High Courts had given conflicting rulings on these issues. The Supreme Court ultimately held that these tests cannot be administered on any accused without consent. Further, the courts should not take the process of obtaining the consent of the accused lightly. The courts must ensure that the "consent" of the accused for such tests is in fact voluntary. For this purpose, the Supreme Court has not only endorsed the guidelines issued by the National Human Rights Commission but, has held them as binding.

81 *Id.*, para 62.



The Supreme Court in *Selvi and Others v. State of Karnataka*⁸² held that: “The compulsory administration of the impugned techniques violates the “right against self-incrimination.” This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence.

The Court also stated that: “Forcing an individual to undergo any of the impugned techniques violates the standard of ‘substantive due process’ which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose, since the test results could also expose a person to adverse consequences of a non-penal nature.”

The Court further said: “The protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses, who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion.”

Upholding the right to remain silent, guaranteed by Article 20(3) of the Constitution, the Supreme Court held that the forcible “conveyance of personal knowledge that is relevant to the facts in issue” violates Article 20(3) of the Constitution.

In the concluding paragraph of the *Selvi* case, the Supreme Court held the “Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused” issued by the National Human Rights Commission in 2000, as binding. The Court said that these guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the “narco analysis technique” and the “brain electrical activation profile” test. These guidelines were reproduced in the *Selvi* Judgment. They are:

1. No lie detector tests should be administered except on the basis of the consent of the accused. An option should be given to the accused whether he wishes to avail such a test or not.
2. If the accused volunteers for a lie detector test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him/her by the police and his lawyer.
3. The consent should be recorded before a Judicial Magistrate.
4. During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.
5. At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a “confessional” statement to the Magistrate but will have the status of a statement made to the police.
6. The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.
7. The actual recording of the lie detector test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.
8. A full medical and factual narration of the manner of the information received must be taken on record.

⁸² AIR 2010 SC 1974.



1.5 Nullum Crimen Sine Lege: Principle of Non-Retroactivity

"No crime, no punishment, without a previous penal law." The simple proposition is that no one can be investigated tried or punished for something which was not a crime when the event or actions took place. The paramount importance of this principle has been universally recognised. The principle also extends to law making. It is considered oppressive and unfair to make laws which operate retrospectively, i.e. make some action performed in the past into a crime in the present. The principle also accords with another universally recognised rule that it is the duty of any law maker to declare the law and make it known so that it can be obeyed. These principles are universally accepted as absolutely necessary to underpin the rule of law and because it is recognised that the State is much more powerful than the individual and its power must be conditioned in order to protect individual liberties against arbitrary and unwarranted intrusions by the State.

1.5.1 Domestic Law

1.5.1.1 Protection Against Ex-Post Facto Law

The guarantee against ex-post facto law includes two parts.⁸³ The first part prohibits conviction for an act which was not an offence at the time of commission. The second part prohibits retrospective enhancement of penalty.⁸⁴ Article 20(1) of the Constitution states: "No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence." Therefore, this Article not only prohibits laws purporting to create an ex post facto application, but also prohibits convictions or sentences based on laws not yet enacted when the charged offence occurred.⁸⁵

*Soni Devrajibhai Babubhai v. State of Gujarat*⁸⁶ is an example of the first safeguard under Article 20(1).⁸⁷ The appellants argued that Section 304B of the IPC which had been inserted in November 1986, should apply to an alleged incident that had occurred in August 1986. The Court rejected this contention and held that Article 20(1) meant that Section 304B could not be given any retrospective effect.

In another instance, a provision was amended providing for harsher penalties for the same crime. The Supreme Court held that a court cannot apply these newer penalties to crimes committed before they entered into force.⁸⁸ However, courts can still apply repealed criminal statutes if the accused committed the crimes prior to such statute's repeal.⁸⁹ Courts can also apply a repealed statute to crimes committed subsequent to the repeal if by the time of the trial a new statute is in force which revives the earlier statute.⁹⁰

83 Art 20(1), Constitution of India.

84 Aparna Chandra & Mrinal Satish, "Criminal Law and the Constitution", *The Oxford Handbook of the Indian Constitution* (Sujit Chowdhury, Madhav Khosla & Pratap Bhanu Mehta eds., 2016) p. 799.

85 *Rao Shiv Bahadur Singh v. State of Vindhya Pradesh*, AIR 1953 SC 394, para 11.

86 (1991) 4 SCC 298.

87 Aparna Chandra & Mrinal Satish, "Criminal Law and the Constitution", *The Oxford Handbook of the Indian Constitution* (Sujit Chowdhury, Madhav Khosla & Pratap Bhanu Mehta eds., 2016) pp. 799-800.

88 *Kedar Nath Bajoria v. West Bengal*, AIR 1953 SC 404.

89 *G. P. Nayyar v. State (Delhi Administration)*, AIR 1979 SC 602.

90 *Id.*, para 13.



G. P. Nayyar v. State (Delhi Administration), AIR 1979 SC 602

Two public officials were tried in 1973 for criminal conspiracy and illegal gratification under the Prevention of Corruption Act, 1947, for allegedly accepting bribes from 1955 to 1961. The accused appealed to the Supreme Court claiming that the burden of proof applied to their trial mandating that the court presume the accused guilty unless proved otherwise was in violation of Article 20(1), as in 1964 the legislature had repealed the relevant statute which applied this standard. The Supreme Court denied the appeal, explaining that repealed statutes remain applicable to crimes committed before the statute's repeal. Also, here, the repealed statute was revived by a subsequent statute in 1967, thus further allowing for application of the rule even during the repeal period for acts committed before the repeal.

Kedar Nath Bajoria v. West Bengal, AIR 1953 SC 404

The appellants committed an offence in 1947 under the Prevention of Corruption Act which then prescribed a punishment of imprisonment or fine or both. In 1949, by an amendment of the law, the punishment was enhanced.

The appellants were fined Rs. 50,000, for accepting Rs. 47,550 from the government as compensation for damages that were falsely claimed. The appellants argued that the Rs. 50,000 fine violated Article 20(1) of the Constitution because, in 1947, the relevant criminal law only allowed for a fine equal to the amount of money the accused obtained from the commission of the crime. However, at the time of his trial in 1950, the relevant statute, enacted in 1949, allowed for increased fines.

Agreeing with the appellant's claim and setting aside the excess fine, the Supreme Court held that the enhanced punishment would not be applicable to the offence committed in 1947 because of the prohibition contained in Article 20(1).

1.5.2 International Law

Article 15(1) of the ICCPR states: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby." In addition to the ICCPR, several international criminal statutes have adopted non-retroactivity, including the Rome Statute of the International Criminal Court.⁹¹

1.5.3 Guide for Judicial Enforcement

When presented with the claim that the application of a law violates Article 20(1), judges should note that retroactivity cannot be cured by the statute at issue merely containing a clause stating that such a law shall be in force as of some back-dated time. The phrase "law in force" in Article 20(1) demands that the law *actually* is in operation at the time of the commission of the offence, not *deemed* to be in operation at that time by a statute *enacted at a later date*.⁹²

⁹¹ Rome Statute of the International Criminal Court, Art. 22, UN Doc. A/CONF. 183/9 (17 July 1998).

⁹² *Rao Shiv Bahadur Singh v. State of Vindhya Pradesh*, AIR 1953 SC 394, para 13.



1.6 Double Jeopardy

1.6.1 Domestic Law

Article 20(2) provides that “No person shall be prosecuted and punished for the same offence more than once.” While UK and US courts have interpreted the guarantee against double jeopardy to protect against a second trial regardless of whether the first ended in conviction or acquittal, the Indian Supreme Court has adopted a different perspective.⁹³ In *S.A. Venkataraman v. Union of India*,⁹⁴ the Supreme Court refused to read “prosecuted and punished” disjunctively and instead read it as barring a second trial only when the person has been punished once for the same offence.⁹⁵ An acquittal, therefore, does not bar a second trial.⁹⁶

1.6.2 International Law

Article 14 of the ICCPR prohibits double jeopardy. Paragraph 7 of this Article prohibits double jeopardy and thus guarantees a substantive freedom, namely the right to remain free from being tried or punished again for an offence for which an individual has already been finally convicted or acquitted.⁹⁷

1.6.3 Guide for Judicial Enforcement

“For the same offence” has been interpreted by the Court to refer to cases where the prosecution and punishment in the first and subsequent offences are same in their ingredients.⁹⁸ A person can be prosecuted and punished for offences which though have same allegations but comprise non-identical ingredients.⁹⁹ Article 20(2) also bars more than one criminal prosecution and not proceedings before civil, administrative, any non-criminal or proceedings before a quasi-judicial body.¹⁰⁰

93 Aparna Chandra & Mrinal Satish, “Criminal Law and the Constitution”, *The Oxford Handbook of the Indian Constitution* (Sujit Chowdhury, Madhav Khosla & Pratap Bhanu Mehta eds., 2016). See also, MP Singh, *VN Shukla’s Constitution of India* (12th edn, Eastern Book Company 2013) 195-96.

94 AIR 1954 SC 375.

95 Aparna Chandra & Mrinal Satish, “Criminal Law and the Constitution”, *The Oxford Handbook of the Indian Constitution* (Sujit Chowdhury, Madhav Khosla & Pratap Bhanu Mehta eds., 2016).

96 See: Section 300, Cr.P.C. See also: Aparna Chandra & Mrinal Satish, “Criminal Law and the Constitution”, *The Oxford Handbook of the Indian Constitution* (Sujit Chowdhury, Madhav Khosla & Pratap Bhanu Mehta eds., 2016).

97 International Covenant on Civil and Political Rights, 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967).

98 Aparna Chandra & Mrinal Satish, “Criminal Law and the Constitution”, *The Oxford Handbook of the Indian Constitution* (Sujit Chowdhury, Madhav Khosla & Pratap Bhanu Mehta eds., 2016) 802; See also, *Sangeetaben Patel v. State of Gujarat*, (2012) 7 SCC 621; *State (NCT of Delhi) v. Navjot Sandhu*, (2005) 11 SCC 600.

99 *Id.*

100 Aparna Chandra & Mrinal Satish, “Criminal Law and the Constitution”, *The Oxford Handbook of the Indian Constitution* (Sujit Chowdhury, Madhav Khosla & Pratap Bhanu Mehta eds., 2016) See also, *Thomas Dana v. State of Punjab*, AIR 1959 SC 375. 5



Fair Trial Manual

A Handbook for Judges and Magistrates

CHAPTER 2

ARREST AND PRETRIAL DETENTION



CHAPTER 2

Arrest and Pretrial Detention

INTRODUCTION

This chapter reviews the basic legal rules governing the practice of arrest and pretrial detention and addresses the judge's role in ensuring that procedures are adhered to. The analysis focuses on the governing domestic law and indicates international standards. The chapter does not extend to the issue of preventive detention or other so-called "special laws" which frequently depart from the accepted mainstream norms; they require special analysis elsewhere.

That said, it is clear that none of the safeguards guaranteed in the Constitution in relation to pretrial procedures or fair trial should be compromised at any stage of operations in dealing with detainees even under special laws. The Supreme Court in *Union of India v. Ranu Bhandari*,¹⁰¹ noted that "courts which are empowered to issue prerogative writs have...to be extremely cautious in examining the manner in which a detention order is passed with respect to an individual so that his right to personal liberty and individual freedom is not arbitrarily taken away from him/her even temporarily without following the procedure prescribed by law."¹⁰² In this case, the Supreme Court refused to overturn the High Court's decision to quash the detention on the ground that the detainee was prevented from making an effective representation in his defence when he was not supplied with all the documents he needed to answer the case against him.

The three major criminal statutes, namely the Cr.P.C, the IPC and the Indian Evidence Act cannot operate *de hors* or outside the Fundamental Rights guaranteed by Part III of the Constitution. That is to say, that the three do not function in a vacuum. Their operation is governed by the standards and limitations laid down in the Constitution. The Constitution's normative framework defines the everyday working of courts and forms the benchmark by which the performance of all the officers of the court – the prosecutor, the defence counsel, and most importantly, the judge are evaluated. The quality of a trial is judged by the measure of compliance with constitutional norms and it is the presiding officer who has the onerous duty of ensuring that fair trial norms are strictly adhered to in his/her courtroom without fear or favour. From this comes the old saying that justice must not only be done but also be seen to be done.

The treatment of suspects, accused and detainees is governed by the need for fairness. Laws governing the administration of justice are designed both substantively and procedurally to ensure the interests of all parties involved: the State and the individual, the accused and the victim, the prosecution and the defence. Thus, safeguarding human liberty is a prime constitutional value and the law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single and those of individuals collectively.¹⁰³ The judge is the custodian of all this.

¹⁰¹ (2008) 17 SCC 348.

¹⁰² *Id.*

¹⁰³ *Joginder Kumar v. State of U.P.*, AIR 1994 SC 1349, para 9.



The Third Report of the National Police Commission (NPC) refers to the quality of arrests by the police and notes that the power of arrest is one of the chief sources of corruption within the police force. The Report concluded that, by and large, nearly 60 per cent of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2 per cent of the expenditure of jails.¹⁰⁴ Strongly condemning the practice of indiscriminate arrests, the Supreme Court has repeatedly said that an arrest cannot be made simply because the police have the power at law to do so. "The existence of the power to arrest is one thing... the justification for the exercise of it is quite another...the police officer must be able to justify the arrest apart from his power to do so."¹⁰⁵ In saying this, the Court filled the word "lawful" with meaning. Put another way, the Court said that it is correct that the police have the power to arrest that has been given to them by the law – they have the statutory power to arrest where other persons do not – but merely because there is a power to do something does not make its operation "lawful." To be "lawful" the arrest has to have reasonable grounds and some rational explainable basis, otherwise it cannot really be termed "lawful." The power itself is limited in its exercise by the balance that must be struck between the individual and the state. All police powers are moderated in this way. No power is absolute and it must pass the test of being reasonably and fairly applied before it becomes "lawful."

Arrest and detention of a person in police custody can cause incalculable harm to the reputation and self-esteem of the arrested person. Therefore, arrests should not be made in a routine manner on the mere allegation that a person has committed an offence. Arrests must only be made after reasonable satisfaction that the complaint has adequate substance to ground a sensible suspicion that an offence has been committed by that person. All too often however, it is routine practice for the police to leap from receiving a First Information Report to forcibly detaining the person named in it without application of mind as to whether there is any justifiable merit in depriving the person of his/her liberty, without first ascertaining the reasonableness of the complaint or objectively assessing the causal link of the person in custody to logically being considered the perpetrator of the alleged offence. It is in the hands of the judge to remedy these wrongs through the firm, constant, certain and even-handed exercise of his/her powers under the Cr.P.C.

Another misconception of the police appears to be that registration of a FIR requires immediate arrest of the suspect. Consequently, if the police are not convinced of the culpability of the suspect named in the FIR, they have a tendency of not registering the FIR, even in cognizable offences. In this context, a Constitution Bench of the Supreme Court in *Lalita Kumari v. Government of Uttar Pradesh*,¹⁰⁶ held that "[t]he remedy [against arbitrary arrests] lies in strictly enforcing the safeguards available against arbitrary arrests made by the police and not in allowing the police to avoid mandatory registration of FIR when the information discloses commission of a cognizable offence."¹⁰⁷

104 Law Commission of India, Relating to Arrest, Report No. 177, Annexure III. (December 2001).

105 *Joginder Kumar v. State of U.P.*, AIR 1994 SC 1349, para 25.

106 (2014) 2 SCC 1.

107 *Id.*



2.1 Right to Freedom from Arbitrary Arrest and Detention

Freedom from arbitrary arrest and detention implies that no one may be deprived of his/her personal liberty except through means that are “fair, just and reasonable.” The State cannot take away life or personal liberty by the mere enactment of a law. The law itself, its procedures and its actual implementation must all pass the test of being “fair, just and reasonable.” If they do not, then the actions of the State and its agents are liable to be considered arbitrary and unjust, and will be struck down by the courts. It must also lead to consequences for those agents of the State, who having the power, did not act within the confines of the law.

2.1.1 Domestic Law

2.1.1.1 The Fundamental Protection of Life and Liberty Under the Constitution

Article 21 of the Indian Constitution guarantees that “no person shall be deprived of his life or his personal liberty except according to procedure established by law.” Article 22 specifies the protections to which each arrested person is entitled by law, namely the right to be informed of the grounds for his/her arrest as soon as possible after being taken into custody; the right to consult and be represented by a legal practitioner of choice; and the right to be produced before a magistrate within twenty-four hours of arrest and not to be detained beyond twenty-four hours without the approval of a magistrate.¹⁰⁸ Personal liberty guaranteed under Article 21 is sacrosanct, in that it casts an obligation on any detaining authority to show that the detention is in accordance with these constitutional imperatives. Article 21 signifies that the State has to justify every deprivation of life and liberty before an impartial tribunal.¹⁰⁹ The accused has the fair opportunity to defend himself/herself and is to be presumed innocent¹¹⁰ until proven guilty beyond reasonable doubt.¹¹¹

2.1.1.2 Magistrate’s Powers of Arrest

A magistrate may arrest a person if such person commits an offence in the presence of the magistrate, within his/her local jurisdiction.¹¹² In such cases, the magistrate may himself/herself arrest the person or order another person to make the arrest. Further, the magistrate may at any time arrest or direct the arrest of a person whose arrest he/she is competent at the time to issue a warrant, as long as this is done within the local jurisdiction of such magistrate.¹¹³

2.1.1.3 Police’s Power to Arrest

A police officer may arrest a person without a warrant or without an order from a magistrate only in the following circumstances:¹¹⁴

- If the person commits a cognizable offence in his/her presence.¹¹⁵
- If a reasonable complaint has been made against the person or credible information has been received that the person has committed a cognizable

108 Constitution of India, Article 22(2). The twenty-four-hour period does not include the time spent travelling from the place of arrest to the Magistrate’s Court.

109 *J. Jayalalitha v. State of Karnataka*, (2014) 2 SCC 401; See also: “Criminal Law and the Constitution”, *The Oxford Handbook of the Indian Constitution* (Sujit Chowdhury, Madhav Khosla & Pratap Bhanu Mehta eds., 2016).

110 *Sahara India Real Estate Corpn. Ltd v SEBI*, (2012) 10 SCC 603; See also: “Criminal Law and the Constitution”, *The Oxford Handbook of the Indian Constitution* (Sujit Chowdhury, Madhav Khosla & Pratap Bhanu Mehta eds., 2016).

111 *Rafiq Ahmad v. State of Uttar Pradesh*, (2011) 8 SCC 300; See also: “Criminal Law and the Constitution”, *The Oxford Handbook of the Indian Constitution* (Sujit Chowdhury, Madhav Khosla & Pratap Bhanu Mehta eds., 2016).

112 Section 44(1), Cr.P.C.

113 Section 44(2), Cr.P.C.

114 Section 41, Cr.P.C.

115 Section 41(1)(a), Cr.P.C.



offence punishable with imprisonment for a term which is less than seven years or may extend to seven years, only if the following conditions are satisfied:¹¹⁶

- o The police officer has reason to believe on the basis of the complaint received, information or suspicion that the person has committed the offence.
 - o The police officer is satisfied that such arrest is necessary to prevent the person from committing any other offence; for proper investigation of the case; to prevent the person from causing the evidence to disappear or tampering with the evidence; to prevent the person from making any threat, inducement or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the court or to the police officer; or if the police officer believes that it is unlikely that the presence of the person can be ensured in court unless he/she is arrested. In these cases, the police officer is required to record in writing, his/her reasons for arresting the person. Alternatively, the police officer is also required to record reasons if the arrest of the person is not required under the provisions of Section 41 of the Cr.P.C.
- If credible information has been received that the person has committed a cognizable offence punishable with imprisonment for a term of more than seven years or with death, and the police officer has reason to believe that such person has committed the offence.¹¹⁷
 - If the person has been declared a proclaimed offender under the Cr.P.C or by the State Government.¹¹⁸
 - If the person has in his/her possession property that the police officer reasonably suspects is stolen property and the officer reasonably suspects that the person has committed an offence in relation to that property.¹¹⁹
 - The person obstructs a police officer in the execution of his/her duty, or has escaped from lawful custody or attempts to escape from lawful custody.¹²⁰
 - The person is reasonably suspected to be a deserter from the armed forces.¹²¹
 - If the person has been concerned in, or against whom a reasonable complaint has been made or credible information has been received, or reasonable suspicion exists that the person has committed at any place outside India, an offence, which if committed in India would have been punishable as an offence and for which the person is under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India.¹²²
 - The person is a released convict who breaches conditions laid down in Section 356(5), Cr.P.C.¹²³
 - Where the officer receives a proper requisition from another officer, which indicates the person to be arrested and the offence committed, and where it appears that the arrest will be lawful without a warrant.¹²⁴

116 Section 41(1)(b), Cr.P.C.

117 Section 41(1)(ba), Cr.P.C.

118 Section 41(1)(c), Cr.P.C.

119 Section 41(1)(d), Cr.P.C.

120 Section 41(1)(e), Cr.P.C.

121 Section 41(1)(f), Cr.P.C.

122 Section 41(1)(g), Cr.P.C.

123 Section 41(1)(h), Cr.P.C.

124 Section 41(1)(i), Cr.P.C.



The Supreme Court in *Arnesh Kumar v. State of Bihar*,¹²⁵ ruled that it is the duty of magistrates to ensure that Section 41, Cr.P.C. is scrupulously followed by the police. In this regard, the Court held that when the arrested person is produced before the magistrate for remand, the magistrate is duty bound to release the person if the requirements of Section 41, Cr.P.C. are not met.¹²⁶ It ruled that the magistrate must examine the reasons that the police officer has given justifying the arrest, and only if he/she is satisfied that the arrest is necessary, should remand be granted.¹²⁷ It further ruled that the magistrate should also record his/her reasons for granting remand.¹²⁸

A police officer may also arrest a person who has committed, or is accused of committing, a non-cognizable offence when that person either refuses to provide the officer his/her name and address, or provides the officer with a name and address that the officer knows to be false.¹²⁹ When the officer obtains the necessary information, the person must be released with a bond.¹³⁰

A subordinate police officer, who does not have the power of arrest may also make an arrest provided he/she has written authorisation from a superior officer, naming the person to be arrested and communicates grounds of arrest to the person being arrested.¹³¹ In the course of arrest the arresting officer will have access to the surrounding area and may search it and gain access through forced entry, if necessary, to liberate others who may be held there.¹³² Police officers have the power to pursue a person to any place in India in order to affect an arrest.¹³³ The law also mandates that the police officer should not use more restraints than are necessary to make the arrest or prevent escape.¹³⁴

Noting the prevalence of unnecessary arrests by the police, Parliament amended the Cr.P.C. in 2009 to introduce provisions wherein police could avoid arrest where not absolutely necessary. Section 41A, which was introduced in 2009, mandates the police to issue a “notice for appearance” in cases where the arrest is not required to be made under the provisions of Section 41(1)(b), Cr.P.C.¹³⁵ The police officer in such cases may issue a notice directing such person to appear before him/her, at such place as specified in the notice. When the notice is issued, it is the duty of that person to appear before the police officer.¹³⁶ If the person appears in response to such notice/s, then the police officer should not arrest the person, unless he/she is of the opinion that arrest is necessary.¹³⁷ The police officer has to record reasons as to why he/she believes that arrest is necessary.¹³⁸ Further, in cases where the person does not comply with the terms of the notice or is unwilling to identify himself/herself, the police officer may arrest the person.¹³⁹ Emphasizing the importance of Section 41A, especially to prevent unnecessary arrests, the Supreme Court in *Arnesh Kumar v. State of Bihar*,¹⁴⁰ issued directions to magistrates on proper implementation of the provision and the role of magistrates in this regard. It ruled

125 (2014) 8 SCC 273.

126 *Id.*, para 8.2

127 *Id.*

128 *Id.*

129 Section 42(1), Cr.P.C.

130 Section 42(2), Cr.P.C.

131 Section 55(1), Cr.P.C.

132 Section 47, Cr.P.C.

133 Section 48, Cr.P.C.

134 Section 49, Cr.P.C.

135 Section 41A, Cr.P.C.

136 Section 41(A)(2), Cr.P.C.

137 Section 41(A)(3), Cr.P.C.

138 *Id.*

139 Section 41(A)(4), Cr.P.C.

140 (2014) 8 SCC 273.



that notice of appearance should be served on the accused within two weeks of the institution of the case, which may be extended by the Superintendent of Police of the district for reasons to be recorded in writing.¹⁴¹

2.1.1.4 Procedure for Arrest

The Cr.P.C. sets out specific statutory requirements that police officers,¹⁴² must follow when making an arrest. The Cr.P.C. envisages two kinds of arrest: (1) arrest made in pursuance of a warrant issued by the magistrate, (2) arrest made without a warrant but in pursuance of legal provisions.¹⁴³ The officer making the arrest must “actually touch or confine the body of the person to be arrested,” unless the person submits to custody after a verbal command.¹⁴⁴ The arresting officer may use all means necessary to effect the arrest of a person who forcibly resists or attempts to evade arrest.¹⁴⁵ The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations.¹⁴⁶ In the course of making an arrest, the police do not have the power to cause the death of a person who is not accused of an offence punishable by death or life imprisonment.¹⁴⁷

Every officer or other person arresting any person without a warrant is required to immediately inform the arrested person of the full particulars of the offence for which he/she is arrested or other grounds for such arrest.¹⁴⁸ Where a police officer arrests any person without warrant, other than a person accused of a non-bailable offence, he/she is required to inform the person that he/she is entitled to be released on bail and that he/she may arrange for sureties.¹⁴⁹ On arresting a person, the police officer is required to prepare a memorandum of arrest. The memorandum has to be attested by at least one witness, who should either be a member of the family of the arrested person or a respected member of the locality where the arrest is made. The memorandum has to be countersigned by the arrested person.¹⁵⁰ In the event that the arrest memorandum is not signed by a relative of the arrested person, the police officer is required to inform the person that he/she is entitled to have a relative or a friend named by such person informed of the arrest.¹⁵¹

In order to ensure transparency and accountability in the arrest process and to help identify arrested persons, Section 41C was added to the Cr.P.C. in 2009. This section requires state governments to establish police control rooms in every district and at the state level.¹⁵² Outside such control room in the district, a notice board has to be kept indicating the names and addresses of people arrested and the names of the police officers who made the arrests.¹⁵³ The control room at the state level is required to collect details of persons arrested, nature of offences for which they are charged, and to maintain a database of this information, which should be accessible to the general public.¹⁵⁴ Section 41C thus ensures that the police are held accountable for every arrest they make, and have a legal obligation

141 (2014) 8 SCC 273, paragraph 11.6.

142 Section 46, Cr.P.C.

143 *Id.*

144 Section 46(1), Cr.P.C.

145 Section 46(2), Cr.P.C.

146 Section 41B(a), Cr.P.C.

147 Section 46(3), Cr.P.C.

148 Section 50(1), Cr.P.C.

149 Section 50(2), Cr.P.C.

150 Section 41B(b), Cr.P.C.

151 Section 41B(c), Cr.P.C.

152 Section 41C(1), Cr.P.C.

153 Section 41C(2), Cr.P.C.

154 Section 41C(3), Cr.P.C.



to publicly notify the arrests made in the district. Through this provision, the proper implementation of Section 50A, which places an obligation on every police officer making an arrest to give information regarding the arrest and place where the arrested person is held to any of his/her friends, relatives or any other person nominated by the arrested person,¹⁵⁵ is ensured. Where the friend or relative lives outside the district or town, that person must be notified of the arrest through the legal aid organisation in that district and the police station of the area concerned, telegraphically within a period of eight to twelve hours after the arrest.¹⁵⁶ The officer is also required to inform the arrested person of these rights as soon as he/she is brought to the police station.¹⁵⁷ Section 41D of the Cr.P.C provides that the arrested person has the right to meet an advocate of his/her choice during interrogation.¹⁵⁸ An entry mentioning who has been informed must be recorded in a book maintained at the police station.¹⁵⁹ The arresting officer may search the arrested person and seize any articles, except for the clothes he is wearing,¹⁶⁰ and provide the arrested person with a receipt for any seized possessions.¹⁶¹ In the case of women, such search has to be necessarily done by a female police officer, "with strict regard to decency."¹⁶² In case any offensive weapons are seized during the search, they must be promptly delivered to the court.¹⁶³

The law provides for special provisions relating to the arrest of women. The Cr.P.C. prohibits the police from arresting a woman between sunset and sunrise, except in exceptional circumstances when prior permission must be obtained from a Judicial Magistrate.¹⁶⁴ This provision was introduced in 2006. A proviso was added to Section 46(1) of the Cr.P.C in 2009 to deal with arrest of women. Section 46(1) requires the police officer, or any other person making an arrest to actually touch or confine the body of the person being arrested, unless that person submits to the custody of the person arresting, through actions or words. The proviso makes an exception with respect to women. It states that an oral intimation of arrest shall be presumed to signify submission to custody by the woman, unless the circumstances indicate to the contrary. It further clarifies that unless the police officer making the arrest is a woman, or the circumstances so requires, the body of the woman shall not be touched while making the arrest.

2.1.1.5 Medical Examination of Arrested Person

Where, on arrest, reasonable grounds exist to believe that a medical examination would provide important evidence in the case, a police officer who at least holds the rank of sub-inspector, may require that a registered medical practitioner examine the arrested person "in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose".¹⁶⁵ It cannot be argued that the accused has been forced or compelled to be a witness against himself if he is merely required to undergo medical examination as per the provisions of Section 53 of the Cr.P.C.¹⁶⁶

155 Section 50(A)(1), Cr.P.C.

156 *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610.

157 Section 50(A)(2), Cr.P.C.

158 Section 41-D, Cr.P.C.

159 Section 50(A)(3), Cr.P.C.

160 Section 51(1), Cr.P.C.

161 *Id.*

162 Section 51(2), Cr.P.C.

163 Section 52, Cr.P.C.

164 Section 46(4), Cr.P.C.

165 Section 53(1), Cr.P.C.

166 *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808.



While Section 53 enables a police officer to compel an arrested person to undergo a medical examination for the purposes of facilitating an investigation, Section 54 of the Cr.P.C gives the accused the right to have himself/herself medically examined to enable him/her to defend and protect himself/herself properly.¹⁶⁷ It mandates that on arrest, the person arrested shall be examined by a medical officer in the service of the state or central government. However, if such a medical officer is not available, any registered medical practitioner may examine the arrested person. The medical officer is required to prepare a record of such examination, noting any injuries or marks of violence on the body of the arrested person, and approximate time when such injuries may have been inflicted.¹⁶⁸ The arrested person or a person nominated by him/her is entitled to a copy of the report.¹⁶⁹ This statutory provision broadens the mandate laid down by the Supreme Court¹⁷⁰ and the former Section 54, Cr.P.C.¹⁷¹

2.1.1.6 Consequences of Non-Compliance with Provisions Relating to Arrest

A trial will not be void just because provisions of arrest have not been complied with.¹⁷² No illegality or irregularity in arrest has the ability to oust the jurisdiction of the court to try the offence.¹⁷³ While non-compliance will not vitiate the trial, it will be material in case such person is charged for resistance to, or escape from custody. If the arrest is illegal then it is equivalent to false imprisonment and the person can sue the person who made the arrest and claim damages in civil court.¹⁷⁴

2.1.2 International Law

Indian law is in line with the international legal standards on pretrial arrest and detention. The UDHR asserts that “no one shall be subjected to arbitrary arrest, detention, or exile.”¹⁷⁵ Article 9(1) of the ICCPR sets forth several provisions that essentially mirror the principles in Indian domestic law. Article 9(1) of the ICCPR states: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

Further to this, Article 9(2) of the ICCPR provides that: “Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” This asserts more or less the same basic principle as stated under Indian law. Article 9(4) of the ICCPR provides for compensation in case of unlawful arrests or detention. India, however, has made a reservation to this provision stating that there is no enforceable right to compensation for victims claiming unlawful arrest or detention against the State.

167 R.V. Kelkar, *Criminal Procedure*, pp. 86-87, 6th ed. 2014.

168 Section 54(2), Cr.P.C.

169 Section 54(3), Cr.P.C.

170 *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610, *Sheela Barse v. State of Maharashtra*, 1983 SCC (Cri) 353.

171 Prior to its amendment in 2009, Section 54 was amended in 2005. The Section provided for medical examination of an arrested person by a medical practitioner at the request of the arrested person. The law now mandates medical examination and does not put the onus on the arrested person to seek examination.

172 R.V. Kelkar, *Criminal Procedure*, pp. 88-89, 6th ed. 2014.

173 *Emperor v. Vinayak Damodar Savarkar*, ILR (1920) 35 Bom 225.

174 *Anowar Hussain v. Ajoy Kumar Mukherjee*, AIR 1965 SC 1651. See: also: Section 220, IPC.

175 Article 9, UDHR.



The Human Rights Committee has explained that “one of the most important reasons for the requirement of *prompt* information on a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his/her detention by a competent judicial authority.” The universal directive to the State to ensure that the arrested person knows the grounds of arrest with all promptness is grounded in assuring him/her the earliest opportunity to challenge his/her arrest and detention, prepare his/her defence, and apply for habeas corpus, or for release on bail as the case may be.

2.1.3 Guide to Judicial Enforcement

Any forcible detention of a person by the police, even temporarily, while questioning, amounts to a loss of liberty. Under the Constitution, according to the design of the Cr.P.C and myriad pronouncements of the courts, citizens can be deprived of liberty only in very specific circumstances and after due process requirements have been satisfied. Nevertheless, serious breaches of procedure often go uncorrected by trial courts because they are so routine and commonplace that they have become invisible. Breaches of procedure are tolerated because it is convenient all around – for the court, the prosecutor, and the police – to be lax, in the knowledge that the victim can do little about it. Adherence to procedural safeguards adds substance to the notion that no one shall be deprived of his/her life or personal liberty except in accordance with the law. Refusal to apply the rules at the time and in the manner required by the Cr.P.C and judgments of the higher courts makes as much a mockery of the law as a criminal does. Besides stripping the victim of abuse of procedure of his/her rightful protections, laxity in upholding all procedural rules at the right time in the legal process jeopardises the system of rule of law based on checks and balances and allows a blurring of executive and judicial roles. The police officer goes from being an investigator and apprehender to becoming judge, jury and final arbiter of guilt or innocence without reference to the court. The judge has a particularly important role to play to prevent this blurring.

By ensuring adherence to procedure, the court not only protects the victim but also safeguards its own dignity and functions within the system as an independent impartial decision-maker. The court has considered the impact of an arrest made with a mischievous or malicious intent. It has recognised that the invasion of rights may not be remedied solely by the victim being set free. Therefore, in appropriate cases, the court has exercised jurisdiction to compensate the victim by awarding suitable monetary compensation.¹⁷⁶ This power resides with the Supreme Court and the High Courts in exercise of their jurisdiction respectively under Articles 32 and 226 of the Constitution of India to a victim whose fundamental rights under Article 21 of the Constitution are violated.¹⁷⁷ Award of monetary compensation is permissible “when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers.”¹⁷⁸

176 *Rudul Sah v. State of Bihar*, (1983) 4 SCC 141; *Bhim Singh v. State of J&K*, (1985) 4 SCC 677; *Raghuvansh Dewanchand Bhasin v. State of Maharashtra*, (2012) 9 SCC 791.

177 *Id.*

178 *Rajender Singh Pathania & Ors. v. State of N.C.T of Delhi & Ors.*, (2011) 13 SCC 329.



2.3 Right to be Brought Promptly Before a Judge or Judicial Officer

The fundamental principle in relation to the power of arrest is that it is granted strictly for the purpose of bringing a suspect before a court of law. The power is coupled with the duty to produce the arrested person before a judicial authority at the very earliest. This means that after arrest, a person cannot be held by the police on any grounds whatsoever beyond the statutory time limit. Any further detention beyond that must only be on the magistrate's order. The magistrate's determination about the need to hold the person in custody, and the duration of that custody, must be based on clear necessity, with personal liberty being a paramount consideration in that determination.

2.3.1 Domestic Law

Article 22(2) of the Constitution guarantees that “every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate.”¹⁷⁹

2.3.1.1 Arrested Person to be Taken Before a Magistrate or Officer in Charge of a Police Station

The Cr.P.C specifies the procedures that the police must follow when making an arrest or detaining an individual. A police officer making an arrest without a warrant must take or send the arrested person before a magistrate or an officer in charge of a police station without undue delay,¹⁸⁰ but no later than 24 hours (exclusive of the time required for the journey from the place of arrest to the magistrate's court).¹⁸¹

2.3.1.2 Procedure when Investigation Cannot be Completed within Twenty-Four Hours

If a person is arrested and detained in custody and it appears that the investigation cannot be completed within the designated twenty-four hours, and there are grounds for believing that the accusation or information is well-founded, then the police officer in charge of the police station or the investigating officer, if not below the rank of sub-inspector, must transmit a copy of the required diary entries and the accused to the nearest magistrate.¹⁸² The magistrate to whom the accused and the information are forwarded *may* authorise the detention of the accused in the custody if he/she deems appropriate for not more than fifteen days, whether or not the magistrate has jurisdiction to try the case.¹⁸³

If the magistrate does not have jurisdiction to try the case or to commit it for trial and finds that further detention is unnecessary, he/she may forward the accused to a magistrate with the necessary jurisdiction. While doing this, the magistrate must also transmit all the relevant information, including diary entries to the new magistrate.¹⁸⁴ As a safeguard against prolonged detention and violence in custody, no magistrate can authorise detention in any custody unless the accused is produced

179 Constitution of India, Article 22(2)

180 Section 56, Cr.P.C.

181 Section 57, 76, Cr.P.C.

182 Section 167(1), Cr.P.C.

183 Section 167(2), Cr.P.C.

184 *Id.*



before him/her.¹⁸⁵ Where the magistrate authorises police remand beyond the statutory twenty-four hours, he/she must record the reasons in writing.¹⁸⁶ The copy of this reasoned order must be sent to the Chief Judicial Magistrate.¹⁸⁷

If in a summons case triable by a magistrate, the investigation is not concluded within six months from the date on which the police arrested the individual, the magistrate must make an order stopping the investigation unless the investigating officer convinces the magistrate of some special reasons to extend the investigation.¹⁸⁸ The Sessions Judge may overrule a magistrate's order to stop the investigation in such a case if he/she is convinced through a separate explanation that there are grounds for further investigation.¹⁸⁹ When a magistrate passes an order for stopping investigation, the accused has to be necessarily discharged. The Supreme Court has clearly held that "Section 167(5), Cr.P.C...is intended to ensure speedy completion of investigation within the time frame specified therein, otherwise to face an order of discharge of the accused."¹⁹⁰ Section 167(2-A), states that if an arrested person is produced before an Executive Magistrate for remand, the said magistrate may authorise the detention of the accused not exceeding seven days in aggregate.¹⁹¹ It further provides that the period of remand by the Executive Magistrate should also be taken into account for computing the period specified in the proviso i.e., aggregate periods of ninety days or sixty days.¹⁹² Since the Executive Magistrate is empowered to order detention only for seven days in such custody as he/she thinks fit, he/she should therefore either release the accused or transmit him/her to the nearest Judicial Magistrate together with the entries in the diary, before the expiry of seven days.¹⁹³ The section also lays down that the Judicial Magistrate who is competent to make further orders of detention, for the purposes of computing the period of detention has to take into consideration the period of detention ordered by the Executive Magistrate.¹⁹⁴

2.3.2 International Law

Article 9(3) of the ICCPR states: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release." Indian law, in fact, not only meets international standards on an individual's right to be brought promptly before a judge, it also eliminates the confusion faced in other international jurisdictions because of more ambiguously worded statutes.¹⁹⁵

2.3.3 Guide to Judicial Enforcement

2.3.3.1 Magistracy to Guard Against Illegal Detentions

Personal liberty is paramount. Any deprivation of liberty, however short or temporary, has to be justified. Prohibition of detention without remand is a salutary provision, enabling the magistrate to keep a check on the police investigation.¹⁹⁶

185 Section 167(2)(b), Cr.P.C.

186 Section 167(3), Cr.P.C.

187 Section 167(4), Cr.P.C.

188 Section 167(5), Cr.P.C.

189 Section 167(6), Cr.P.C.

190 *Durgesh Chandra v. Bimal Chandra*, 1996 Cr LJ 1137, para 8.

191 Section 167 (2-A), Cr.P.C.

192 *Id.*

193 *Id.*

194 *Id.*

195 See for example: *Assanidze v. Georgia*, App. No. 71503/01, Eur. Ct. H.R. (2004).

196 *Khatri & Ors. v. State of Bihar & Ors.*, (1981) 1 SCC 627.



The magistrate is the main bulwark against unnecessary detention and abuse of power and process. It is his/her duty to guard citizens vigilantly against needless and illegal detentions.

There are no exceptions under the Cr.P.C regarding bringing an accused before a magistrate within 24 hours. The State and police officials must ensure that this constitutional and legal requirement is strictly enforced.¹⁹⁷ A police officer, who fails to comply with this rule is guilty of the offence of illegal detention/ wrongful confinement. The magistrate's duty is to take note of that and act on it. It cannot be ignored or condoned.

At the first production, the magistrate must assure himself/herself that all the documents which should accompany the accused are presented to him/her. These documents include the First Information Report, the arrest memo, the medical examination reports, etc. Later, there are also other documents, specifically the case diary, that indicates the pace and directions the investigations are taking. The presence of these papers at this time is a factual necessity that must be complied with.

It is mandatory at first production for all the papers to be available, and it is mandatory for the magistrate to peruse them. These safeguards are essential to avoid and reduce the large numbers of unjustified arrests that the police make and the rough treatment meted out to suspects. Without all the papers before him/her and on the assurance that they will be produced at a later time, and without taking the time to examine them with some care, the magistrate has no basis on which to assess the legality or reasonableness of the arrest. He/she also has no means by which to decide on the continued remand in police or judicial custody. In the absence of a careful examination of a full set of papers, there can be no proper application of mind and the process of remand becomes a mechanical exercise for the convenience of the police and in violation of the rights of the accused. This has implications for the court as an institution. In the absence of careful examination of all the papers, the judge is left to rely only on the say so of the police. This is an extraneous consideration and an unreliable one. In effect, this means that the court is giving up its discretion to the police and abdicating or ceding its role to the executive.

The law indicates that mere production of documents is not enough. The magistrate is required to check the arrest memo to ensure that all the strict statutory safeguards for a legal arrest have been complied with. A quick examination of the arrest memo allows the magistrate to cross check the dates and signatures with the accused, to ensure the truth of what is stated in the memo. Routine and robot-like reliance on the police version defeats the purpose of these provisions. If, as often happens, no memo of arrest is presented at the time of the first production of the accused, the magistrate has a duty to ask why it has not been produced. Absence of a memo exposes the investigating officers to a series of strictures from the magistrate. The magistrate should refuse to proceed and order immediate release of the arrested person. He/she can reprimand the police officer for not following the necessary procedural safeguards, indicate disapproval of the practice, point out bad practice to superior police officers, and suggest disciplinary actions, especially if there are repeated instances of the police ignoring legal standards. The Supreme Court in *Arnesh Kumar*, while laying down guidelines to be followed by the police has ruled that failure to follow the prescribed guidelines would amount to contempt of court.¹⁹⁸

¹⁹⁷ *Khattri & Ors. v. State of Bihar & Ors.*, (1981) 1 SCC 627.

¹⁹⁸ *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273, para 11.7.



Where the court makes it a practice to regularly ask the police, and cross-check the circumstances of the arrest and what is written in the arrest memo with the accused, and ensures that every remand goes forward only when accompanied by an arrest memo, police behaviour will change considerably. Equally, the conscientious magistrate can reprimand the prosecution for not ensuring that all papers are in order. Even little attention at this preliminary stage of the proceedings and adherence to strict procedure would prompt positive changes in present police practice. The number of arbitrary arrests would decline in the knowledge that the grounds for arrest would be tested by the magistrate. It would reduce instances of undertrials languishing in lockups without ever being produced before the courts.

2.3.3.2 The First Remand

The Supreme Court in *Arnesh Kumar v. State of Bihar*,¹⁹⁹ ruled as follows:

*The power to authorise detention is a very solemn function. It affects the liberty and freedom of citizens and needs to be exercised with great care and caution. Our experience tells us that it is not exercised with seriousness it deserves. In many of the cases, detention is authorised in a routine, casual and cavalier manner. Before a Magistrate authorises detention under Section 167, Cr.P.C., he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested are satisfied.*²⁰⁰

It further ruled:

*The Magistrate before authorising detention will record his own satisfaction, may be in brief, but the said satisfaction must reflect from his order. It shall never be based upon the ipse dixit of the police officer...[The facts, reasons and materials provided by the police officer] shall be perused by the Magistrate while authorising detention and only after recording his satisfaction in writing that the Magistrate will authorise detention of the accused. In fine, when a suspect is arrested and brought before a Magistrate for authorising detention, the Magistrate has to address the question whether specific reasons have been recorded for arrest and if so, prima facie those reasons are relevant, and secondly, a reasonable conclusion could at all be reached by the police officer that one or the other conditions stated above are attracted. To this limited extent the Magistrate will make judicial scrutiny.*²⁰¹

The Court importantly noted that its endeavour was to ensure that magistrates do not authorise detention casually and mechanically.²⁰² The Court further held that if magistrates do not provide reasons for authorising detention, they shall be liable for departmental action by the appropriate High Court.²⁰³ Hence, the Supreme Court has emphasized that magistrates should not mechanically allow remand of the accused under Section 167, Cr.P.C. It is the role of the magistrate to ensure that police do not abuse the power of arrest and detention and to enforce constitutional rights of the arrested person.

199 (2014) 8 SCC 273.

200 *Id.*, para 8.1-8.2.

201 *Id.*, paras 8.3-8.4.

202 *Id.*, para 11.

203 *Id.*, para 11.8.



2.3.3.3 Granting Further Remands

Extra caution should be exercised by magistrates when investigations cannot be completed within the first remand period and further remand is sought by the police. Proviso (b) to Section 167(2), Cr.P.C states that a magistrate/ court should not remand an accused to custody without the production of the accused, either in person or through the medium of electronic video linkage.²⁰⁴ This provision is aimed at protecting the rights of the arrestee by giving him/her an opportunity to inform the magistrate of any incidents of ill treatment, torture or harassment at the hands of prison officials or police while in custody. The practice of producing the accused only for obtaining the first order of remand and not for getting further detention orders is contrary to law, and has been held so by the Supreme Court even before Proviso (b) was introduced in Section 167(2)(b) in 2009.²⁰⁵

The practice of routinely sending to the court information that the accused cannot be brought before it for various reasons, the commonest being non-availability of a police escort from jail to court, has become widespread across the country. Recognising the personnel crunch or drain on police resources while producing all arrestees before the magistrate for granting or extending their remand, video conferencing has become permissible while granting further remands. The magistrate should ensure that the process of extending remand by video conferencing does not become mechanical, without production and perusal of all documents and examining the necessity of further detention. Moreover, an accused might be unable to freely discuss allegations of torture/mistreatment with the magistrate over video-conferencing, since he/she continues to be in the prison during such production and might anticipate danger to his/her life or limb if he/she complains about custodial torture. Production in court also facilitates the accused to meet his/her lawyer, and get information about his/her case. Hence, physical production is preferable for the purpose of remand, and video-conferencing, although permitted, should be used selectively.

The practice of granting further remands mechanically is also rife and can be laid squarely at the door of the magistrate. It is one of the prime reasons for prison overcrowding. In addition, magistrates routinely grant further remands in tranches of fifteen days, that being the maximum allowable. Reasons for always using the maximum period without even considering that the accused should be produced at the very earliest, amounts to entrenched bad practice, suggests non-application of mind and can only be explained as a willingness to prioritise court and prosecution convenience over constitutional safeguards and obedience to the clear words of the statute.

The clarity in the prohibition against extending remands in the absence of the accused in Proviso 2(b) of Section 167 has been clouded by conflicting judgments of several High Courts and the Supreme Court. Several judgments decry the fact that the police and prosecution routinely delay adjudication for their own reasons,²⁰⁶ while others seem to say that administrative convenience is an allowable factor for not producing the accused and extended remand in the absence of the accused is allowable.²⁰⁷ The circumstances within which it becomes allowable are nowhere satisfactorily explained. Some judgments speak of requiring reasons beyond the control of the police or jail authorities while others seem to require only “adequate”

204 Section 167(2)(b), Cr.P.C.

205 *Khatril & Ors., v. State of Bihar & Ors.*, (1981) 1 SCC 627.

206 *Elumalai v. State of Tamil Nadu*, (1983) LW (CrI) 121.

207 *Kurra Dasaratha Ramaiah and Ors. v. State of Andhra Pradesh*, (1992) Cri. LJ 3485 (AP-FB).



grounds for extending remands in the absence of the accused. The issue of denial of opportunity to the accused to put forward his/her case and the extension of his/her custody merely on the strength of executive excuses has not been fully discussed. Several judgments also indicate that remand extended in the absence of the accused makes the confinement illegal and bail must be granted,²⁰⁸ while others appear to indicate that the custody is not rendered illegal and that bail need not be granted for that reason alone.²⁰⁹ This uncertainty has allowed magistrates to continue with routine, mechanical fifteen-day extensions of remand.

However, conscientious magistrates must always demand the production of the accused at the first available opportunity and only in the rarest of cases concede that the accused cannot be produced before him/her. The first available opportunity does not mean the first available convenience of the court, the lawyer or the police. It means at the very earliest time given that the accused is behind bars and awaiting trial through delays not of his/her making. In the routine rush and hurry of the court it is easy to forget that the person behind bars is not just a person who may or may not be guilty of a crime, but a constitutional entity equal before the law and clothed with all the rights afforded by it, and is a ward of the court whose first duty is to protect his/her rights as well as the notion of a fair trial. The Supreme Court has also clarified that even though it has ruled that the non-production of the accused will not vitiate an order of remand, the magistrate passing an order of remand ought, as far as possible, to see that the accused is produced in the court when the order of remand is passed.²¹⁰ Equally important is the need to make up for absence on one date by setting the earliest possible date for the next appearance. Routine cycles of fifteen days are an unacceptable subversion of legislative intent.

The issue of the total number of days that a person can be remanded to police custody was dealt with by the Supreme Court in *CBI v. Anupam J. Kulkarni*.²¹¹ The Court held that the magistrate may remand a person either to police or judicial custody only for fifteen-day periods. After the completion of the first fifteen days of custody, the person may be remanded only to judicial custody. It is only if custody is sought in a different case can the person be sent from judicial custody to police custody.

2.4 Alternatives to Detention: Guarantees to Appear at Trial

Depriving a person of liberty is a last resort. Always remembering that a person is innocent until proven guilty, bail not jail is the rule. Bail must be granted unless there are reasonable grounds to believe that the suspect would subvert the process of law or flee from justice.

2.4.1 Domestic Law

2.4.1.1 Cases Where Bail Can be Granted

Bailable offences are those in which the police can grant bail themselves. If the police then produce the person before a magistrate, as they usually do, the magistrate must grant bail, with or without conditions, as a matter of course. The arrested person can seek bail at any point during the proceedings, including at first remand. Bail will be granted with or without conditions, and on an assurance

208 *K Palimiyappan v. State of AP*, 1999 Cri. LJ 3616(AP).

209 *Gouri Shankar v. State of Bihar*, AIR 1972 SC 711; *M Sambasiva Rao v. Union of India*, AIR 1973 SC 850.

210 *Sandip Kumar Dey v. Officer in Charge Jamshedpur*, (1974) 4 SCC 273.

211 (1992) 3 SCC 141.



of future appearances. These assurances can be underwritten by money forfeits or assurances from the arrested persons or their guarantors.

Where the court is satisfied that a person is too poor to provide a money guarantee and is also unable to provide any other sureties to stand up for him/her, the court may, at its discretion, release the person on his/her own personal bond that he/she will be available to appear at all trial hearings.²¹² Where the offence is bailable, the court has no discretion, and must release him/her on his/her bond within seven days of the arrest.²¹³

If at any time a person fails to comply with the time and location conditions of the bail-bond, the court may refuse to release the person on bail on a later occasion.²¹⁴ This refusal will not prejudice the court in calling for the individual to pay the penalty on the bond.²¹⁵

2.4.1.2 Limits on Detention Without Bail

There are three further circumstances under which bail must be granted by law and cannot be refused. An indefeasible right to be released on bail arises where a person has been held in custody for a period which amounts to half or more of the maximum sentence he/she would have served for the offence he/she has been accused of, if he/she were found guilty.²¹⁶ Here, he/she must be released on bail under a personal bond with or without sureties.²¹⁷ Where a person is accused of an offence punishable with death, life imprisonment or imprisonment for a term of not less than ten years, and no chargesheet has been filed within ninety days of his arrest, whether or not investigations have been completed, the court must release the arrested person on bail and cannot authorise any further detention beyond ninety days.²¹⁸ Similarly, in every other case if ongoing investigations stretch beyond sixty days and no charge sheet has been filed, the accused must be released on bail and cannot be detained beyond sixty days.²¹⁹ However, in the latter two circumstances where charge sheets have not been filed within the statutory limits of ninety and sixty days the person has a right to be released on bail but may continue to be detained if he/she does not furnish bail.²²⁰ Once a bond has been executed, release must be immediate.²²¹

2.4.1.3 When Bail May be Taken in Case of Non-Bailable Offences

While bail is the rule, in very serious offences the Cr.P.C. mandates that a court other than the Sessions Court and the High Court should not grant bail to the accused where there appears “reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life”²²² or if the accused has been previously convicted of an offence punishable with death, life imprisonment, or imprisonment for seven years or more. If the court decides to grant bail, before doing so it is required to hear the Public Prosecutor on the issue.²²³ The High Court and the Sessions Court may grant bail to a person whose alleged crime is punishable with imprisonment for life. However, in such cases, the court has to give notice to the Public Prosecutor. Where no notice has been given to the Public Prosecutor, reasons must be given in writing indicating why it

²¹² Section 436(1), Cr.P.C.

²¹³ Explanation to Section 436(1), Cr.P.C.

²¹⁴ Section 436(2), Cr.P.C.

²¹⁵ *Id.*

²¹⁶ Section 436A, Cr.P.C.

²¹⁷ *Id.*

²¹⁸ Section 167(2)(a)(i), Cr.P.C.

²¹⁹ Section 167(2)(a)(ii), Cr.P.C.

²²⁰ Explanation to Section 167(1)(a)(i) and (ii), Cr.P.C.

²²¹ Section 442(1), Cr.P.C.

²²² Section 437(1)(i), Cr.P.C.

²²³ *Id.*



was not practicable to do so.²²⁴ The Cr.P.C. also states that a person who has been previously convicted on at least two occasions of a cognizable offence punishable with imprisonment for not less than seven years, should also not be ordinarily released on bail.²²⁵ However, persons below sixteen years, women and infirm people may be released on bail.

2.4.1.4 Amount of Bond and Reduction Thereof

Surety conditions and amount of bond are to be fixed with due regard to the circumstances of the case and should not be excessive.²²⁶ Whether a surety is sufficient and appropriate must be arrived at after an inquiry into the circumstances of the arrested person.²²⁷ Additionally, if the accused is unable to arrange for someone to come forward and stand as surety for them, they may be released on personal bonds on demonstrating roots in the community that would deter their evading the course of justice.²²⁸ The prosecution's objections must also be taken into account in arriving at a determination.

2.4.1.5 Power to Order Sufficient Bail When the Initial Bail Taken is Insufficient

If, through mistake or fraud, the court deems that the first sureties provided were either insufficient or have become insufficient, the court may order increased sureties from that person and if he/she fails to provide them, may commit him/her to jail.²²⁹

One of the aims of detaining an accused person following his/her arrest, is to ensure that he/she attends the trial and if he/she is found guilty, is present to receive a sentence. However, since arrest and detention are serious infringements on the right to personal liberty, the presence of the accused at the trial should, where possible, be ensured through methods other than pretrial detention. This is the larger principle behind bail.

Hussainara Khatoon v. State of Bihar, (1980) 1 SCC 81

The Supreme Court admitted a writ petition to look into the administration of justice in Bihar after *The Indian Express* published a series of news items about shocking conditions in Bihar's jails. An alarmingly large number of men, women and children were found to be in prison awaiting trial for extensive periods in shocking conditions. These included persons charged with minor offences carrying punishment for not more than a few months. Many had been in jail for periods ranging from three to ten years.

The Supreme Court declared that it was a travesty of justice that people end up spending extended time in custody, not because they are guilty but because the courts are too busy to try them and the accused are too poor to afford bail. Quite often the bail amount fixed by the magistrate is "unrealistically excessive" and the poor cannot arrange for it. The Court asserted that "courts must abandon the antiquated concept under which pretrial release is ordered only against bail with sureties."

Releasing all persons incarcerated, the Court gave the following directives: when satisfied of the accused's roots in the community, the magistrate should release the accused on a personal bond without sureties and that the bail amount should not be based merely on the nature of the charge but should be fixed keeping in mind the individual financial circumstances of the accused and the probability of his/her absconding.

224 Proviso to Section 439(1), Cr.P.C.

225 Section 437(1)(ii), Cr.P.C.

226 Section 440(1), Cr.P.C.

227 Section 441(4), Cr.P.C.

228 *Hussainara Khatoon (I) v. Home Secretary, Bihar, (1980) 1 SCC 81.*

229 Section 443, Cr.P.C.



Motiram v. State of Madhya Pradesh (1978) 4 SCC 47

Motiram, a mason, appealed to the Supreme Court that despite being granted bail he was unable to secure his release because the Chief Judicial Magistrate fixed an exorbitant sum of Rs. 10,000 as surety. The Magistrate also rejected the surety offered by his brother because he resided in another district. Motiram wanted the Supreme Court to either reduce his surety amount or release him on personal bond.

The Court said that, “it shocks one’s conscience to ask a mason to furnish a surety of Rs. 10,000 for a release on bail.” The Court also expressed anguish that the Magistrate had demanded surety from the appellant’s own district and wondered: “What is a Malayalee, Kannadiga, Tamilian or Andhra to do if arrested for alleged misappropriation or theft or criminal trespass in Bastar, Port Blair, Pahalgam or Chandni Chowk?”

Directing the release of the petitioner on his own bond for Rs. 1,000 the Court said that bail should be given liberally to poor people simply on a personal bond if reasonable conditions are satisfied. The bail amount should be fixed keeping in mind the financial circumstances of the accused and the accused should not be required to produce a surety from the same district especially when he/she is a native of some other place.

An important power available to the Sessions Court is to reduce surety amounts. If the High Court or a Court of Session comes to a conclusion that the bail amount fixed by a magistrate or the police is excessive, it may reduce the bail amount required.²³⁰ This is an important provision, especially since situations often arise where the only reason that a person who has been granted bail cannot be released is that he/she is unable to deposit the surety amount. In such cases, courts should be liberal in reducing the surety amount, and in appropriate cases, releasing the person on a personal bond.

2.3.1.6 Anticipatory Bail

An anticipatory bail is a pre-arrest legal process which is effective at the very moment of arrest. It directs that if the person in whose favour it is issued is thereafter arrested (on the accusation with respect to which the direction is issued), he/she shall be released on bail.²³¹ Arrest includes issuance of summons for appearance²³² and issuance of warrant by the magistrate which gives rise to apprehension of arrest.²³³ The court while granting anticipatory bail should necessarily record the reasons for doing so²³⁴ and the offence with respect to which alone the order will be effective.²³⁵

The Court of Session or High Court may also impose conditions while granting anticipatory bail.²³⁶ The conditions mentioned in Section 438(2) are not comprehensive and the court has the discretion to impose other conditions.²³⁷

230 Section 440 (2), Cr.P.C.

231 Section 438, Cr.P.C.; *Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565.

232 *P.V. Narasimha Rao v. Delhi Admn.*, 1997 Cri LJ 961 (Del).

233 *Puran Singh v. Ajit Sharma*, 1985 Cri LJ 897 (P&H).

234 *State of Maharashtra v. Vishwas Shripati Patil*, 1978 Cri LJ 1403 (Bom).

235 *Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565

236 Section 438(2), Cr.P.C.

237 *Suresh Vasudeva v. State*, 1978 Cri LJ 677 (Del).



Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565

The appellant was facing allegations of political corruption. Fearing arrest, he applied for anticipatory bail under Section 436 of the Cr.P.C in the High Court of Punjab and Haryana. The High Court refused the application and the applicant approached the Supreme Court.

The Supreme Court held as follows:

- The question whether to grant bail or not depends upon a variety of circumstances. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal to bail. Therefore, the powers of the High Court or Sessions Court to grant or refuse bail is discretionary as should be exercised in the circumstances of each case. Conditions mentioned in Section 437 cannot be read into Section 438.
- The use of the expression “reason to believe” shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Such belief must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested.
- If an application for anticipatory bail is made to the High Court or the Court of Session it must apply its own mind to the question and decide whether a case has been made out for granting such relief. It cannot leave the question for the decision of the magistrate concerned under Section 437 of the Cr.P.C. as and when an occasion arises.
- The filing of a First Information Report is not a condition precedent to the exercise of the power under Section 438.
- Anticipatory bail can be granted even after an FIR is filed, so long as the applicant has not been arrested. But the provisions of Section 438 cannot be invoked after the arrest of the accused.
- An order of bail can be passed under the section without notice to the public prosecutor. But notice should be issued to the public prosecutor or the government advocate forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties. The ad interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage.
- The court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an FIR with respect to the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail under Section 437 or 439 of the Cr.P.C. within a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time.

In deciding an application for anticipatory bail courts need to take into account the following:²³⁸

- (i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;
- (ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court with respect to any cognizable offence;

238 *Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors.*, (2011) 1 SCC 694.



- (iii) The possibility of the applicant to flee from justice;
- (iv) The likelihood of repetition of similar or other offences;
- (v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;
- (vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;
- (vii) The court must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the IPC, the court should consider with even greater care and caution because over-implication in the cases is a matter of common knowledge and concern;
- (viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;
- (ix) The court should consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;
- (x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution; in the normal course of events, the accused is entitled to an order of bail.

2.4.2 International Law

Article 9(3) of the ICCPR provides that release from detention may be conditioned by guarantees to appear for trial. It states that: "[It] shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."²³⁹

2.4.3 Guide to Judicial Enforcement

Indian jurisprudence as stated in the books conforms closely to international standards. However, court practice is not as consistent. Persons caught in the criminal justice system are in the majority from amongst the poorer segments of society and are the most likely unaware of their rights. Nor do they understand the intricacies of trial procedure. An unrepresented and unrepresented person in custody is least likely to know how to move a bail application, know that he/she has a right to bail, or that the right is indefeasible in the circumstances mentioned above.

The magistrate has a duty to inform the arrested person of his/her right to bail at the very outset, when he/she first appears before the court. This is particularly important, because the police are acknowledged as making too many unnecessary arrests. It is expected that a conscientious court would also mention this right to the accused at subsequent hearings, especially when the statutory limits for detention come into play after half the maximum sentence has been spent in detention or no

²³⁹ Article 9 (3), Cr.P.C.



charge sheet has been filed within sixty or ninety days, as the case may be. Equally, the court can assure that the defence counsel is aware of his/her client's rights and enforces them. However, that none of this is diligently done is evidenced by the number of illegal overstays who presently crowd prisons and remain unattended to by the court.

Even when bail is applied for, magistrates routinely refuse it for no other reason than that it is automatically opposed by the prosecution, or the police plead lack of infrastructure and time to complete investigations, or in order to play it safe when the person is indigent and not known in the local community. This last situation does indeed present a dilemma for the court. On the one hand, there are the statutory and discretionary provisions that favour granting bail rather than prolonging detention to these very categories. On the other hand, there is the real concern that once out on bail, people without roots in the community may not appear in court. The balance is not easily found but has to be striven for in each case, and easy recourse to lengthy incarceration cannot be the solution.

The Apex Court has said that there can be no fixed rule for setting bail conditions or quantum of bail amounts, but that each case has to be decided on its own particular merits. The court must exercise its discretion afresh in each case and not be guided by stereotypes or preconceptions about similarly circumstanced individuals. It must consider the application of a particular accused in the light of his/her own unique circumstances. Bail is the rule, and jail is the exception to be considered only where the court, on serious application of mind, finds circumstances that reasonably suggest that the accused may indeed flee from justice, thwart its course, or create other problems in the shape of repeating offences or intimidating witnesses and so on.

While a detailed examination of evidence and elaborate documentation of the merits of a case is not usually necessary, there is a need to provide clear, reasoned orders about why bail is granted or rejected. Courts need to take account of:

- The nature of the accusation;
- The gravity of the crime;
- The circumstances of the individual concerned;
- Whether further detention is at all necessary;
- The risk of flight;
- The risk of subverting or tampering with evidence;
- The nature of the evidence in support of the accusation;
- The severity of the punishment which conviction would entail;
- Whether the sureties are independent, or indemnified by the accused person.²⁴⁰

Whilst fixing bail/sureties:

- If a magistrate is satisfied after making an enquiry into the condition and background of the accused that the accused has roots in the community and is not likely to abscond, he/she can safely release the accused on order to appear or on his/her own recognisance.²⁴¹

²⁴⁰ *Gudikanti Narasimhulu v. Public Prosecutor*, (1978) 1 SCC 240.

²⁴¹ Report of the Legal Aid Committee appointed by the Government of Gujarat, 1971, p. 185.



- When the accused is too poor to find sureties, there is no point in insisting on his/her furnishing bail with sureties, as it will only compel him/her to be in custody with the consequent handicaps in making his/her defence.²⁴²
- The only reason for remaining in custody cannot be poverty. The law itself has recognised this and now requires the release on the personal bond of indigent undertrials. This course of action should be resorted to in most cases where there is no substantial risk of non-appearance of the accused.²⁴³

The order that grants – and most particularly when it refuses – bail must indicate that each of the relevant factors have been weighed and measured separately and when cumulatively taken into account have led logically to the conclusion. In the absence of such a careful, supporting rationale to justify an order, there is every reason to infer that there has been no application of mind and therefore no conclusion sustainable at law.²⁴⁴

2.5 Right to Legal Counsel

The right to legal counsel which necessarily includes the right to communicate with counsel (during the pretrial stage and detention as well) is one of the most essential elements of a fair trial. A suspect/accused without counsel is often unaware of all his/her rights and will therefore often be more compliant with the investigative authorities. It is crucial that the suspect/accused has early access to counsel in order to gain information such as to how long he may be detained, what are the allegations against him/her, what the allegations actually mean, and what the consequences of a refusal to make a statement might be. An early access to counsel is also important in order to draw up a sound defence strategy.

2.5.1 Domestic Law

The Constitution provides every arrested person with the right to consult and be defended by a legal practitioner of his/her choice.²⁴⁵ The Constitutional mandate of providing equal protection of laws to all persons²⁴⁶ can be fulfilled only when contesting parties in an adversarial system are given equal legal representation. Provision of legal aid is the basis for fair and just procedure that is a part of the mandate of Article 21.²⁴⁷ The right to legal aid is further strengthened by Article 39A that envisions the operation of the legal system in which opportunities for securing justice are not denied to any citizen by reason of economic or other disability. The state is under an obligation to provide free legal aid, by suitable legislation or schemes to fulfil the constitutional pledge of equal justice in its letter and spirit. This has been done through the enactment of the Legal Services Authorities Act, 1987.

2.5.1.1 Right of the Person Against Whom Proceedings Are Instituted to be Defended

The Cr.P.C, provides that any person accused of an offence may by right be defended by a lawyer of his/her choice.²⁴⁸ Every court should appoint an attorney to the accused at the expense of the State when he/she “is not represented by a

242 Report of the Expert Committee on Legal Aid-Processual Justice to the People, May 1973.

243 *Moti Ram v. State of Madhya Pradesh*, (1978) 4 SCC 47.

244 *Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav and Anr.*, (2005) 2 SCC 42.

245 Constitution of India, Article 22(1).

246 Constitution of India, Article 14.

247 *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

248 Section 303, Cr.P.C.



pleader, and where it appears to the court that the accused has not sufficient means to engage a pleader".²⁴⁹ With the approval of the state government, the High Court may fashion rules that provide for the mode of selecting lawyers, the "facilities" allowed to the lawyers, and the fee the appointed lawyers are to receive.²⁵⁰

Right to legal counsel is especially essential at the pretrial stage of criminal proceedings, since the investigation provides the foundation for the rest of the trial. Section 41D of the Cr.P.C provides that the arrested person has the right to meet an advocate of his/her choice during interrogation.²⁵¹ When the accused is produced before the magistrate for the first time, he/she needs competent legal advice and representation to apply for bail and obtain his/her release and also to resist remand to police or judicial custody. The magistrate is under an obligation to inform the accused that if he/she is unable to engage a lawyer on account of poverty, he/she is entitled to obtain free legal services at the cost of the State.²⁵² Even after the accused has been remanded and kept in detention for ninety or sixty days, as the case may be, the magistrate must, on the expiry of the statutory period for detention under Section 167, point out to him/her that he/she is entitled to be released on bail and ensure that the assistance of a lawyer at State cost is secured to him/her.²⁵³

Counsel representing the accused must be present when the court examines the chargesheet and takes cognizance of the offence. Counsel is also required to argue against the framing of charges; and beyond that, of course, for the trial. The services of a legal practitioner are also required during interrogation and police custody, so that the accused is informed about his/her rights as an arrestee, including the right to remain silent, and the right against duress or torture, amongst others.

2.5.1.2 Legal Aid to the Accused at State Expense in Certain Cases

Through the Legal Services Authorities Act, 1987, all states and the centre have set up legal aid authorities and committees at the state, district and block (taluk/tehsil) levels. They are required to maintain a panel of lawyers to provide free services to needy persons. Section 12 of the Act provides that every person who has to file or defend a case will be entitled to legal aid, if that person is:

1. A member of a Scheduled Caste or Scheduled Tribe;
2. A victim of trafficking in human beings or *begar*;
3. A woman or a child;
4. A mentally ill or otherwise disabled person;
5. A person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster;
6. An industrial workman;
7. In custody, including custody in a protective home; or
8. In receipt of an annual income less than rupees nine thousand or such other higher amount as may be prescribed by the state government, if the case is before

249 Section 304(1), Cr.P.C.

250 Section 304(2), Cr.P.C.

251 Section 41-D, Cr.P.C.

252 *Khatri & Ors. v. State of Bihar & Ors.*, (1981) 1 SCC 627; *Hussainara Khatoon & Ors. v. State of Bihar*, AIR 1979 SC 1369.

253 *Hussainara Khatoon & Ors. v. State of Bihar*, AIR 1979 SC 1369.



a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the central government, if the case is before the Supreme Court.

Legal aid can be provided to a person for a case that includes a suit or any proceeding before a court.²⁵⁴ Legal aid can be provided in any court of law including a civil, criminal or revenue court, a tribunal or any other authority constituted under any law for the time being in force, to exercise judicial or quasi-judicial functions.²⁵⁵ *Legal services* has been defined to include the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and giving advice on any legal matter.²⁵⁶

Given the operation of the legal system, marginalised persons are particularly vulnerable to suffer long periods of detention. An arrested person is vulnerable to harassment, torture, illegal detention and other human rights violation at the hands of the police. To safeguard the rights guaranteed to the accused under the Constitution and Cr.P.C., there is the urgency to provide a legal counsel at State expense to an indigent accused, at the time of arrest and detention.

The police are under a duty to inform the nearest Legal Aid Committee as soon as a person is arrested and taken to the lock-up.²⁵⁷ The right to legal counsel begins from the time of arrest and continues not only till the end of the trial but till the time the accused has exhausted all avenues to challenge the decision.

Khatiri (II) v. State of Bihar, (1981) 1 SCC 627

Several undertrial prisoners were blinded when in custody. It was found that they had not been provided with legal representation from the time of their initial appearance before a Judicial Magistrate till their remand orders were passed. The Magistrate's records showed that no legal representation was asked for and thus not provided. The Magistrate himself had not asked the accused at any stage if they wanted to be defended by lawyers.

The Supreme Court reaffirmed that the right to legal representation begins when the accused is first brought before a magistrate and when he/she is remanded from time to time, and not merely at the trial stage. It is at this stage that the accused is at highest risk, and thus he/she is entitled to legal representation.

The Court remarked that it would be unfair to expect an illiterate person to ask for representation because he/she most likely did not even know that he was entitled to this right. Therefore, the Court held that magistrates and judges must inform every accused person that he/she is entitled to free legal services at the state's expense.

254 Section 2(1)(a), Legal Services Authorities Act, 1987.

255 Section 2(1) (aaa), Legal Services Authorities Act, 1987.

256 Section 2(1)(c), Legal Services Authorities Act, 1987.

257 *Sheela Barse v. State of Maharashtra*, (1983) 2 SCC 96.



***Nandini Satpathy v. P. L. Dani*, AIR 1978 SC 1075; (1978) 2 SCC 424**

The Supreme Court held that simply because every arrested person has the right to an attorney of his choice, it does not necessarily mean that people not under arrest or in custody can be denied that right. The Court went on to say: "The spirit and sense of Article 22(1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near custodial interrogation. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice."

The Court made it clear that it does not require the police to secure a lawyer to represent the accused, but only expects that "if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied, without being exposed to the serious reproof that involuntary self-incrimination secured in secrecy and by coercing the will, was the project." The lawyer's presence is only to "intercept where intimidatory tactics are tried and to caution his client where incrimination is attempted and to insist on questions and answers being noted where objections are not otherwise fully appreciated. The lawyer cannot supply answers or whisper hints or otherwise interfere with the course of questioning. The police also need not wait for more than a reasonable time for the advocate's arrival." The Court also issued directions to take the accused after examination to a magistrate, a doctor or other willing and responsible official or non-official in case the presence of the lawyer could not be secured during interrogation. The accused must be given an opportunity to unburden himself/herself and state if he/she has suffered duress without any fear of the police and he/she must then be transferred to judicial or other custody that is beyond the control of the police.

The Courts also observed the limits that an inadequate system of advocates places on an individual's constitutional right to an attorney. Recognising that "the presence of a lawyer is asking for the moon in many cases until a public defender system becomes ubiquitous," the Court stated that the police only wait a reasonable period of time for the advocate to arrive and not unreasonably postpone the investigation. The police must nonetheless warn the suspect about his/her right to silence against incrimination, record the fact that the suspect was so warned, and if the suspect is literate, obtain a written acknowledgement of the warning.



State (N.C.T. Of Delhi) v. Navjot Sandhu @ Afsan Guru, (2005) 11 SCC 600

The appellant was accused of being involved in a terrorist attack on the Indian Parliament, which took place on 13 December 2001. The trial court sentenced him to death. The High Court confirmed the death sentence. The Supreme Court, in this appeal, discussed the right to effective counsel and held the confessional statement of the appellant to be unreliable due to procedural lapses in recording the same.

Confession made by a person before a police officer is admissible in the trial of such person under POTA.²⁵⁸ But the police officer while recording the confession in this case, failed to inform the persons under arrest of their right to consult a legal practitioner and did not provide any facility to the accused to contact a lawyer. The court reaffirmed the right of the detainee who cannot afford the services of a legal practitioner by himself, to seek free legal aid either by applying to the court through the police or the Legal Services Authority concerned. The police in such cases is expected to promptly take note of such request and initiate immediate steps to place it before the magistrate or the Legal Services Authority so that at least at some stage of interrogation, the person in custody would be able to contact a legal counsel.

The Court stated that the requirement of a legal counsel is in consonance with the philosophy underlying Articles 20(3), 21, and 22(1) and this right cannot be circumvented by subtle ingenuities or innovative police strategies. The presumption should be that a person in custody in connection with the POTA offences does not know about his/her right to legal counsel and legal aid and the police and the magistrate should adequately inform him/her about the same.

2.5.2 International Law

Indian law is again in line with international standards. The UDHR affirms that: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the Fundamental Rights granted by the Constitution or by law."²⁵⁹ Article 14(3)(d) of the ICCPR asserts that in determining any criminal charge against a person, that person has the right "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."²⁶⁰

2.5.3 Guide to Judicial Enforcement

It is now settled law that the right to free legal assistance at State expense is a Fundamental Right of a person accused of an offence. This Fundamental Right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21.²⁶¹ The magistrate is duty bound to inform the accused of his right to consult a lawyer of choice and in case the accused is unable to afford the services of such a lawyer, to provide him/her a legal practitioner at State expense. The

²⁵⁸ Section 32(1), Prevention of Terrorism Act (POTA), 2002

²⁵⁹ Article 8, UDHR.

²⁶⁰ Article 14 (3)(d), ICCPR.

²⁶¹ *Suk Das v. Union Territory of Arunachal Pradesh*, (1986) 2 SCC 401.



Supreme Court has directed all magistrates in the country to faithfully discharge the aforesaid obligation and opined that any failure to fully discharge this duty would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceedings.²⁶² The guiding principle is that no accused must go unrepresented and he/she must be allowed access to a lawyer or provided with a lawyer from the time he/she comes into contact with the criminal justice system.

The failure to provide a lawyer to the accused at the pretrial stage may not have the consequence of vitiating the trial. It may have other consequences like making the delinquent magistrate liable to disciplinary proceedings, or giving the accused a right to claim compensation against the State for failing to provide him/her with legal aid. But it would not vitiate the trial unless it is shown that failure to provide legal assistance at the pretrial stage had resulted in some material prejudice to the accused in the course of the trial.²⁶³

The due process of law incorporated in the constitutional system demands that a person not only be given an opportunity of being heard before being condemned, but also that such opportunity be fair, just and reasonable. So, the legal requirement of appointing a counsel to defend an accused means appointing an effective counsel who can safeguard the interest of the accused in the best possible manner²⁶⁴ and sufficient time must be given to the defence counsel to prepare the case.²⁶⁵ Assigning an experienced or diligent defence counsel to an indigent accused is a facet of fair procedure and an inbuilt right to liberty and life envisaged under Articles 14, 19 and 21 of the Constitution. An accused facing charge of murder may be sentenced to death or imprisonment for life and consequently his/her case should be handled by a competent person and not by one who has no professional expertise and the duty is on the magistrate to appoint an effective counsel.²⁶⁶ The weaker the person accused of an offence, the greater is the caution and higher is the responsibility of the law enforcement agencies to ensure compliance with these mandatory safeguards.²⁶⁷

In the landmark case of *D.K. Basu v. State of West Bengal*,²⁶⁸ amongst the eleven guidelines laid down by the Supreme Court pertaining to arrest and detention, the Court directed that:

- *The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation;*
- *It is the duty of the magistrate to check whether a lawyer has been permitted during interrogation;*
- *It is also the duty of the magistrate to inform every accused who is not represented by a lawyer on account of poverty and indigence, of his/her right to free legal services at the State's expense.*²⁶⁹

By amendment in 2010, Section 41D has been inserted into the Cr.P.C. to give legislative effect to the guidelines laid down in *D.K. Basu* and *Nandini Satpathy*, pertaining to assistance of a legal counsel during interrogation. The objective is

262 *Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra*, AIR 2012 SC 3565.

263 *Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra*, AIR 2012 SC 3565. For a discussion on this issue, see: Aparna Chandra & Mrinal Satish, Criminal Law and the Constitution, in *The Oxford Handbook of the Indian Constitution* (2016), (Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta, eds., 794, 808-810).

264 *Ram Awadh v. State of U.P.*, 1999 Cri L.J. 40.

265 *Chaluvegowda & Ors., v. State (by Circle Inspector of Police)*, MANU/SC/0398/2012.

266 *Ram Awadh v State of U.P.*, 1999 Cri L.J. 40.

267 *Kishore Chand v State of Himachal Pradesh*, (2005) 11 SCC 600.

268 *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610.

269 *Khatri (II) v. State of Bihar*, (1981) 1 SCC 627.



not only to help the poor in securing equal justice under the law, but also to have a redeeming influence in investigation procedures, which in turn might improve the quality and standards of criminal justice.

In *Directorate of Revenue Intelligence v. Jugal Kishore Samra*,²⁷⁰ the question before the Court was whether a person summoned for interrogation by the officers of the Directorate of Revenue Intelligence in a case under the NDPS Act had the right of the presence of his lawyer at the time of interrogation. The Court, after discussing the decision in *Nandini Satpathy* and relying on *Poolpandi v. Superintendent, Central Excise*,²⁷¹ rejected the claim; but, in light of the decision in *D.K. Basu* and with regard to the special facts and circumstances of the case, directed that the interrogation of the respondent may be held within sight of his advocate or any person duly authorised by him, with the condition that the advocate or person authorised by the respondent might watch the proceedings from a distance, or from beyond a glass partition. The advocate, however would not be within hearing distance, and the respondent would not be allowed to have consultations with him/her in the course of the interrogation.

In *Sheela Barse*,²⁷² the Supreme Court gave detailed guidelines on the need to provide legal assistance not only to women prisoners but to all prisoners lodged in the jails in the state of Maharashtra:

- *To send a list of all undertrial prisoners to the Legal Aid Committee of the district in which the jail is situated giving particulars of the date of entry of the undertrial prisoners in the jail and to the extent possible, of the offences with which they are charged, showing male and female prisoners separately;*
- *To furnish to the concerned District Legal Aid Committee a list giving particulars of persons arrested on suspicion, who have been in jail beyond a period of fifteen days;*
- *To provide facilities to the lawyers nominated by the concerned District Legal Aid Committee to enter the jail and interview the prisoners who have expressed a desire for their assistance;*
- *To furnish to the lawyers nominated by the concerned District Legal Aid Committee whatever information is required by them in regard to the prisoners in the jail;*
- *To put up notices at prominent places in the jail that lawyers nominated by the concerned District Legal Aid Committee would be visiting the jail on particular days and that any prisoner who desires their assistance can meet them and avail of their counselling services;*
- *To allow any prisoner who desires to meet the lawyers nominated by the concerned District Legal Aid Committee to meet such lawyers regarding any matter for which he/she requires legal assistance and for which the meeting should take place within sight but out of hearing of any jail official.*

It is the magistrate's duty to carefully check if each of these guidelines has been complied with. He/she must also ensure that the lawyer representing the accused has prepared his/her case and is present to defend his/her client.

270 (2011) 12 SCC 362.

271 (1992) 3 SCC 259.

272 1983 SCC (Cri) 353.



Fair Trial Manual

A Handbook for Judges and Magistrates

CHAPTER 3

**FROM THE INVESTIGATION
TO THE TRIAL STAGE**



CHAPTER 3

From the Investigation to the Trial State

INTRODUCTION

The previous chapter dealt with laws relating to arrest. However, there are other procedural aspects that must be adhered to if fair trial norms are to be assured. These include:

1. Right to freedom from torture;
2. Right to respect for one's private life;
3. Duty to keep records of investigation.

The manner in which a crime is investigated is not merely a matter for the police; it has an effect on the way the trial is conducted and its fair outcomes. This is the reason courts have independent powers to inquire into the manner of investigation.

Many of the rights implicated during the investigation stage emanate from Article 21 of the Constitution which states: "No person shall be deprived of his life or personal liberty except according to procedure established by law." Domestic statutory provisions and case law also protect these rights and Supreme Court decisions provide valuable instructions to judges on how to protect the rights of accused persons. International law reinforces these rights as well.

This Chapter outlines the basic legal rules governing the investigation of an offence. It specifically examines some of the rights that belong to the accused at the stage of criminal investigations till the beginning of the trial. Arrest forms an integral part of the investigation stage and rights at the time of arrest are also relevant at this stage. These however, have been discussed in the previous chapter which is solely devoted to arrest and pretrial detention.

Major features of fair criminal trial have been enshrined in Article 10 and 11 of the UDHR.²⁷³ Fair trial has been universally accepted as a human value—the accused should not be punished without a fair trial.²⁷⁴ In order to assure a fair trial, it is imperative to follow strict procedural safeguards embedded in the Constitution and the Cr.P.C. from the moment the police receive information about an offence and initiate criminal investigation to the first production at court. But in practice, police conduct, the prosecution's role and judicial oversight of fair trial norms are riddled with breaches which have become so routine, that they are no longer paid attention to as being vital elements that must not be disobeyed. Yet non-implementation of fair trial principles in these early stages of criminal proceedings can, and do jeopardise the possibility of just outcomes. Courts provide the single most effective check on police malpractice. They are the first and most important means by which both victim and accused can be assured of a level playing field,

²⁷³ R.V. Kelkar, *Criminal Procedure Code*, (2014) 345-347, 6th edn.

²⁷⁴ *Id.*



which is the essence of maintaining the balance between individual liberties and state power, to bring people to justice. It is for this reason that the independence of the judiciary is held to be sacred and judges and magistrates are expected to follow every procedural safeguard and protect every assurance provided by the law to all parties. The police frequently overstep their role of marshalling evidence and apprehending the suspect by taking on the role of the judge. Judicial inclinations, especially amongst hard-pressed judges, or those unsure of their role and power, can tend towards passive acceptance of police depredations and versions without bothering to test their veracity by ensuring that procedural tests are followed. This abrogation of independence and role blurs the contours of independent adjudication and results in the possibility of bias, which is fatal to a fair trial.

It should be stressed that it is important for a fair trial that judges and magistrates should personally examine the evidence brought forth by the prosecution. This does not follow from distrust vis-à-vis the police but it is important that judges and magistrates receive a direct impression of all the relevant evidence, since they are the ones who decide the case. Furthermore, the examination by the judge or magistrate is an additional safeguard against violations of the fair trial principle.

3.1 Right to Freedom from Torture

Torture is absolutely forbidden. The prohibition against it is total and unconditional. Though Indian law does not mention the word "torture" specifically, the Constitution, and criminal law absolutely forbid, in all circumstances, any actions amounting to torture.

In the Indian context, torture and violence in custody is routine and widespread. Torture, violence and death in police custody are common occurrences. This has been repeatedly noted by Law Commission Reports, a slew of Supreme Court decisions, reports of the National Police Commission as well as the National Human Rights Commission.

One reason for the continuance of this state of affairs is that its presence is often condoned and very often deliberately overlooked. The police hardly bother to deny it any longer; on the contrary, they excuse themselves by openly declaring that it is often their only method of solving crime. Yet the routine and widespread use of torture in the course of investigation has not reduced crime, helped solve it, or led to increased convictions at court. Nor has it contributed to the public's perceptions of safety and security. The court not paying attention to this issue sends a strong signal to the police that they can get away with torture without fear of any consequences.

3.1.1 Domestic Law

In Indian law, torture is a violation of Fundamental Rights, a crime, and a civil wrong. As such, it attracts imprisonment, liability to compensate the victim, and contempt proceedings. In the *D.K. Basu*²⁷⁵ case, the Supreme Court characterised torture as one of "the worst kind of crimes in a civilised society." The Court was convinced that the increasing incidence of torture was "affecting the credibility of the rule of law and the administration of the criminal justice system." Addressing the competing interests of individual liberty and society's need to police criminals,

275 AIR 1997 SC 610, para 18.



the Court stated: "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."²⁷⁶

A slew of judicial decisions have made it abundantly clear that Article 21 articulates a strict prohibition of torture. Illustratively, in *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*,²⁷⁷ the Supreme Court made it clear that any form of torture, cruel, inhuman or degrading treatment or punishment, offensive to human dignity violates the all-important right to life and personal liberty under Article 21 of the Constitution and stated: "Obviously, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity...and it would on this view be prohibited by Article 21."²⁷⁸ The Supreme Court went on to say: "No law which authorises and no procedure which leads to such torture can ever stand the test of reasonableness and non-arbitrariness. It would plainly be unconstitutional and void as being violative of Articles 14 and 21."²⁷⁹

3.1.1.1 Constitutional Safeguards

It has been held in a plethora of judgments that just because a person is in police custody or detained or under arrest, he/she is not deprived of his basic Fundamental Rights.²⁸⁰ The violation of Fundamental Rights empowers the person to move the Supreme Court under Article 32 of the Constitution of India.

Article 20

As discussed earlier, Article 20 of the Constitution guarantees the right against self-incrimination. A person accused of an offence cannot be compelled to be a witness against himself/herself. This extends to not answering any question that may have a tendency to incriminate the person. This is an important safeguard against torture since otherwise the police would torture the accused in custody to elicit confessions or evidence from him/her. The Supreme Court has in fact held that if a "discovery" is made under Section 27 of the Indian Evidence Act, as a consequence of violation of Article 20(3), such "discovery" will be inadmissible.²⁸¹

Article 21

Article 21 has been interpreted to include the right to be free from torture.²⁸² The right to life has been interpreted to be more than mere animalistic existence.²⁸³ The Supreme Court in *D.K. Basu v. State of West Bengal*,²⁸⁴ emphasized that the expression "life or personal liberty" in Article 21 includes a guarantee against torture and assault in custody by the State and its functionaries. It held that the doctrine of sovereign immunity cannot be pleaded against the liability of the State arising due to such criminal use of force over the captive person.

²⁷⁶ *Id.*, para 34.

²⁷⁷ AIR 1981 SC 746. The matter involved a British woman detained for attempting to smuggle hashish. She challenged the constitutionality of Clause 3 of the Conditions of Detention after prison authorities effectively prevented her from meeting her lawyer and only permitted her to meet her young daughter once a month.

²⁷⁸ *Id.*, para 8.

²⁷⁹ *Id.*

²⁸⁰ See: *Prabhakar Pandurang v. State of Maharashtra*, AIR 1966 SC 424, *D. B. Mohan Patnaik v. State of Andhra Pradesh*, AIR 1971 SC 2092.

²⁸¹ *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808, *Ashish Jain v. Makrand Jain*, 2019 SCC OnLine SC 37.

²⁸² The Constitution of India, 1950, Article 21.

²⁸³ *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*, (1980) 2 SCC 275.

²⁸⁴ (1997) 1 SCC 416.



Article 22

Article 22 guarantees three indispensable rights to an arrested person: the right to be informed of the grounds of arrest, the right to be defended by a legal practitioner of one's choice, and production before the nearest magistrate within 24 hours of arrest.²⁸⁵ These provisions are calculated to make certain that a person is not subjected to any ill-treatment during custody.

3.1.1.2 Procedural Safeguards Against Torture

Section 163 of the Cr.P.C. prohibits investigating officers from obtaining statements from witnesses through threatening conduct. In order to reduce the possibility of torture and custodial violence and protect the rights of anyone who finds themselves in police custody, first the Supreme Court and now the statutory law has laid down a considerable set of procedural safeguards. These include:

- Immediately on arrest, the arresting police officer has an obligation to give information about the arrest and the place of detention to any person nominated by the arrested person,²⁸⁶ and make an entry of the same in the general diary maintained in every police station,²⁸⁷ providing the details of the person who is informed;
- The arresting officer is required to draw up an "Arrest Memo" indicating the date, place and time of arrest. The memo has to be signed by two independent witnesses and countersigned by the arresting officer;²⁸⁸
- An "Inspection Memo" is required to be drawn up containing all major and minor injuries on the body of the arrested person;²⁸⁹
- A medical examination of the arrested person is required to be conducted at the time of arrest. This is to be repeated every 48 hours if the arrestee is in police custody;²⁹⁰
- It is also the duty of the magistrate before whom the accused is produced to check with the accused whether the police have complied with the above provisions;²⁹¹
- The magistrate must inform the arrested person, when first produced, about the right to a medical examination and also enquire whether they have any complaints of torture or maltreatment in custody.²⁹²

These provisions along with the twenty-four-hour production rule and Section 49 of the Cr.P.C. that states that restraints must not be more than necessary to prevent escape, cumulatively create a procedural design aimed at ensuring that the dangers of torture and illegal detention are minimised. They empower the person in custody (on his/her own request) to bring to the notice of the court any torture or assault they may have been subjected to and have themselves examined by a medical practitioner.²⁹³

The Indian Evidence Act through Sections 24 and 25 provide safeguards against torture by making evidence collected through torture inadmissible. A confession

285 The Constitution of India, 1950, Article 22.

286 Section 50(A)(1), Cr.P.C.

287 Section 50(A)(2), Cr.P.C.

288 *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610.

289 *Id.*

290 *Id.*

291 Section 50(A)(4), Cr.P.C.

292 *Sheela Barse v. State of Maharashtra*, (1983) 2 SCC 96.

293 See: *Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble*, (2003) 7 SCC 749.



to a police officer cannot be proved as against an accused²⁹⁴ and a confession procured from the accused through threats by a person in authority, or in order to avoid any evil of a temporal nature would be irrelevant in criminal proceedings.

3.1.1.3 Penalty for Torture

The IPC makes clear that physical and psychological ill-treatment of the accused by law enforcement officials is impermissible and punishable. Causing of “hurt”²⁹⁵ or “grievous hurt”²⁹⁶ by public servants to obtain confessions or to compel restoration of property, carry sentences up to seven and ten years of imprisonment respectively.²⁹⁷

Disobedience of the law by a public servant with intent to cause “injury” (any harm illegally caused to any person in body, mind, reputation or property)²⁹⁸ is punishable by imprisonment for up to one year for the disobedience²⁹⁹ and criminal liability for the injury. Similarly, wrongful confinement to extort confessions, compel restoration of property or obtain information that could lead to detection of an offence carries up to three years of imprisonment.³⁰⁰ Moreover, Section 330 of the IPC explicitly criminalises torture during interrogation and investigation for purposes of extracting a confession.

In addition to possible imprisonment for up to seven years for violating Section 330 of the IPC,³⁰¹ any police officer failing to comply with the aforementioned court mandated requirements intended to prevent torture is liable to be punished for contempt of court. These can be instituted in any High Court that has territorial jurisdiction over the matter.³⁰² Further, any police officer engaging in torture is liable for civil damages payable to the victim or victim’s family.³⁰³

The recognition that there is violence and coercion in custody led to Section 176 of the Cr.P.C being amended to provide that in the case of death or disappearance of a person, or rape of a woman while in the custody of the police, there shall be a mandatory judicial inquiry and in the case of death, an examination of the dead body shall be conducted within 24 hours of death. Whenever a person dies in police custody, Section 176 requires the magistrate to investigate the cause of death.³⁰⁴ An inquiry under this Section is to be conducted independently by the Magistrate and not jointly with the police.³⁰⁵ This inquiry confers the magistrate with all powers he/she would normally have when investigating any of these offences. The inquiring magistrate shall record all his evidence and, if considered necessary, examine the dead body. Wherever practicable, the Magistrate may inform and allow the family of the deceased to participate in the inquiry.³⁰⁶

294 Section 25, Indian Evidence Act.

295 Under Section 319 of the Indian Penal Code, 1860 (IPC), the scope of “hurt” includes causing bodily pain, disease or infirmity to any person.

296 Section 320 of the Indian Penal Code, 1860 defines “grievous hurt” as emasculation (depriving a person of masculine vigour, castration); permanent privation of the sight of either eye; permanent privation of the hearing of either ear; privation of any member or joint; destruction or permanent impairing of the powers of any member or joint; permanent disfigurement of the head or face; fracture or dislocation of a bone or tooth; any hurt which endangers life or which causes the sufferer to be during the space of 20 days in severe bodily pain, or unable to follow his ordinary pursuits.

297 Sections 330, 331, IPC.

298 Section 44, IPC

299 Section 166, IPC

300 Section 348, IPC

301 Section 330 of the Indian Penal Code holds criminally liable any person who “voluntarily causes hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct.

302 *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610, para 37.

303 *Id.*, para 45.

304 Section 176, Cr.P.C.

305 See: *Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746, para 9.

306 Section 176(4), Cr.P.C.



3.1.1.4 Compensation for Torture

In addition to any civil remedy in tort, victims and families of tortured victims have a right to monetary compensation under public law. Articles 32 and 226 of the Constitution provide for compensation from the State for contravention of Fundamental Rights. In *Nilabati Behera v. State of Orissa*,³⁰⁷ the Supreme Court affirmed that Article 32 empowers courts to grant compensation for deprivation of a Fundamental Right. The Court explained that without this power to render compensation, the Court's role as a protector of constitutional rights is merely a mirage, and might even create an incentive to torture in certain circumstances.³⁰⁸ Moreover, the Court dispelled the notion that the police were immune from such claims, stating that immunity only exists for liability in tort, and does not extend to the State's liability for contravention of Fundamental Rights.³⁰⁹ Such a claim shall impose strict liability and a sovereign immunity defence is not available. The State will have the right to be indemnified by the wrongdoer.³¹⁰ This compensation for violation of Fundamental Rights by the State is in addition to the criminal penalties for injury and homicide that the individual public servant would be liable for.

Nilabati Behera v. State of Orissa, (1993) 2 SCC 746

Nilabati Behera's twenty-two-year-old son, Suman Behera, was taken into police custody in connection with the investigation of a theft. The next afternoon, Suman Behera was found dead on a railway track with multiple injuries to his body.

Ms Behera filed a writ petition under Article 32, alleging that her son died as a result of injuries inflicted while in police custody and requested that she be monetarily compensated for the death of her son. She said that her son was beaten to death at a police post after being detained in connection in relation to a theft.

The police asserted that Suman Behera had escaped from police custody the night before and was run over by a passing train during his escape. The Court first vigilantly scrutinised the asserted defence. Based on medical evidence, the lack of police effort in locating the supposed escaped detainee, and the fact that Suman Behera was still partially bound by rope, the Court ultimately held that his death was not a result of a train accident. On the contrary, Suman Behera had succumbed to injuries most likely inflicted by police-administered lathi blows.

The Court then held that the State was liable for compensation in cases where police conduct during custodial detention results in the deprivation of a Fundamental Right, in this case, the right to life guaranteed by Article 21. Ms Behera was awarded Rs 150,000 as compensation.

307 *Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746, para 13.

308 *Id.*, para 22.

309 *Id.*, para 16.

310 *Id.*, paras. 43-45.



Defining Torture

The UN Convention Against Torture (Torture Convention), which India has signed but not ratified, defines torture as: “Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Pursuant to customary law as articulated by Article 18 of the Vienna Convention, India, as a signatory of the Torture Convention, is obliged to refrain from conduct which would defeat the object and intent of the Torture Convention.

The Rome Statute of the International Criminal Court also gives a comprehensive definition of torture. The Statute defines torture as: “The intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.”

Torture has been defined as “the deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons, acting alone or on the orders of any authority to force another person to yield information, to make a confession or for any other reason” by the World Medical Association in 1975 in its Tokyo Declaration.

3.1.2 International Law

No single human rights violation has been subject to more Conventions and Declarations than torture.³¹¹ The prohibition against torture is treated by all countries as being *jus cogens*. In Latin “*jus cogens*” means a higher or compelling law. Article 53 of the Vienna Convention on the Law of Treaties describes *jus cogens* as: “A norm accepted and recognised by the international community of states as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” No country may permit any form of torture or create state or individual immunities for its practice; nor make any law that permits torture.

Both Article 5 of the UDHR and Article 7 of the ICCPR stipulate: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The United Nations Convention against Torture requires that “[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” Article 4 of the Convention against Torture requires that: “Each State Party shall ensure that all acts of torture are offences under its criminal law.”

311 D.K. Basu v. State of West Bengal, AIR 1997 SC 610.



3.1.3 Guide for Judicial Enforcement

Preventing torture is the greatest task facing India's courts, and thus it is essential for courts to adopt a new outlook and attitude toward prosecuting torture. Dual responsibility is cast on magistrates who are the primary gatekeepers against torture. The first responsibility is to ensure adherence to all procedures designed to safeguard against torture and the second is to hold accountable and bring to justice any perpetrator of torture.

Torture is an illegal activity and any state actor such as the police who indulges in this engages in a criminal activity. Yet, it is too often condoned by the courts. It persists as a common practice, in part because courts ignore police practices which they know to be common and because they do not insist on going strictly by the law but tolerate the practice. In fact, by not being proactive in preventing and punishing the use of torture, courts become silent partners in the illegality. The Cr.P.C. and guidelines issued by the Supreme Court require courts to be proactive in ensuring that no torture takes place.

Judges and magistrates have a responsibility to ensure that they do not themselves, unintentionally collude with acts of torture while carrying out their official functions. This means total intolerance of any form of custodial violence and being vigilant and vocal when there is even the slightest likelihood of transgression. There are no circumstances in which even a *"little torture"* or *"some violence"* can be considered legal or justified.

Preventing torture requires magistrates to take account of the fact that torture is common and very likely and therefore it is necessary to make it clear to police and prosecutor that the court is ever alert to the possibility that defendants and witnesses may have been subject to torture or other ill-treatment.

The Cr.P.C codifies the duties of the magistrate. At the time of production of an accused, it requires that the magistrate:

- Ask the accused if he/she has been threatened, tortured or abused in custody;
- Check to see if the Memo of Arrest has been filled and then cross checks the facts in the Memo of Arrest by questioning the accused. If he/she suspects that the accused is intimidated by police presence he/she can question and record the statement of the accused in the absence of the police;
- Check to ensure that the medical examination was conducted and the medical certificate is attached with the case papers;
- Examine each of these documents to ensure that their contents include everything that needs to be included.

Magistrates may sometimes bypass these procedural "niceties" on the plea of being extraordinarily busy, or to avoid further tussles and wrangles in an already overburdened judicial system. However, such neglect destroys every possibility of a fair trial.

When magistrates observe breaches of procedure by the police and prosecution or repeated transgressions, they must treat these violations as serious disrespect for the court and take all steps to address the breach. These may include:

- Calling for explanations by superior officers about patterns of observed behaviour by subordinates;



- Seeking explanations from the prosecutor whose duty it is to ensure that papers are in order before being submitted to court. Equally, the magistrate can haul up the defence lawyer for not ensuring proper representation of his client;
- If there is no defence lawyer at this stage the magistrate has the additional duty of ensuring that a lawyer is provided at State expense.

Magistrates also need to recognise that the arrested person, even in court, is in an extremely vulnerable position. It is the magistrate's duty not only to ascertain whether the arrested person can communicate freely to the court without any threat or intimidation, but also to create circumstances within the courtroom where the arrested person can feel less intimidated and freer to voice his/her concerns. The magistrate should be particularly attentive to the detainee's condition. Where necessary, he/she should routinely carry out a visual inspection for any signs of physical injury – or order one to be carried out by a doctor. Magistrates should also be alert to other clues, such as the individual's physical and mental condition and overall demeanour, the behaviour of the police and guards involved in the case and the detainee's attitude towards them. They should actively seek to demonstrate that they will take allegations of torture or ill-treatment seriously and will take action where necessary to protect those at risk.

If the arrested person alleges before the magistrate that he/she has been ill-treated in custody, it is incumbent on the magistrate to record the allegation in writing, immediately order a medical examination and take all necessary steps to ensure that the allegation is fully investigated. This should be done even in the absence of an express complaint or allegation, if the person concerned bears visible signs of physical or mental ill-treatment. The court can further safeguard the accused by ensuring that the accused is accompanied by a relative to any medical examination.

The primary role of judges in preventing acts of torture, therefore, is to ensure that the law is upheld at all times.

3.2 Right to Respect for One's Private Life

The right to privacy is essential and fundamental in an organised society. Without it, an individual would be unable to enjoy the privileges which belong to him/her as a member of society.³¹² It is a cherished right. There must be strong, cogent and legally justifiable reasons for law enforcement agencies to interfere with this right. Here, it is essential that proper procedure is always followed because intrusion into a person's home, professional or family life in the name of investigation without any proper basis is not permitted.³¹³

3.2.1 Domestic Law

A Nine-Judge Bench of the Supreme Court has recognised the right to privacy as a fundamental right.³¹⁴ It overruled previous cases where the Court had held that the Constitution does not recognise a fundamental right to privacy. The Court however held that the right to privacy is not absolute and would be subject to reasonable restrictions.

312 *Roberson v. Rochester Folding-box Co.*, 171 N.Y. 538.

313 *Kharak Singh v. State of Uttar Pradesh and Others*, AIR 1963 SC 1295.

314 *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.



3.2.2 International Law

Article 17 of the ICCPR states: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.” However, Article 4 permits this right to be derogated in a “time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed” as long as the measures taken “are not inconsistent with [India’s] other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”.

3.2.3 Guide for Judicial Enforcement

The Supreme Court in *Kharak Singh v. State of U.P.*³¹⁵ held that the right to privacy is a sacred and cherished right. There must be strong, cogent and legally justifiable reasons for law enforcement agencies to interfere with this right. Even then, the proper procedure must be followed, as intrusion into a person’s home, professional or family life in the name of investigation or domiciliary visits – without a proper basis – is not permitted.

*People’s Union for Civil Liberties (PUCL) v. Union of India*³¹⁶ illustrates these principles. Here, the Supreme Court laid down the following directives for telephone tapping:

- *Tapping of telephones is prohibited without an authorising order from the Home Secretary, Government of India or the Home Secretary of the concerned state government.*
- *The order, unless it is renewed, shall cease to have authority at the end of two months from the date of issue. Though the order may be renewed, it cannot remain in operation beyond six months.*
- *Telephone tapping or interception of communications must be limited to the addresses specified in the order or to the addresses likely to be used by a person specified in the order.*
- *All copies of the intercepted material must be destroyed as soon as their retention is not necessary under the terms of Section 5(2) of the Indian Telegraph Act, 1885.*

In other words, where state action is challenged for violating the right to privacy, the intrusion into privacy will be struck down or read down if the legislation is not itself bound with reasonable criteria for making that inroad into the right to privacy. State actions will also be struck down as unconstitutional if the manner of surveillance, whether through observation, tapping, cameras or inquiry into private financial or other circumstances, is conducted without sufficient reason or in a manner that is abusive of the powers that have been given. Both the ambit of the legislation and the procedure to be followed are subservient to constitutional mandate and must be within the limits of permissible restrictions.

315 *Kharak Singh v. State of Uttar Pradesh and Others*, AIR 1963 SC 1295.

316 AIR 1997 SC 568.



3.3 Duty to Keep Records of Investigation Without Unnecessary Delay

*The necessity to discover the truth in every case demands that police records must be kept with scrupulous completeness, and investigations carried out with promptness, urgency, and efficiency.*³¹⁷

3.3.1 Domestic Law

3.3.1.1 Diary of Proceedings in an Investigation

Section 172 of the Cr.P.C requires the police to conduct investigations expediently, while keeping thorough records of their methods and findings. Section 172(1) requires police to keep a day-to-day Case Diary of their investigation setting forth the time at which the information reached them, the time at which the investigation began and was closed, the place or places visited by them, and a statement of the circumstances ascertained through their investigations.³¹⁸ Underlining the vital importance of executive record keeping, the Supreme Court has repeatedly reiterated that the Case Diary should be maintained with scrupulous completeness and efficiency.³¹⁹

3.3.1.2 The Police Officer's Report on the Completion of Investigation

Section 173, Cr.P.C. imposes further record-keeping duties on police. The police must present a police report to the magistrate containing the following information:

1. The names of the parties;
2. The nature of the information;
3. The names of the persons who appear to be acquainted with the circumstances of the case;
4. Whether any offence appears to have been committed and, if so, by whom;
5. Whether the accused has been arrested;
6. Whether the accused is released on his bond and, if so, whether with or without sureties;
7. Whether he/she has been forwarded in custody under Section 170.

In cases tried before a magistrate, the police must give the magistrate all the relevant supporting documents, as well as the statements of all witnesses on which the prosecution intends to rely. Section 173 places a continuous duty on the investigating officer to forward to the Magistrate any additional reports that may be necessary to keep the court updated of further facts that may have come to light or further evidence that the police may have obtained.³²⁰

The Supreme Court has held that such investigation standards require police to question and record statements from parties who may possibly possess relevant information, to quickly take into custody hard evidence, and have experts file an urgent forensic report so that no valuable clues are lost.³²¹ Police failure to

317 *Bhagwant Singh v. Commissioner of Police, Delhi*, 1983 Cri.L.J. 1081.

318 Section 172(1), Cr.P.C.

319 *Bhagwant Singh v. Commissioner of Police, Delhi*, 1983 Cri.L.J. 1081, para 16.

320 Section 173, Cr.P.C.

321 *Bhagwant Singh v. Commissioner of Police, Delhi*, 1983 Cri.L.J. 1081, paras. 10 and 14.



quickly prepare such records of investigation, resulting in undue delay at trial, might violate Article 21 of the Constitution, as the procedure prescribed by law for denying a person's liberty is not reasonable, fair and just, if the accused is not afforded a speedy trial.³²²

***Bhagwant Singh v. Commissioner of Police, Delhi* AIR 1985 SC 1285**

Bhagwant Singh brought a claim against his local police department, alleging that they did not adequately investigate the death, by burning, of his daughter. The Supreme Court found the police's investigation deficient in the following ways:

- The police did not take into custody the blanket with which the fire was said to have been doused;
- They waited for over five weeks before attempting to obtain a fingerprint analysis of a mirror located in the vicinity of the burning;
- They allowed a material witness to return to his village without ever examining him;
- The police did not question the victim about the incident before she died, despite being informed by her doctors that she was capable of responding to questioning;
- They did not record the statement of the taxi driver who drove the victim to the hospital;
- They did not record the statement of an important local witness.

3.3.3 Guide for Judicial Enforcement

The value of scrupulously following record-keeping procedures laid down at law in a complete and timely manner cannot be over-emphasized. Complete, detailed and consistent police records indicate the sequence of police actions in investigations that eventually lead to the specific charges being laid against the accused before the court. The papers accompanying the charge sheet reveal the logic that grounds the charges. These documents are the only aid available to the judge when applying his/her mind as to whether or not the accused has a case to answer. Incomplete, illogical, records full of inconsistencies and incoherencies mean that the judge has nothing substantial against which to measure whether to go ahead with the trial.

The requirement that accurate records be kept and produced before the court has a dual purpose. On the one hand, it is aimed at ensuring that no person is subjected to police action and perhaps even custody without there being some reasonable basis for limiting his freedom. On the other hand, it is a check to ensure that the court's time and manpower, and the taxpayer's money is not wasted on ill-prepared and shoddy cases which will not stand the test of judicial scrutiny and eventually come to naught. Most importantly, the court's scrutiny of the records is designed as a check on police bias, manipulation or negligence.

322 *Mihir Kumar Ghosh v. State of West Bengal and Ors.*, 1990 Cri. LJ 26 (SC).



The judge's signature on each page of the case diary at the time of remand before filing the charge sheet also operates as a safeguard against interpolation, embellishment and manipulation. Any mechanical attestation of the case diary vitiates the high standards of fair trial and can materially affect the life and liberty of the accused. This depends considerably on the exercise of the protective role of the court.

What is true for the police is also true for the judge. Absence of timely attention by the judge to the quantity and quality of basic material and procedural safeguards relating to record keeping, leads to delays in the trial, and breaches the safeguards built into the procedure that requires judicial scrutiny at this very juncture of the process.

To be able to say that there is indeed a rational basis for his/her decision to proceed with or discharge the case, the judge must ensure that all the required papers accompany the charge sheet. He/she must subsequently examine each paper carefully for chronological and factual consistency and detail. This must be done with absolute objectivity³²³ with the sole purpose of assessing that the alleged actions do ground the charges made against the accused.

323 *Bhagwant Singh v. Commissioner of Police, Delhi*, 1983 Cri.L.J. 1081, para 16.



Fair Trial Manual

A Handbook for Judges and Magistrates

CHAPTER 4

FROM TRIAL TO FINAL JUDGMENT

CHAPTER 4

From Trial to Final Judgment

INTRODUCTION

This chapter examines the basic legal rules governing the trial proceedings and the relevant case law. The analysis focuses on domestic law, as well as indicates international standards. These rules are essential for any country that respects the rule of law, in that they guarantee the fundamental justice that the judicial system is intended to provide. How a person is treated when accused of a crime provides a clear indication of a state's implementation of vital human rights norms.

A trial is a process by which a court decides on the innocence or guilt of an accused person. The procedure for trial is found in the Cr.P.C and the Indian Evidence Act. But the entire trial process is governed and underpinned by the principles laid down in the Constitution of India.³²⁴

In our system of trial, the prosecution, on behalf of the State, accuses the defendant of the commission of a crime and must convince an independent judge of the person's guilt beyond reasonable doubt. The accused person is given every opportunity to defend himself/herself. The adversarial system is based on the idea that the truth will emerge from the disputed facts through effective and constant challenges. In order for the truth to emerge from the adversarial system, its three main components – namely the prosecution, the defence and the court and especially the court – must perform their roles. The role the judge plays is that of an active umpire of fair play. This means he/she has a role in ensuring that both officers of the court – the prosecution and defence lawyers – are being diligent, honest and learned in their efforts to arrive at the truth, that the prosecution is painstaking in presenting the State's case and the representative of the accused mounts a proper defence. The judge's role is to ensure that witnesses are examined with care. He/she has the duty to referee motions, weigh the facts, circumstances, evidence presented and the relevant law and then to draw logical conclusions to arrive at a reasoned decision about guilt or innocence.

4.1 Right to be Tried by a Competent, Independent and Impartial Tribunal

All major human rights instruments, and our own Constitution and legal system insist on the fundamental human right of an accused to be tried before a competent, independent and impartial tribunal. This is an essential aspect of any fair trial. The independence of the judiciary is one of the pillars of the rule of law. Independence is essential for the protection of fair trial standards. The principle of an independent judiciary requires that a judge can make every decision without the intervention of the government, parliament or administration. Court decisions can only be reviewed by higher courts. The impartiality and independence of the courts may be guaranteed by ensuring that a judge hearing a case has no relationship with either party that may affect the decision-making process. Judges are required to view both parties in a fair and equal manner making an objective decision based solely on the facts and evidence of the case. The guarantee of a competent, impartial and independent judiciary grounds the rule of law, because it assures citizens of a body outside the Legislature and the Executive – that is outside the law maker and the law enforcer – to adjudicate on legality and disputes. It also ensures that the rights of the individual in dispute with the law will be adjudicated by a neutral authority.

³²⁴ Articles 20(1), (2) and (3), Article 21 and Article 22, Constitution of India.



4.1.1 Domestic Law

4.1.1.1 Separation of the Judiciary from the Executive

Article 50 of the Constitution ensures that “the State shall take steps to separate the Judiciary from the Executive in the public services of the State”. The principles of competence, independence and impartiality are equally of paramount importance to all the courts, from the Supreme Court to the High Courts and subordinate courts. Inevitably, there is an overlap in the three principles but each is also separately vital for fair trials. Our laws require that all disputes be adjudicated according to law by tribunals created for those purposes. The law lays down the hierarchy of courts and their jurisdiction. This fulfils the requirement of “competence,” that is, setting up by law, the rules and procedures that can be relied on as conforming to legal standards. “Independence” relates to institutional arrangements by which the courts are not influenced by, or subordinated to, the other arms of government. The conditions of independence include, but are not limited to, the appointment of judges; security of tenure of their office; their immunities and privileges; their salaries and financial security; their discipline and removal (or disqualification); and their institutional independence.

“Impartiality” on the other hand relates to the expectation that a judge will in no case be biased in favour of any party, influenced by extraneous factors, or materially bring to bear his own prejudices in deciding the outcome of a matter before him.

The notion of impartiality of the judiciary is an essential aspect of the right to a fair trial. It means that all the judges involved must act objectively and base their decisions on the relevant facts and applicable law, without personal bias or preconceived ideas on the matter and persons involved, and without promoting the interests of any of the parties.

The independence of the judiciary is valued as part of the basic structure of the Constitution. In *S.P. Gupta v. Union of India*,³²⁵ the Court interpreted independence not merely as non-interference from the Executive and other forces, but independence from prejudices: “It is necessary to remind ourselves that the concept of independence of judiciary is not limited only to independence from Executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It has many dimensions, namely, fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the judges belong”.³²⁶

Further, in *Union of India v. R. Gandhi, President, Madras Bar Association*,³²⁷ the Supreme Court held that: “Rule of law is possible only if there is an independent and impartial judiciary to render justice. An independent judiciary can exist only when persons with competence, ability and independence with impeccable character man the judicial institutions...standards expected from the Judicial Members...are apart from a basic degree in law, rich experience in the practice of law, independent outlook, integrity, character and good reputation.”³²⁸

325 1981 (Supp.) SCC 87, pp. 221-222.

326 *S.P. Gupta v. Union of India*, 1981 (Supp.) SCC 87, pp. 221-222.

327 (2010) 11 SCC 1.

328 *Id.*, para 46.



One of the oldest rules of justice and of common sense is that no person shall act as a judge in a case in which he/she has a substantial interest. The principle of individual impartiality or the rule that no person can be his/her own judge or give judgment concerning his/her own rights is now universal. Apart from being inherent in the constitutional design of our judiciary, it is captured by statute, illustratively under Section 479 of the Cr.P.C, which states that a judge or magistrate may not try or commit to trial any case in which they have a personal interest or to which they are a party, unless the court to which an appeal lies from their court gives its permission.³²⁹

The basic rule is that a judge cannot sit in a case in which he/she has a financial or other interest or knows someone involved as a friend, foe or family member. There must be nothing that makes it appear to the public that the judge is a partisan, even if in fact he/she is not.

Having any personal interest even if you do not act on it and can separate it completely in your mind when adjudicating, or even if you have genuinely forgotten it, does not prevent an allegation of bias because justice must not only be done but be seen to be done. This principle was voiced by the Apex Court in the case of *Satish Jaggi v. State of Chhattisgarh & Ors.*³³⁰ The transfer of the case was sought on the grounds that the Sessions Judge was an elder brother of a sitting MLA who was very close to the father of one of the main accused. The Sessions Judge himself did not indicate his disinclination to hear the matter. The High Court felt that he did this probably because he believed that the mere fact that his brother was known to the father of the accused, who was a political heavyweight, would not stand in the way of his discharging his judicial function impartially without fear and favour. The Apex Court however transferred the case to another trial court saying: "...to ensure that justice is not only done, but also seen to be done and the peculiar facts of the case, we feel that it will be appropriate to transfer the case to some other Sessions Court...."

4.1.2 International Law

Indian law is in consonance with the prevailing international legal standards on the right to be tried by a competent, independent and impartial tribunal. Article 14(1) of the ICCPR encapsulates the international legal perspective:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

³²⁹ It is not possible here to give a detailed exposition of what amounts to public interest, conflict of interest or impartiality. However, it may be sufficient to say that there must not be even a whiff of suspicion that a judge has any personal interest in a matter.

³³⁰ (2007) 3 SCC 62.



The attributes of a fair criminal trial enshrined in Articles 10 and 11 of UDHR 1948, also contain references to judicial independence: “full equality to fair and public hearing by an independent and impartial tribunal.”³³¹

4.1.3 Guide for Judicial Enforcement

A judicial officer, no matter, in what capacity he/she may function has to act with the belief that he/she is not to be guided by any factor other than to ensure that he/she shall render a free and fair decision, which is right on the basis of the material placed before him/her.³³²

The adversarial nature of our trial system appears to suggest that the judge is a mere umpire of fact and applier of statutory law. However, the Supreme Court has repeatedly urged judges not to limit themselves to being merely observers of the prosecution and defence, but to be conscious that the highest duty of the judge is to arrive at the truth. “If a criminal court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth.”³³³ This must however, be done without unduly trespassing on the functions of the public prosecutor or the defence counsel, without hint of partisanship and without appearing to frighten or bully witnesses.³³⁴ This requires the judge to be aware and active and move towards a just conclusion by testing, probing and challenging all contentions in his/her court, thereby arriving at conclusions through rationale and objective thought processes.

The Supreme Court in *S.P. Gupta* also held that impartiality in judging is the touchstone of a fair trial. Impartiality implies being free from bias. This is judged on the basis of two tests:

1. **Subjective test:** A judge should not have any personal interest in the case, or, because of his personal convictions; he/she should not be biased against any party.
2. **Objective test:** A judge should conduct the proceedings in a manner which excludes any legitimate doubt as to his impartiality.

In order to satisfy the objective test, two important considerations are that:

1. The court should not be a mere onlooker in a trial before it; and
2. The court should ensure that the trial is not merely a hasty stage-managed or partisan one.

On several occasions, the Supreme Court has asserted the principle of the independence of the judiciary from the other branches of government, as well as the point that this independence from influence or authority applies to all levels of the judiciary including the magistracy. One strong signal of impartiality is being scrupulous in following procedure and arriving at a reasoned conclusion. Procedural fidelity provides proof of impartiality. The necessity of following procedure and delivering a reasoned judgment supported by rational objective that can relate back to facts and arguments can never be over-emphasized. The Supreme Court in *Zahira Habibulla Sheikh*³³⁵ strongly criticised the practice adopted

331 Article 10, UDHR 1948.

332 *Satish Jaggi v. State of Chhattisgarh & Ors.*, (2007) 3 SCC 62.

333 *Ram Chander v. State of Haryana*, AIR 1981 SC 1036.

334 *Id.*

335 *Zahira Habibullah Sheikh and Anr. v. State of Gujarat and Ors.*, (2004) 4 SCC 158.



by courts of pronouncing the final order without a reasoned judgment. In *State of Punjab and Ors. v. Jagdev Singh Talwandi*, the Court stated: “It is desirable that the final order which the High Court or a trial court intends to pass should not be announced until a reasoned judgment is ready for pronouncement....Without the benefit of the reasoning of the High Court, it is difficult for this Court to allow the bare order to be implemented.”³³⁶

Justice must not only be done but be seen to be done – a legal maxim, is the other sign of impartiality. It is the perception of the litigant and the possibility of the judge’s decision being questioned by one of the parties of the case at a later stage that matters. If there is the slightest doubt of personal interest, then, in such cases, before the first hearing, the judge must make his connections, interests or relationships known to the parties and ask if there is a concern about it in the litigants’ minds. If the litigants have any doubts, it should be stated at this time. In such a case, it is only proper for the judge to recuse himself/herself from hearing the matter. If there is no mention of a concern or doubt at this stage then the parties must accept the judge’s control of the case and his/her decisions.

4.2 Right to a Public Hearing

The right to a public hearing involves the possibility of the general public to attend and observe a trial. It is an important safeguard in the interest of the individual and society at large.³³⁷ It guarantees that the public is informed of how justice is administered and decisions are reached by the judicial system. It also constitutes a guarantee to the parties, because the public can review the legality of the proceedings. A public hearing affirms the independence, impartiality and fairness of the courts, thereby increasing the general trust of the population in the judicial system.

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4.2.1 Domestic Law

The right to a public hearing lies within the sweep of Article 21 of the Constitution. Similar to impartial justice, the administration of justice in the open is a universal norm, in India as well as elsewhere. The paramount value of dispensing justice in an open court has been reaffirmed repeatedly by the Supreme Court.

It is well settled that in general, all cases brought before the courts, whether civil, criminal, or others, must be heard in an open court. Public trial in an open court is undoubtedly essential for the healthy, objective and fair administration of justice. Trials open to public scrutiny and gaze naturally act as a check against judicial caprice or vagaries, and serve as a powerful instrument to create confidence in the public in the fairness, objectivity and impartiality of the administration of justice.

³³⁶ (1984) 1 SCC 596, 611.

³³⁷ United Nations Compilation of General Comments, Comment No. 13 on Article 14 of the ICCPR, pp. 123-124, para 6.



Public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial tribunals, courts must generally hear cases in the open and must permit the public admission to the courtroom.³³⁸ The Law Commission of India has noted that the right to a public trial is based on the right to “freedom and expression” which is contained in Article 19(1)(a) of the Constitution of India, and which has been interpreted to include the freedom of press³³⁹ and the right of the public to know³⁴⁰ and to publish the same.³⁴¹

As Bentham observed: “In the darkness of secrecy sinister interest, and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. It keeps the judge himself while trying undertrial (in the sense that) the security of securities is publicity.”³⁴²

Having settled the principle that the administration of justice demands trials in open courts, the Supreme Court also pointed out that this does not mean that there are no exceptions to the rule of openness.

The principle underlying the insistence on hearing cases in open court is to protect and assist fair, impartial and objective administration of justice; but if the requirement of justice itself sometimes dictates the necessity of trying the case in camera, it cannot be said that the said requirement should be sacrificed because of the principle that every trial must be held in open court.

It is the fair administration of justice which is the end of judicial process, and so, if ever a real conflict arises between the fair administration of justice itself on the one hand, and public trial on the other, inevitably, public trial may have to be regulated or controlled in the interest of administration of justice.

338 *Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr.*, AIR 1967 SC 1, para 20.

339 *Express Newspapers v. Union of India*, AIR 1958 SC 578.

340 *Dinesh Trivedi v. Union of India*, (1997) 4 SCC 306.

341 Law Commission, 41st Report, p. 26.

342 *Scott v. Scott*, (1911) All. E.R. 1, 30.



Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr.,
AIR 1967 SC 1

In a defamation case instituted against the publisher of an English weekly, the judge made an oral order forbidding the publication of the evidence of a witness. This order was passed to save the witness from risk of excessive publicity. Aggrieved by the order, the petitioners petitioned the High Court against the order. The writ was dismissed on the grounds that the order was a judicial order of the High Court and was not amenable to writ under Article 226.

The petitioners then approached the Supreme Court under Article 32 for the enforcement of a Fundamental Right. The Court began its analysis by stressing the historic importance of all cases, whether civil or criminal, being heard in open court, because a public trial “is undoubtedly essential for the healthy, objective and fair administration of justice. Trial held subject to the public scrutiny and gaze naturally acts as a check against judicial caprice or vagaries, and serves as a powerful instrument for creating confidence of the public in the fairness, objectivity, and impartiality of the administration of justice. Public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial tribunals, courts must generally hear causes in open and must permit the public admission to the court room.”

The Court however went on to hold that the High Court “has inherent jurisdiction to hold a trial in camera if the ends of justice clearly and necessarily require the adoption of such a course.”³⁴⁴

4.2.1.1 Court to be Open

Any criminal court that is either inquiring into or trying an offence is an open court to which the general public can have access, to the extent that the courtroom can conveniently contain them.³⁴⁵ An open trial serves an important prophylactic purpose of providing an outlet for community concern, hostility and emotions. Criminal trial is a public event, what transpires is a public property.³⁴⁶

However, the right to a public trial is qualified by several exceptions. A judge or magistrate, at their discretion, may order that the general public or a particular individual cannot have access to the court at any stage of an inquiry or trial.³⁴⁷ Exceptions to a public trial lie in the nature of crimes involved along with the administration of justice. Trials can be conducted in-camera in situations as follows:

1. The inquiry into and trials of rape for offences punishable under Sections 376, 376A, 376B, 376C, 376 D, 376DA, 376DB and 376E of the IPC must be conducted in camera.³⁴⁸ These statutory provisions were preceded by guidelines that the Supreme Court laid down in *State of Punjab v. Gurmit Singh*,³⁴⁹ and *Sakshi v. Union of India*,³⁵⁰ on the manner in which rape trials should be conducted. These guidelines (noted below) are still relevant for ensuring that rape victims are not re-victimised during the trial process.

343 Naresh Shridhar Mirajkar, AIR 1967 SC 1, para 20.

344 *Id.*, para 21.

345 Section 327(1), Cr.P.C.

346 *Mohd. Shahabuddin v. State*, (2014) 4 SCC 653, para 135; See also: *Kehar Singh v. State (Delhi Admn.)*, (1988) 3 SCC 609.

347 Section 327, Cr.P.C.

348 Section 327(2), Cr.P.C.

349 (1996) 2 SCC 384.

350 (2004) 5 SCC 518.



2. A court under Section 14 of the Official Secrets Act, 1923, on an application by the prosecution may direct that the public may be excluded during the proceedings. The ground for such exclusion can only be that publication of the proceedings, evidence or statement given may be prejudicial to the safety of the State. However, sentencing has to be done in public.
3. The Protection of Children from Sexual Offences Act, 2012 (POCSO) provides for Special Courts that are required to conduct trials in-camera, without revealing the identity of the child, and in a child-friendly manner.

The Supreme Court in *Sakshi v. Union of India*³⁵¹ issued the following directions:

- *The provisions of sub-section (2) of Section 327 of the Cr.P.C shall, in addition to the offences mentioned in the sub-section, also apply in inquiry or trial of offences under Sections 354 and 377 of the IPC.*
- *In holding trials of child sexual abuse or rape:*
 - o *A screen or some such arrangements may be made where the victim or witnesses (who may be as equally vulnerable as the victim) do not see the body or face of the accused;*
 - o *The questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and not embarrassing;*
 - o *The victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.*

In *State of Punjab v. Gurmit Singh and Ors.*,³⁵² the Supreme Court stressed the importance of in-camera trials for sexual offences, stating that “the expression that the inquiry into and trial of rape ‘shall be conducted in camera’ is not only significant but very important. It casts a duty on the court to conduct the trial of rape cases invariably ‘in camera.’ Courts are obliged to act in furtherance of the intention expressed by the legislature and not to ignore its mandate and must invariably take recourse to the provisions of Section 327(2) and (3) of the Code and hold the trial of rape cases in camera.”

The Court also directed all High Courts to draw the attention of trial courts to the amended provisions of Section 327 of the Cr.P.C and to impress on trial judges to invariably hold the trial of rape cases in camera, rather than in the open court.

4.2.2 International Law

International law, too, attaches importance to an individual’s right to an open trial. Article 14(1) of the ICCPR states that “everyone shall be entitled to a fair and public hearing.”³⁵³ The provisions of the ICCPR require that the trial of an accused must be “fair,” should be an “open, public trial” and declares that the accused has a right to a trial conducted “in his presence and to examine or have examined, the witnesses against him.” The citizens, public and press have a right to know and to publish what they know, subject to restrictions in the interests of respecting rights or reputation of others, or for protecting national security or public order or public health or morals. The press and public may be excluded for the purpose of

351 AIR 2004 SC 3566.

352 (1996) 2 SCC 384.

353 Article 14(1), ICCPR.



protection of the above rights, or where the interests of private lives so require, to the extent strictly necessary, in the opinion of the Court, in special circumstances where publicity would prejudice the interests of justice. Article 19 of the ICCPCR also guarantees the freedom of expression.

4.2.3 Guide for Judicial Enforcement

The Supreme Court warns that judges must exercise their power to hold a trial in camera “with great caution and it is only if the court is satisfied beyond the doubt that the ends of justice themselves would be defeated if a case is tried in open court that it can pass an order to hold the trial in camera.”³⁵⁴

The rule that all trials must be conducted in the open, nevertheless allows the judge in his/her discretion to make exceptions. These exceptions require the judge to apply his/her mind as to whether there is a fit case for excluding the public from a trial, what the level of exclusion should be, what limits to publication of evidence there might be, and decide the degree of prohibition of reporting and whether it is to be temporary, for the duration of the trial, for a period after that, or permanent.

Providing guidance on what should direct the judge in making a decision about whether or not to close some part of a trial or the evidence from being reported, the Supreme Court, in *Naresh Shridhar Mirajkar*³⁵⁵ ruled that: “The power of an ordinary court of justice to hear in private cannot rest merely on the discretion of the Judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private... If there is any exception to the broad principle which requires the administration of justice to take place in open court, that exception must be based on the application of some other and over-riding principle which defines the field of exception and does not leave its limits to the individual discretion of the Judge.”

Public policy and statute require that all trials be held in public. The mere possibility that publicity will adversely affect one or other party or cause hardship is not a reason for in-camera proceedings. The principle of open public trials will yield to some exceptions, for instance when the court acts on behalf of children, where it acts in a parental role to protect the interests of a child. Another circumstance would be if the publicity of an open trial would destroy the matter in issue and the evidence can be effectively brought before the court in no other fashion. The paramount purpose of assuring the administration of justice must be shown to be served by the exclusion of the public from the trial.

4.3 Right to be Tried Without Undue Delay

An important requirement of a fair trial is that it should be completed without undue delay. A fair trial implies a timely trial and no procedure can be reasonable, fair or just if the trial extends for an unreasonably long time. The requirement of a prompt trial in criminal cases obliges the authorities to ensure that all proceedings, from the pretrial stage to the final appeal are completed and judgments are issued within a reasonable time.

³⁵⁴ *Naresh Shridhar Mirajkar*, AIR 1967 SC 1 at para 21
³⁵⁵ *Id.*, para 23.



4.3.1 Domestic Law

A speedy trial, as such, is not mentioned as a specific Fundamental Right in the Constitution. Nevertheless, timely justice is recognised as implicit in the spectrum of Article 21 of the Constitution and is now regarded as a *sine qua non* of Article 21.³⁵⁶ The Supreme Court in *Kartar Singh v. State of Punjab*³⁵⁷ held that the right to a speedy trial is not only an important safeguard to prevent undue and oppressive incarceration, to minimise anxiety and concern accompanying the accusation and to limit the possibility of impairing the ability of an accused to defend himself but there is also a societal interest in providing a speedy trial.

The design of investigation and trial proceedings laid out in the Cr.P.C also reaffirms that the requirement of swiftness and promptitude applies to all stages of the criminal process – investigation, inquiry, trial, appeal, revision and retrial.³⁵⁸

In every inquiry or trial, the proceedings should be held “as expeditiously as possible.”³⁵⁹ Particularly, when the examination of witnesses has begun, the examination must continue daily till all the witnesses present have testified, unless the court finds it necessary to adjourn the examination beyond the following day.³⁶⁰ After a trial has begun or the court takes notice of an offence, the court may, at its discretion, deem it necessary or advisable to postpone or adjourn the inquiry or trial for a reasonable period of time and may remand the accused to custody by warrant.³⁶¹ A magistrate cannot remand an accused person to custody for more than fifteen days at a time.³⁶² When witnesses are in attendance, the court should not postpone or adjourn the proceeding without examining them unless the court has special reasons for doing so, which it must record in writing.³⁶³ The court may not adjourn a proceeding for the sole purpose of allowing the accused person to show cause against his potential sentence.³⁶⁴ Costs can be imposed on either party by the court if witnesses are present but they are not examined at the request of either the defence or the prosecution.³⁶⁵

In the post-independence period, the Supreme Court strongly disapproved of judicial delays. In *Machander v. State of Hyderabad*,³⁶⁶ the Court refused to remand the case back to the trial court for a fresh trial because of a delay of five years between the commission of the offence and the final judgment of the Supreme Court. The Court poignantly recorded that:

We are not prepared to keep persons who are on trial for their lives under indefinite suspense because trial judges omit to do their duty...we have to draw a balance between conflicting rights and duties...while it is incumbent on us to see that the guilty do not escape, it is even more necessary to see that persons accused of crimes are not indefinitely harassed... while every reasonable latitude must be given to those concerned with the detection of crime and entrusted with administration of justice, limits must be placed on the lengths to which they may go.

356 *Abdul Rehman Antulay and Ors. v. R.S. Nayak and Anr.*, (1992) 1 SCC 225.

357 (1994) 3 SCC 569.

358 *Id.*

359 Section 309(1), Cr.P.C.

360 *Id.*

361 Section 309 (2), Cr.P.C.

362 *Id.*

363 *Id.*

364 *Id.*

365 Section 309(2), Cr.P.C., Explanation 2.

366 AIR 1955 SC 792.



In *Veerabadrar Chettiar v. E.V. Ramaswami Naicker*,³⁶⁷ the Supreme Court reversed the concurrent finding on the basis of which the trial court had refused to take cognisance of the complaint but still did not allow the matter to proceed on the ground that it had become “stale”.³⁶⁸ In *Chajoo Ram v. Radhey Shyam*,³⁶⁹ delay in trial was one of the factors on the basis of which the Court dropped further proceedings. In *State of Uttar Pradesh v. Kapil Deo Shukla*,³⁷⁰ though the Court found the acquittal of the accused unsustainable, it refused to order a remand or direct a trial after a lapse of twenty years.

The 1978 Supreme Court decision in *Hussainara Khatoon (I) v. Home Secretary, State of Bihar*³⁷¹ proved to be a high watermark in the development of speedy trial jurisprudence. A writ of habeas corpus was filed on behalf of prisoners languishing in Bihar jails awaiting trials, for periods longer than the maximum sentences for the offences they were charged with. The Court held that undue delay in trial vitiated the guarantee of Article 21 of the Constitution. The Supreme Court relied on its earlier decision in *Maneka Gandhi v. Union of India*³⁷² which held that the “procedure” required under Article 21 has to be “fair, just and reasonable” and not “arbitrary, fanciful or oppressive.” Taking this interpretation to its logical end, the Court observed:

... procedure prescribed by law for depriving a person of his liberty cannot be ‘reasonable, fair or just’ unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure, which does not ensure a reasonably quick trial, can be regarded as ‘reasonable, fair or just’ and it would fall foul of Article 21. There can therefore be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21.

The Court added that the state cannot be permitted to deny the constitutional right to speedy trial on the grounds that it does not have adequate financial resources to incur the necessary expenditure needed to improve the administrative and judicial apparatus with a view to ensuring speedy trial.³⁷³

The law laid down in *Hussainara Khatoon’s* case³⁷⁴ was further developed in subsequent decisions. In *State of Bihar v. Uma Shankar Ketriwal*,³⁷⁵ the High Court quashed the proceedings on the ground that the police did not disclose any evidence against the accused and that the prosecution which commenced sixteen years earlier, and was still in progress was an abuse of court process and should be discontinued. Refusing to interfere on appeal with the High Court’s decision, the Supreme Court said that with regard to the delay, such protraction itself means considerable harassment to the accused and there had to be a limit to the period for which criminal litigation is allowed to continue at the trial stage.³⁷⁶ In *Kadra Pahadiya v. State of Bihar*³⁷⁷ too, the Court reaffirmed the principle of the *Hussainara Khatoon* case³⁷⁸ and held that:

367 AIR 1958 SC 1032.

368 *Id.*, 1035.

369 AIR 1971 SC 1367.

370 (1972) 3 SCC 504.

371 (1980) 1 SCC 81.

372 (1978) 1 SCC 248.

373 *Hussainara Khatoon (IV) v. Home Secretary, State of Bihar*, (1980) 1 SCC 107.

374 (1980) 1 SCC 81.

375 (1981) 1 SCC 85.

376 (1981) 1 SCC 75, 77.

377 (1983) 2 SCC 104.

378 (1980) 1 SCC 81.



*...any accused who is denied this right of speedy trial is entitled to approach this Court for the purpose of enforcing such right and this court in discharge of its constitutional obligation has the power to give necessary directions to the state governments and other appropriate authorities for securing this right to the accused.*³⁷⁹

In *Sheela Barse v. Union of India*,³⁸⁰ the Supreme Court addressed the question left unanswered in the *Hussainara* case³⁸¹ about the consequences of delayed trial. The Court held that:

"The right to speedy trial is a right implicit in Article 21 of the Constitution and the consequence of violation of this right would be that the prosecution itself would be liable to be quashed on the ground that it is in breach of the fundamental right."

In *Rakesh Saxena v. State through CBI*,³⁸² the Court quashed the proceedings on the ground that any further continuance of the prosecution after lapse of over six years was uncalled for. In *Srinivas Gopal v. Union Territory of Arunachal Pradesh*,³⁸³ the Court quashed the proceedings against the accused on the ground of delay in investigation and commencement of trial. It termed a delay of nine and a half years in proceedings for rash and negligent driving as enormous.

However, the Court has held that not every type of delay amounts to injustice. In *State of Maharashtra v. Champalal Punjaji Shah*,³⁸⁴ the Supreme Court declared that while deciding on whether there was a denial of the right to a speedy trial, the court is entitled to take into consideration if the defendant himself/herself was responsible for some of the delays and whether he/she was prejudiced in the preparation of his/her defence by reason of the delay. The court is also entitled to take into consideration if the delay was unintentional, caused by overcrowding of the court's docket, or understaffing of the prosecutors, and whether the accused contributed a fair part to delay unintentionally.³⁸⁵ On the basis of the test laid down in *Champalal Punjaji Shah*,³⁸⁶ the Court, in *Diwan Naubat Rai v. State through Delhi Administration*,³⁸⁷ refused to quash the proceedings, as it found that the accused himself was mainly responsible for the delays of which he was complaining.

A landmark decision by the Supreme Court in *Abdul Rehman Antulay v. R.S. Nayak*³⁸⁸ finally adjudicated on questions left open in the *Hussainara* case,³⁸⁹ such as the scope of the right, the circumstances in which it could be invoked, its consequences, limits, etc. The salient features of the decision were:

- The right to a speedy trial flowing from Article 21 encompasses all the stages, namely those of investigation, inquiry, trial, appeal, revision and re-trial.
- In every case, where the right to a speedy trial is alleged to have been infringed, the first question to be put and answered is: who is responsible for the delay? Proceedings by either party in good faith, to vindicate their rights and interests

379 *Id.*, 107.

380 (1986) 3 SCC 632.

381 (1980) 1 SCC 81.

382 1986 Supp SCC 505.

383 (1988) 4 SCC 36.

384 (1981) 3 SCC 610.

385 This decision has been severely criticised by Prof. Upendra Baxi, in his article, Right to Speedy Trial Geese, Gander and Judicial Sauce, 1983 J.I.L.I. Vol. 25, p. 90. Baxi argues that an accused taking the benefit of all opportunities and procedures available at law is within his right and it cannot be said that by doing this he has contributed to the delay. On the other hand, delay caused by failure on the part of the courts to assign priority to the organisation of day-to-day work cannot be said to be unintentional.

386 (1981) 3 SCC 610.

387 (1989) 1 SCC 297.

388 (1992) 1 SCC 225.

389 (1980) 1 SCC 81.



as perceived by them, cannot be taken as delaying tactics; nor can the time taken in pursuing such proceedings be counted towards delay.

- While determining whether undue delay has occurred one must take into account all the attendant circumstances, including the nature of offence, the number of accused persons and witnesses, the court's workload, the prevailing local conditions and so on.
- Every delay does not necessarily prejudice the accused. However, inordinately long delays may be taken as presumptive proof of prejudice. The prosecution should not be permitted to become a persecution. But when the prosecution becomes a persecution depends on the facts of a given case.
- An accused person's plea of denial of a speedy trial cannot be defeated by saying that the accused did not at any time demand a speedy trial.
- The court has to balance and weigh several relevant factors – balancing test – and determine in each case whether the right to a speedy trial has been denied in a given case.
- Charge or conviction must be quashed if the court comes to the conclusion that the right to a speedy trial of an accused has been infringed. But this is not the only course open. It is open to the court to make any other appropriate order – including an order to conclude the trial within a fixed time period, where the trial is not concluded, or reducing the sentence, where the trial has concluded – as may be deemed just and equitable in the circumstances of the case.
- It is neither advisable nor practicable to fix any time limit for trial of offences.
- An objection based on denial of the right to a speedy trial and for relief on that account should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in cases of grave and exceptional nature. Such proceedings in the High Court must be disposed on a priority basis.

In the case of *Common Cause, a Registered Society through its Director v. Union of India*,³⁹⁰ the Supreme Court directed the release of undertrials on bail if the trial continued for a certain period for particular offences, and the accused were in prison during that period. It also directed acquittal or discharge of an accused, where for certain offences, the trial had not begun even after a lapse of the whole or two-thirds of a stipulated period. However, the Court excluded certain economic and other offences from the application of these guidelines. In a subsequent case,³⁹¹ the Supreme Court clarified its order in *Common Cause*,³⁹² and excluded from its application those cases where the pendency of criminal proceedings was wholly or partially attributable to dilatory tactics adopted by the accused, or on account of any other action by the accused, which resulted in prolonging the trial.

The initiative taken by the Court in the *Common Cause* case³⁹³ was taken ahead by the Court in *R.D. Upadhyay v. State of Andhra Pradesh*.³⁹⁴ In this case, the Court gave directions with respect to the undertrials languishing in Tihar jail. Directions were given for the nomination of special judges to dispose murder cases. The Court directed that these were to be disposed within six months. The Court also gave directions for the release of undertrials on bail.

390 (1996) 4 SCC 33.

391 *Common Cause v. Union of India*, (1996) 6 SCC 775.

392 (1996) 4 SCC 33.

393 *Id.*

394 (1996) 3 SCC 422.



Another attempt was made to concretise the right to a speedy trial in *Raj Deo Sharma v. State of Bihar*.³⁹⁵ In this case, the Court directed the closure of the prosecution's evidence on the completion of two years in cases of offences punishable with imprisonment for a period not exceeding seven years, and on the completion of three years in cases of offences punishable with imprisonment for a period exceeding seven years. But the effect of this judgment was whittled down in the subsequent clarificatory order,³⁹⁶ where it was laid down that the following periods could be excluded from the limit prescribed for completion of the prosecution's evidence in *Raj Deo Sharma (1)*.³⁹⁷

- Period of pendency of appeal or revision, against interim orders, if any, preferred by the accused to protract the trial;
- Period of absence of the presiding officer in the trial court;
- Period of three months if the office of the public prosecutor falls vacant (for any reason other than expiry of tenure).

In *Akhtari Bi v. State of Madhya Pradesh*,³⁹⁸ the Court held that if an appeal is not disposed within five years, for no fault of the convicts, such convicts may be released on bail on conditions as may be deemed fit and proper by the court.

In *P. Ramachandra Rao v. State of Karnataka*,³⁹⁹ the Supreme Court reversed the trend initiated in *Common Cause v. Union of India*,⁴⁰⁰ and thereafter, in *Raj Deo Sharma v. State of Bihar*.⁴⁰¹ These cases marked a step forward in the implementation of the right to a speedy trial at the practical level and making it a practical reality. However, the Court in *P. Ramachandra Rao*,⁴⁰² held that it is not advisable, feasible or judicially permissible to draw or prescribe any outer time limit for the conclusion of all criminal proceedings. It added that the dictum in the *A.R. Antulay* case⁴⁰³ was correct and still held the field, while the time limits or bars of limitation prescribed in several directions made in *Common Cause (I)*⁴⁰⁴ and *Raj Deo Sharma (I)*⁴⁰⁵ and *(II)*⁴⁰⁶ could not have been so prescribed and are not good law as they amounted to "judicial legislation" and ran counter to the doctrine of binding precedents.

It further directed that criminal courts should exercise their available powers such as those under Sections 309 and 311 of the Cr.P.C to effectuate the right to a speedy trial.

395 AIR 1998 SC 3281.

396 *Raj Deo Sharma v. State of Bihar*, (1999) 7 SCC 604.

397 AIR 1998 SC 3281.

398 (2001) 4 SCC 355.

399 AIR 2002 SC 1856.

400 (1996) 4 SCC 33.

401 AIR 1998 SC 3281.

402 (1996) 4 SCC 33.

403 (1992) 1 SCC 225.

404 (1996) 4 SCC 33.

405 AIR 1998 SC 3281.

406 (1999) 7 SCC 604.

407 *Hussainara Khatun and Ors. v. Home Secretary, State of Bihar*, AIR 1979 SC 1377



Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar, AIR 1979 SC 1377

This case arose as a result of the State of Bihar's failure to fully address the Supreme Court's order to file a report on the number of undertrial prisoners, indicating the time each had spent in jail and the crimes of which each was accused. The Court issued this order after an inquiry revealed that several undertrial prisoners were in jail for periods longer than the maximum term for which they would have been sentenced if convicted of the crimes they were accused of committing.⁴⁰⁷ The Court was appalled by this situation, noting that it "betrays complete lack of concern for human values" and "exposes the callousness of our legal and judicial system which can remain unmoved by such enormous misery and suffering resulting from totally unjustified deprivation of personal liberty." Laying great emphasis on a speedy trial, the Court declared: "A fair trial implies a speedy trial and no procedure can be reasonable, fair or just unless that procedure ensures a speedy trial for determination of the guilt of the accused person."

The Court directed the State of Bihar to immediately release those undertrial prisoners suffering in these unjust circumstances because "continuance of their detention is clearly illegal and in violation of their fundamental right under Article 21 of the Constitution."

Moti Lal Saraf v. State of Jammu and Kashmir and Anr., (2006) 10 SCC 560

The appellant worked as a manager in the State Bank of India. An FIR under Section 5(2) of the Jammu and Kashmir Prevention of Corruption Act was registered against him, pursuant to which he was arrested on the allegation that he had received a sum of Rs. 700 as a bribe.

Over a period of 26 years, repeated challans were filed, causing immense mental, physical and emotional stress and harassment to the appellant. In the intervening 26 years, not even a single witness was examined by the prosecution. The appellant sought relief on the grounds that it was the right of every citizen to seek a speedy trial and that continuation of further proceedings against him was contrary to the basic spirit of Article 21 of the Constitution.

Discharging the appellant, the Court maintained that permitting the State to continue with the prosecution and trial any longer would be a total abuse of the process of law. It also stressed that it is the bounden duty of the court and the prosecution to prevent unreasonable delay. "The purpose of right to a speedy trial is intended to avoid oppression and prevent delay by imposing on the courts and on the prosecution an obligation to proceed with reasonable dispatch." In order to make the administration of criminal justice effective, vibrant and meaningful, the Court urged the central and state governments and all the concerned authorities to take necessary steps to ensure that the constitutional right of the accused to a speedy trial does not remain only on paper.



4.3.2 International Law

India's domestic law mirrors Article 9(3) of the ICCPR which states: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."⁴⁰⁸ The importance of this right is clear, as also reiterated in Article 14(3)(c): "In the determination of any criminal charge against him, everyone shall be entitled to...be tried without undue delay."⁴⁰⁹

4.3.3 Guide for Judicial Enforcement

It is the responsibility of the judge to ensure that cases come to trial and are disposed as swiftly as possible.

Apart from the guidelines laid down in *Antulay*, if the provisions of the Cr.P.C, particularly Section 309, are strictly adhered to, delays in trials could be reduced to a considerable extent. At present, this provision is observed in the breach. Strict adherence to this provision is required by the judge who must also ensure the active cooperation of the prosecuting agency and warn the defence of the consequences to his/her client of non-cooperation in bringing the trial to a speedy conclusion. Once the criminal trial begins, the trial court must ensure that witnesses are examined continuously and continue on a daily basis, till all the witnesses in attendance are examined. Requests for adjournments, either by the prosecution or defence, should be discouraged unless there are exceptional circumstances. It is routine not to award costs even when the breaches in statutory requirements are frequent and amount to disrespect for the process. Awarding costs routinely or in strategic instances is essential to demonstrate the value of the court's time and the respect that is due to the law, and will act as a disincentive to future tardiness. Costs where witnesses are in attendance but are not examined or cross-examined must be imposed on the concerned party.

The *Antulay* case laid down principles in the context of the accused who seeks to quash a case on the grounds that it has taken too long to be fair. The Court was concerned to strike a balance between the realities of the functioning of the criminal justice system in an environment of huge arrears, the ability of powerful criminals and clever counsels to take advantage of this on the one hand, and the obligation of the State to ensure a speedy trial and minimise incarceration periods of the accused, on the other hand. These principles were laid down in hindsight, on an examination of the factors which led to the inordinate delay, while deciding whether to quash the case or not.

Given that speedy trial is a fundamental right, the latitudes provided by the Cr.P.C must be read as being in the nature of exceptions that take account of the fact that there may be emergency circumstances under which the Court has no option but to adjourn proceedings.

The Cr.P.C safeguards the right to a speedy trial. Illustratively, in Section 309 it requires that the court demonstrates that the discretionary powers to adjourn have been wisely used, when it says that where witnesses are present for examination,

⁴⁰⁸ Article 9(3), ICCPR.

⁴⁰⁹ Article 14(3), ICCPR.



their evidence must not be postponed unless the judge has “special reasons for doing so which must be recorded in writing.” The discretion to impose costs is based on the same reasoning that the court’s time must not be wasted or lost to the caprice of either party.

Thus, the judge’s discretion in granting adjournments, as for any other discretionary power, requires that it be based in logic and reasoning that can be upheld in light of the public policy behind it. The logic that backs every single adjournment must be that the adjournment itself serves the ends of justice, enhances a fair trial, or is in the nature of an unusual unforeseen emergency. It cannot be, as it has become, a routine event based on accommodating the convenience of the officers of the court and the compulsions in the shortcomings in the system.

When the Supreme Court in *P. Ramachandra Rao*⁴¹⁰ disapproved of specific time limits being set for the completion of various kinds of cases but instead reverted to commending judges to heed Section 309, it trusted that the exercise of judicial discretion provided in Section 309 would be informed by the constitutional imperatives that the right to a speedy trial is a Fundamental Right.

In addition, where the accused is in custody, a premier consideration for the judge must be as per the Supreme Court’s dicta that the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or an unduly long incarceration before his/her conviction. In this view of the issue, no incarceration can be justified on grounds of shortfalls within the system itself.

4.5 Right to Free Legal Aid⁴¹¹

A procedure which does not make legal services available to an accused person who is too poor to afford a lawyer and who would therefore have to go through the trial without legal assistance, cannot possibly be regarded as reasonable, fair and just. Thus, the State is obliged to provide free legal aid to a prisoner who is indigent or otherwise disabled from securing legal assistance where the ends of justice call for such service.

4.5.1 Domestic Law

The due process rights guaranteed to all individuals in Article 21 of the Constitution require that an individual have access to free legal counsel if he/she cannot afford it.⁴¹²

4.5.1.1 Legal Aid to an Accused Person at the State’s Expense

The Cr.P.C makes this right explicit and outlines its implementation.⁴¹³ When the accused is not represented by a pleader in a trial before the Court of Session, and when the Court finds that the accused does not have sufficient means to engage a pleader, the Court is required to assign a pleader to defend the accused at the State’s expense.⁴¹⁴ With the previous approval of the concerned state government, the High Court may create a rule to determine the method to select pleaders for defence, the facilities the assigned pleaders will be given, and the fee payable

410 AIR 2002 SC 1856.

411 Also See: Chapter 2 for a discussion on this topic.

412 Constitution of India, Article 21.

413 Section 304, Cr.P.C.

414 Section 304 (1), Cr.P.C.



to the pleader by the government.⁴¹⁵ The state government may order that these provisions be made applicable to any class of trials before other courts in the state as they apply in relation to trials before the Courts of Session.⁴¹⁶

Courts have reiterated multiple times that provision of legal aid is vital for India's legal system. The Supreme Court in several decisions has referred to both Articles 21 and 39A of the Constitution to underline the importance of providing legal aid to undertrials. In the *Hussainara*⁴¹⁷ case the Court explained: "Legal aid is nothing else but equal justice in action. Legal aid is in fact the delivery system of social justice. If free legal services are not provided to such an accused the trial itself may run the risk of being vitiated as contravening Article 21." It is obligatory for the Magistrate to tell the accused of his right to get free legal aid. Failure to do so will result in disciplinary action against him.⁴¹⁸

In *Hussainara Khatoon*, the Supreme Court concluded that the right to free legal service is an essential ingredient of reasonable, fair and just procedure for an accused person and it must be held to be implicit in the guarantee of Article 21. The Supreme Court also ruled that the State cannot seek to avoid this constitutional obligation by pleading financial or administrative inability.⁴¹⁹ Failure to provide legal aid to indigent accused would vitiate the trial, entitling setting aside of conviction and sentence.⁴²⁰

In the *Suk Das*⁴²¹ case, the Supreme Court observed: "It would make a mockery of legal aid if it were left to a poor, ignorant and illiterate accused to ask for legal services." The Court held that the right to free legal services is a Fundamental Right which is not conditional on the accused applying for free legal assistance.

415 Section 304 (2), Cr.P.C.

416 Section 304 (3), Cr.P.C.

417 *Hussainara Khatoon (V) v. State of Bihar*, (1980) 1 SCC 108.

418 *Mohd. Ajmal Amir Kasab v. State of Maharashtra*, (2012) 9 SCC 1.

419 *Khatri (II) v. State of Bihar*, (1981) 1 SCC 627.

420 *Suk Das v. UT of Arunachal Pradesh*, (1986) 2 SCC 401; *Mohd. Hussain v. State (Govt. of NCT of Delhi)*, (2012) 9 SCC 408; *Rajoo v. State of MP*, (2012) 8 SCC 553.

421 *Suk Das v Union Territory of Arunachal Pradesh*, (1986) 2 SCC 401.



Suk Das v. Union Territory of Arunachal Pradesh, (1986) 2 SCC 401

In this case, the appellant, along with four others, was charged with an offence under Section 506 of the IPC. The appellants, being poor, could not engage a lawyer to represent them at the trial. They were convicted by the Sessions Court. On appeal to the High Court, they pleaded that they had not been given the assistance of a lawyer, but the High Court dismissed the appeal on the ground that they had made no request for legal aid and that in the facts and circumstances of the case it could not be said that the failure to provide them legal assistance vitiated the trial. The matter then came before the Supreme Court by way of appeal.

The main issue for the court to consider in this case was whether this Fundamental Right could be denied lawfully to an accused person if he does not apply for free legal aid. The court pointed out that the bulk of Indian people living in rural areas are illiterate and not aware of their rights. Even literate people do not know what their rights are under the law. In the circumstances, it would make a mockery of legal aid if it were left to the poor, illiterate accused to ask for free legal services. Legal aid would be an idle formality if it were to depend on a specific application by such poor or ignorant people.

The Court reiterated that in a case where on a conviction, a sentence of imprisonment would be imposed, social justice requires that the accused be given legal aid. It stated that the magistrate is under a legal obligation to inform the accused of the availability of free legal services at State expense.

The conviction of the appellant was quashed by the Supreme Court because the accused remained unrepresented by a lawyer and the trial was vitiated on account of a fatal constitutional infirmity.

4.5.2 International Law

Article 14(3)(d) of the ICCPR also sets forth every individual's right to have legal services provided by the State if he/she cannot afford them.⁴²² In *Hoskot*, the Supreme Court referenced the ICCPR when addressing the importance of providing free assistance of counsel to indigent defendants.⁴²³

4.5.3 Guide for Judicial Enforcement

Legal aid is currently viewed essentially as a welfare measure rather than as a non-derogable and enforceable fundamental right. A shift from this position would require steps to ensure that:

1. No accused person who is unable to afford a lawyer goes unrepresented in criminal proceedings;
2. Certain minimum standards of performance of the assigned lawyers must be insisted upon;⁴²⁴
3. In cases involving offences entailing serious consequences for the liberty of the accused, a choice of counsel must be made available and the accused be given the option of rejecting a counsel perceived to be ineffective;

⁴²² Article 14(3)(d), ICCPR.

⁴²³ *M.H. Hoskot v. State of Maharashtra*, AIR 1978 SC 1548, para 20.

⁴²⁴ The basis for such a demand can be found in judgments of courts that have adversely commented on the performance of legal aid lawyers in cases involving serious charges entailing serious loss of liberty to the accused; see in particular: *State v. Ravi*, 2000 Cri.LJ 1125; *Ram Awadh v. State of Uttar Pradesh*, 1999 Cri.LJ 4083; *Kunnumal Mohammad v. State of Kerala*, AIR 1963 Ker 54; *Ranchod Mathur Wasawa v. State of Gujarat*, 1974 Cri. LJ 779 (SC); *Hussain v. State of Kerala*, (2000) 8 SCC 129.



4. Legal aid lawyers' fees must be paid at least on par with public prosecutors.⁴²⁵

4.6 Right to be Notified of Charges/Framing of Charge

The objective of this provision is to give adequate notice to an accused person of the material to be used against him/her so that he/she is not prejudiced during the trial. It is also to ensure that the trial is just and fair. The right to know what wrongful activity is alleged and the basis for it is vital in order to give the defendant a chance to mount the fullest defence and is a fundamental fair trial requirement.

4.6.1 Domestic Law

Key provisions of the Cr.P.C work in concert to ensure that an accused person is notified of the charges against him/her.

4.6.1.1 Provide Copies of Police Report and Other Documents to the Accused

Section 207 of the Cr.P.C mandates that in any criminal proceeding instituted on the basis of a police report, the magistrate must furnish the following documents to the accused free of cost:

1. A copy of the police report;
2. A copy of the First Information Report;
3. Statements of any prosecution witnesses made to the police under Section 161 of the Cr.P.C. This must be done keeping in mind requests made by police officers for exclusion of statements under Section 173(6);
4. Any recorded confessions or statements;
5. Any other documents forwarded to the magistrate by the police, unless in the opinion of the magistrate, they are too voluminous.

4.6.1.2 Provide Copies of Other Statements and Documents to the Accused if the Case is Triable by the Court of Sessions

Sections 207 and 208 are important provisions in the Cr.P.C, which require the magistrate to provide copies of the police report and other documents to the accused. This is a process that has to be followed before the trial begins, and seeks to inform the accused of the material that the prosecution seeks to use against him/her. If a matter is triable exclusively by the Court of Sessions, Section 208 of the Cr.P.C requires that the magistrate furnish to the accused, free of cost, the statements of persons examined by the magistrate under Sections 200 or 202, any statements, and confessions recorded under Sections 161 or 164, and any documents produced before the magistrate on which the prosecution proposes to rely.

The entire purpose of these provisions is to give adequate notice to accused persons of the material to be used against them so that they are not prejudiced during the trial. It aims to ensure a just and fair trial rather than create a situation where the trial may be delayed or not held at all. In terms of case preparation, the fullest supply of papers means that the case will go forward without delay and the early supply of all papers will result in an early determination of whether there is

⁴²⁵ The decisions in *T. Suthendra Raja v. State of Tamil Nadu*, 1995 Cri. LJ 1496 and *Rataniya Bhima Bhil v. State of Gujarat*, 1997 Cri. LJ 891 commented on this disparity.



adequate material for the trial to go forward at all. That is the utilitarian need. But a paramount consideration to provide a full and early supply of documents is that no trial is expected to be a surprise. Bringing accusations against an individual is a serious matter.

The duty of the Sessions Court to supply copies of the chargesheet and other such relevant documents which are used by the prosecution under Sections 207 and 208 is not just an empty formality. It must be complied with strictly so that the accused is not prejudiced in his/her defence even at the stage of framing of charge.⁴²⁶

The requirement that the papers indicating evidence that the prosecution seeks to rely upon be provided early to both the court and the accused is to ensure an assessment of whether there are real grounds for going forward, on the one hand, and on the other, to assist the defendant to argue that there is no case to answer.

4.6.1.3 Duty of the Magistrate regarding Charges

The magistrate has to comply with various provisions of the Cr.P.C to ensure that the accused is not denied of the right to a fair trial. These include the following:

1. The accused must be given full notice of the offences he/she is charged with.⁴²⁷
2. Each offence must be described and have the specific name of the offence as stated in the law.⁴²⁸
3. The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.⁴²⁹
4. The framed charge must state the exact time and place of the alleged offence and the person against whom, or the thing with respect to which, it was committed.⁴³⁰
5. In cases concerning criminal breach of trust or dishonest misappropriation of money or other such movable property, it shall be sufficient to specify the gross sum or to describe the movable property, the dates between which the offence is alleged to have been committed.⁴³¹ The time included between these dates shall not exceed one year.
6. If the accused, having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, then, the fact, date and place of the previous conviction shall be stated in the charge.⁴³²

No error or omission in stating either the offence or the particulars required to be stated in the charge shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.⁴³³

4.6.1.4 Framing the Charges

If the Magistrate considers that the accused has committed an offence which is not exclusively triable by the Court of Session, he/she may frame a charge against the accused and transfer the case for trial to the Chief Judicial Magistrate.⁴³⁴

⁴²⁶ *Jahid Shaikh v. State of Gujarat*, (2011) 7 SCC 762.

⁴²⁷ Section 211(1), Cr.P.C.

⁴²⁸ Section 211(2), Cr.P.C.

⁴²⁹ Section 211(4), Cr.P.C.

⁴³⁰ Section 212, Cr.P.C.

⁴³¹ Section 212(2), Cr.P.C.

⁴³² Section 211(7), Cr.P.C.

⁴³³ Section 215, Cr.P.C.; See also: *Main Pal v. State of Haryana*, (2010) 10 SCC 130.

⁴³⁴ Section 228, Cr.P.C.



The Magistrate/ Sessions Judge has a duty to frame the charges in writing. The judge may add or alter the charges framed by the prosecution. This finalises the parameters of the accusation to be met. Subsequently, the charges must be read out to the accused and explained to him/her.⁴³⁵

While the judge is considering the question of framing charges, he/she has the power to sift and weigh the evidence for the limited purpose of finding out whether or not a *prima facie* case against the accused has been made out. This test to determine a *prima facie* case would depend upon the facts of each case. However, if two views are equally possible and the Judge is satisfied that the evidence produced before him/her does not give rise to grave suspicion against the accused, the judge will be fully within his/her right to discharge the accused.⁴³⁶ Suspicion alone, without anything more, cannot form the basis for, or be sufficient for framing a charge.⁴³⁷

The judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on.⁴³⁸

At the stage of framing of the charge, the Court has to consider the material with a view to find out if there is ground for proceeding against the accused and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction.⁴³⁹

4.6.1.5 Court May Alter Charges

The court has sufficient powers to alter or add to any charges that have been included by the prosecution.⁴⁴⁰ Such power to alter or add any charge is unrestrained provided such addition and/or alteration is made before the judgment is pronounced.⁴⁴¹ Every alteration or addition shall be read and communicated to the accused.⁴⁴²

4.6.1.6 Recall of Witnesses When Charges are Altered

When a charge is altered or added by the court, the prosecutor and the accused are allowed to recall, re-summon and examine any witness who may have already been examined by the court, unless the court is of the view that the same is being done to defeat the ends of justice.⁴⁴³

The aim of these provisions is to enable the accused to have a clear idea of what he/she is being tried for and of the essential facts he/she has to meet. It is one of the elementary principles of criminal law that an accused person must know the precise accusation against him/her *before* he/she is called on to enter his/her defence.

435 Section 228(2), Cr.P.C.

436 *Union of India v. Prafulla Kumar Samal and Anr.*, (1979) 3 SCC 4.

437 *Soma Chakravarty v. State through CBI*, (2007) 5 SCC 403.

438 *Id.*

439 *State of Maharashtra v. Priya Sharan Maharaj and Ors.*, (1997) 4 SCC 393.

440 Section 216(1), Cr.P.C.

441 *Jasvinder Saini v. State (Govt. of NCT of Delhi)*, (2013) 7 SCC 256.

442 Section 216(2), Cr.P.C.

443 Section 217, Cr.P.C.



State of Orissa v. Debendra Nath Padhi, (2005) 1 SCC 568

The issue before the Apex Court was whether the trial court, while framing the charges could consider material filed by the accused?

In the case of *Satish Mehra v. Delhi Administration and Anr.*, the Apex Court concluded that if the accused succeeded in producing reliable material at the stage of taking cognizance or framing charges, which might fatally affect even the very sustainability of the case, it would be unjust to suggest that no such material should be looked into by the court at that stage.

This decision was challenged by the State on the grounds that observations in the *Satish Mehra* case amounted to upsetting well-settled legal propositions and making nugatory amendments in the Cr.P.C and would result in conducting a mini trial at the stage of framing the charges. The matter was referred to a larger bench. The Court held as follows:

1. *At the stage of framing charge, the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion, at the initial stage of framing of charge, is sufficient to frame the charge;*
2. *Permitting the accused to adduce his/her defence at the stage of framing of charge and for examination would result in a mini trial at this stage. This is against the criminal jurisprudence and would defeat the object of the Cr.P.C;*
3. *The expression “hearing the submissions of the accused” cannot mean opportunity to file material to be granted to the accused. Thereby amending the settled law, the Court held that at the stage of framing charges hearing the submissions of the accused has to be confined to the material produced by the police. The only right the accused has at that stage is of being heard and nothing beyond that.⁴⁴⁴*

4.6.2 International Law

Indian law on this subject is again compliant with international law. Article 14(3) (a) of the ICCPR guarantees anyone charged with a criminal offence the right to be promptly informed in detail of the nature and cause of the charges against him/her in a language that he/she understands.⁴⁴⁵

4.6.3 Guide for Judicial Enforcement

Magistrates must not commit the case to the Court of Sessions till copies of all documents have been supplied to the accused. They should adjourn the case till this formality is completed. These adjournments, awaiting papers, cannot be unduly prolonged. The term “within reasonable time” must be adhered to. The accused is undoubtedly prejudiced without this. However, magistrates must take every care to avoid undue delay in the committal proceedings on account of non-supply of documents. As soon as the chargesheet is filed by the prosecution, copies must be supplied to the accused.

⁴⁴⁴ State Anti-Corruption Bureau, Hyderabad and Anr. v. P. Suryaprakasam, 1999 SCC (Cri) 373.

⁴⁴⁵ Article 14 (3)(d), ICCPR



Judges and magistrates at times treat the charge-framing process as a mere mechanical event. There is little application of mind on the material placed on record. Due to an overburdened court schedule, the judge or magistrate merely accepts the police/ prosecution version. In the absence of considering the broad probabilities of the case or without examining the basic infirmities of the charges by judges and magistrate at this stage, the charges that the accused has to answer remain vaguely defined. Defective charges may have serious repercussions on the ultimate result of the case. On the other hand, frivolous charges against the accused burden the court with additional unsustainable prosecution cases. It is within the power as well as the duty of the judge to avoid such scenarios.

The burden on the court system is not reduced, nor is speed better served by leaving the consideration of the examination of the charge sheet to a later time. It merely delays matters and creates logjams at later stages. As the processual pile ups mount, the accused, especially if he/she is incarcerated, is greatly prejudiced by not knowing the exact case that has to be met and having to mount potential defences to charges which were probably unsustainable in the first place.

There must be application of mind while framing a charge. Without going through the material on record, the court cannot fully adopt the version/decision of the prosecution, however broad or loosely framed or unsubstantiated by the record; the judge renounces his/her duty and allows a usurpation of his/her function to the police by default. Judges must thus refrain from rubber-stamping police endorsements stating that the accused remain in custody and must insist that the accused be produced and then informed of the charges. In our circumstances, where most of the accused are poor, often illiterate, frequently absolutely unfamiliar with court procedures, and often badly represented, the judge's duties must be even more diligently adhered to.

Although a detailed consideration of the evidence is not called for at the stage of framing of charges, the court must also not uncritically adopt the decision of the prosecution and proceed to frame charges. If the court feels there is insufficient material or if there is any ground not to frame charges, then it can exercise its powers to discharge the accused of the charge.

The Magistrate must keep in mind at all times that an unmerited order discharging an accused sometimes results in irreparable harm to the victim or public interest, whereas wrong trials initiated on framing of charges incorrectly, may not only prejudice the accused but also result in a loss of faith in the judicial system.

The finalisation of the charges is in the hands of the judge. The time for this is stipulated as being "without unnecessary delay." At all costs, the process of charge-framing should not stretch endlessly, and as far as possible in the interests of justice, it must be completed in as minimal time as possible, preferably over a single hearing without leaving any space for adjournments by either side.

4.7 Right to be Present at One's Trial

The presence of an accused during his/her trial is an absolute right. The right to be tried in one's presence is implicit in the right to adequate defence. Trials in absentia can prejudice the fairness of the hearings in a grave manner. It is obligatory that the evidence from the prosecution and defence should be taken in the presence of the accused. A trial is vitiated by the failure to examine witnesses in the presence of the accused.



4.7.1 Domestic Law

One element of a reasonable, fair and just trial is the opportunity for the accused to be able to answer every charge made against him/her. This is why the law insists that the accused has the right to be personally present (or be represented by his/her lawyer) on all occasions so that he/she knows what is said against him/her and who says it, and can thus challenge it and mount the best possible defence that he/she can. In this manner, the balance between the accuser and the accused is maintained.

4.7.1.1 Evidence to be Taken in the Presence of the Accused

This principle has been read into Article 21 as being an element of due process and is given clear expression in Section 273 of the Cr.P.C which says: “Except as otherwise expressly provided, all evidence taken in the course of trial or other proceeding shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader.”

Several convictions have been set aside where the trial court was unmindful of this universally acknowledged and vital principle of the administration of justice and the court had proceeded *ex parte* in the absence of the accused – even where the court had only dispensed with the presence of the accused on a few occasions in the course of a long trial.

Where a judge had proceeded with hearings in the absence of the accused and recorded witness’ evidence even after seemingly receiving agreement from the defence counsel, it was held by the Madhya Pradesh High Court that the trial was defective. The death reference was not confirmed and a retrial was ordered.⁴⁴⁶

With the introduction of video conferencing, the Supreme Court has held that evidence recorded via video in the presence of the accused or his pleader fully meets the requirements of Section 273.⁴⁴⁷ In the context of cases of rape, certain guidelines have been laid down for recording of evidence. This takes into consideration that trauma that the victim may undergo by the mere sight of the accused, which may induce an element of extreme fear in the mind of the victim and put her in a state of shock. This may result in the victim being unable to give full details of the incident which may result in miscarriage of justice. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. Hence, the Supreme Court had ruled that questions to be put by the accused in cross-examination may be given in writing to the Presiding Officer of the Court, who may put the same to the victim or witnesses.⁴⁴⁸ The Protection of Children from Sexual Offences Act, 2012 (POCSO) also makes special provisions with respect to recording of evidence of victims of child sexual abuse.

A right to cross-examine a witness, apart from being a natural right is a statutory right. Section 137 of the Indian Evidence Act provides for examination-in-chief, cross-examination and re-examination. Section 138 of the Indian Evidence Act confers a right on the adverse party to cross-examine a witness who had been examined in chief.

446 *State of Madhya Pradesh v. Budhram*, 1996 Cri. LJ 46 (MP).

447 *State of Maharashtra v. Praful B Desai*, AIR 2003 SC 2053.

448 *Sakshi v. Union of India and Ors.*, (2004) 5 SCC 518.



4.7.1.2 Provisions for Inquiries and Trials Held in the Absence of the Accused

The right to be in court throughout a trial belongs to the accused. Therefore, if there is no risk of prejudice to either side and where the interests of justice remain fully served even in the absence of the accused, the court may at the request of an accused dispense with his/her personal appearance and allow the matter to go forward through his/her representative.⁴⁴⁹ The Cr.P.C. requires the judge to record his/her reasons for concluding that the personal attendance of the accused is not necessary.⁴⁵⁰

A judge is also responsible to keep the court in order and may on occasion, in the interest of justice, where he/she feels that “the accused persistently disturbs the proceedings of the Court,” may dispense with the attendance of the accused and proceed with the inquiry/trial in his/her absence.⁴⁵¹ However, it is essential that the accused is represented by his/her pleader.

Another instance when the court can proceed in the absence of the accused is when he/she is declared an absconder.⁴⁵² Mere absence of the accused is not enough. It must be established to the satisfaction of the Court that there is no chance of immediate arrest of the absconder.⁴⁵³ This provision is in derogation of the normal procedure that evidence in a trial of an accused shall be recorded in his/her presence. But its justification lies in the accused’s default to take part in the trial.

State of Madhya Pradesh v. Budhram, 1996 Cri. LJ 46 (MP)

The Sessions Court found Budhram guilty of murder and sentenced him to death.

Budhram appealed on the grounds that when the trial commenced he was not defended by a lawyer but got one only on making a request to the court. However, on a number of occasions, as an accused he was not produced before the court. The trial was adjourned on this ground on several occasions and was inordinately delayed. To proceed more expeditiously, counsel representing the accused informed the court that he had no objection if the witnesses in attendance were examined in the absence of the accused. With this no objection from the defence counsel, the judge went ahead and recorded the evidence of witnesses in the absence of the accused. The matter ended in a conviction.

In appeal, Budhram submitted that the law required that all the evidence must be recorded in his presence, barring the exceptions expressly provided in the Cr.P.C. The counsel representing Budhram had no authority to inform the Court that he had no objection if evidence was recorded in his absence. In such circumstances, recording of the evidence from witnesses in the absence of the accused resulted in the violation of Section 273 of the Cr.P.C.

The Court agreed, set aside the conviction and ordered a retrial. The Court also criticised the practice of jail authorities of not producing the accused on several occasions on some pretext or the other, terming this to be an attempt to obstruct the course of justice and said: “The time has come when this Court is to take stock of the situation and try to evolve remedial measures.”

449 Section 317, Cr.P.C.

450 Section 317(1), Cr.P.C.

451 *Id.*

452 Section 299, Cr.P.C.

453 *Nirmal Singh v. State of Haryana*, (2000) 4 SCC 41.



4.7.2 International Law

Article 14(3)(d) of the ICCPR mirrors Indian law in requiring every individual charged with a crime to have the right to be tried in his presence. Article 63(1) of the Rome Statute of the International Criminal Court also requires that the accused shall be present during the trial.

4.7.3 Guide for Judicial Enforcement

All court processes are designed to further the ends of justice and not meant to harass the accused or prejudice the other side.

Certain trivial or technical matters involve persons having to travel a long distance and spend large amounts of money. This can be highly inconvenient for those belonging to socially and economically disadvantaged backgrounds and for women, labourers (specifically daily wagers), old and differently abled persons. In such special cases, the Court can take a call regarding the necessity of their presence at every appearance.⁴⁵⁴

Only in very rare instances should a court dispense with the personal attendance of the accused. This has to be solely in the larger interests of justice: for instance, if the accused persistently disturbs the proceedings. Then after recording the reasons for the same in writing, the trial may be conducted in the absence of the accused.⁴⁵⁵ But this is not good practice and the absence of the accused must be minimised to the bare necessity. The court must also dispense with the accused's appearance after warning the accused to desist from disruption and an opportunity to return to the court proceedings should be afforded as soon as may be possible.

The right to be personally present at the trial can be waived only at the request of the accused. The court cannot continue the trial in his/her absence merely because his/her lawyer is present or has agreed that the trial may continue without his/her client. The pleader representing the accused has no authority to inform a court that the accused will have no objection if evidence is recorded in his/her absence.

It is common for police and jail authorities to plead that there is no escort for a prisoner and not produce him/her in court on a trial date. This cannot be a reason to continue the trial in his/her absence.

4.8 Right to Examine Witnesses

Fair trial includes fair and proper opportunities allowed by the law to prove one's innocence. Denial of this right means the denial of a fair trial. The right is critical to preserving fairness and ensuring accuracy at trial. The accused cannot adequately present his/her defence and challenge the prosecution's case against him/her unless he/she has the opportunity to call witnesses on his/her behalf and cross-examine prosecution witnesses. Moreover, the questioning of witnesses by the defence provides the court with an opportunity to arrive at more accurate findings, as questioning witnesses serves the necessary function of scrutinising the witness' credibility and reliability. However, there can be some exceptions to this rule for example, to protect the witness, but such exceptions cannot infringe on the rights of the accused.

454 *Mathew v. State of Kerala*, 1986 (2) Crimes 393 (Ker).

455 Section 317, Cr.P.C.



4.8.1 Domestic Law

Fair trial includes rules of procedure that are designed to ensure reasonable and adequate opportunities to mount an effective defence. This includes the accused's right to present evidence on his/her behalf and challenge evidence put forward by the prosecution. If this is denied to the accused there is no fair trial.

Fair trial also includes fair and proper opportunities allowed by law to prove one's innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means the denial of a fair trial. It is essential that the rules of procedure designed to ensure justice should be scrupulously followed, and courts should be zealous in ascertaining that there is no breach of them.⁴⁵⁶

4.8.1.1 Evidence for the Prosecution

The chargesheet indicates the facts and circumstance that emerge through the police investigation and form the elements of the crime which the accused must answer. Once that is presented to the accused and he/she is asked to plead his/her case, he/she knows the charges and the basis for these. The prosecution can file further charges if more evidence comes to light or further crimes are indicated.

The rules of procedure require that the prosecution presents and completes its case first. The prosecution is required at the very outset of the trial to put before the court *all* the evidentiary material it intends to rely on to prove its case beyond reasonable doubt. This can include lay and expert witnesses, documents, forensic material and analysis. At the commencement of the trial the prosecution must again indicate the witnesses it has chosen to put in the box. All such witnesses must be present in person, give evidence orally and be available for cross-examination.

The prosecution has to lay before the court all material evidence available to it to unfold the case. Sections 230, 231, 242, and 244 of the Cr.P.C afford the opportunity to the prosecution to examine its witnesses and put forth oral or documentary evidence. Every witness must be examined orally. The judge should record the evidence of prosecution witnesses till the prosecution closes its evidence. The accused, in order to test the veracity of a prosecution witness' testimony, has the right to cross-examine him/her. The judge's duty is to exclude inadmissible evidence whether it is, or is not objected to by both parties.

Section 138 of the Indian Evidence Act provides the accused the right to cross-examine the prosecution's witnesses. The judge in the interests of justice can defer this cross-examination. Considerable latitude must be given in cross-examination and it need not be confined to the facts elicited in the examination in chief or strictly relevant facts. However, questions manifestly irrelevant must be ruled out. Hearsay is as inadmissible during cross-examination as it is in the examination-in-chief. Cross-examination must be within reasonable limits, and when the privilege is abused, the judge always has the discretion as to how far it may go or how long it may continue.

After prosecution witnesses are examined, cross-examination by the accused and re-examination (if any) shall follow immediately. There is no right to reserve cross-examination. Ordinarily, examination and cross-examination are to be a continuous process. However, Section 231(2), Cr.P.C. vests the judge with the discretion to

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⁴⁵⁶ *Kalyani Bhaskar v. M. S. Sampornam*, (2007) 2 SCC 258.



permit deferring the cross-examination of any witness until any other witness or witnesses have been examined. The section also empowers the judge to recall any prosecution witness for further cross-examination.

4.8.1.2 Entering the Defence

Section 233 of the Cr.P.C provides that if the judge does not acquit the accused under Section 232 of the Code on the ground that there is no evidence, he/she shall call the accused to enter his/her defence and adduce evidence and file with the record any written statement, if put in by the accused. If the accused desires to call any witness and applies for the issue of process to compel the attendance of a witness or the production of any document or item, an adjournment has to necessarily be given for the purpose.

4.8.1.3 Evidence for the Defence

Sections 243 and 247, Cr.P.C grant the right to the accused to produce witnesses in his/her defence. This right applies equally to cases instituted on a police report and through private complaints. After the examination and cross-examination of all the prosecution witnesses, i.e. after the completion of the prosecution case, the accused is called upon to enter his/her defence.

Section 254, Cr.P.C. pertains to the trial of summons cases by a magistrate. When there is no admission of guilt by the accused, the magistrate must proceed to hear the case and take evidence adduced by the parties.

Sukanraj v. State of Rajasthan, AIR 1967 Raj 267

The appellant's main claim in this case was that five prosecution witnesses were examined in a particular case (Case No. 9), but copies of their evidence were taken as evidence in another case (Case No. 8). Similarly, 26 witnesses were examined in Case No. 8, but copies of this testimony were used as evidence in Case No. 9. The convictions in both cases relied on evidence which was inadmissible and not recorded in accordance with the provisions of procedures relating to admissibility of evidence. The question that arose for determination before the High Court was whether the procedure adopted by the trial court, of bringing on the record of a criminal case statements of witnesses who were actually examined in another case without giving the accused an opportunity to cross-examine them was an irregularity that could be curable or was it an illegality that vitiated the trial.

The High Court confirmed the defendant's right to cross-examination, explaining that the defendant "must be given all opportunities to defend himself by testing the veracity of the witness through the process of cross-examination."⁴⁵⁷ Denial of this right by interchanging transcripts of evidence was impermissible and such an error could not be cured even by obtaining the defendant's consent to waive his opportunity for cross-examination.⁴⁵⁸ Further, when prosecuting a single defendant being tried for separate offences at separate trials, the prosecution cannot enter witness testimony from one trial into the records of the second trial without re-presenting the witness for cross-examination.⁴⁵⁹

457 1967 Cri. LJ 1702, para 5.

458 *Id.*

459 *Id.*



4.8.2 International Law

The right to examine witnesses is widely recognised in international conventions and jurisprudence. Article 14(3)(e) of the ICCPR states that every criminal defendant shall be entitled, in full equality “to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” This provision interacts with the accused’s right to have adequate time to prepare a defence, affording the accused the right to prepare the examination of prosecution witnesses. Thus, implied in Article 14(3)(e), is the prosecution’s obligation to give the defence adequate advance notice of its witnesses. International law also discourages anonymous witnesses, explaining that testimony from an anonymous witness violates the accused’s right to examine witnesses by depriving the accused of the necessary information to challenge the witness’ reliability.⁴⁶⁰ While anonymous witnesses are not per se forbidden, they are strongly discouraged under international law.⁴⁶¹

4.8.3 Guide for Judicial Enforcement

Court proceedings are not expected to have any element of surprise or entrapment. The police and prosecution are expected to come to trial with a full, well-prepared case which has a good chance of succeeding in proving the accusation. This means that the elements of the crime both the *actus reus* and the *mens rea* must be provable and the evidence they produce must be credible, able to withstand challenge and relevant to prove the charges.

A judge is not merely a passive observer but an alert adjudicator, who is not only umpiring contending parties. He/she is expected to be active in ensuring that justice is upheld. He/she is the jealous guardian of the credibility of the court as well as the procedural niceties that ensure that justice is done as far as it is humanly possible. The judge has complete control over the case and has the powers to intervene in the interests of fairness as well, as to punish, if he/she observes that deliberate efforts are being made to delay or withhold relevant material.

The court has an important role to play in the examination of witnesses. This is the stage at which material evidence is put forth by both parties in support of their cases. To guarantee a fair trial, the court must provide for the possibility of adversarial questioning of witnesses. The right to call witnesses does not mean that an unlimited number of witnesses may be called. The judge must ensure that the witnesses are relevant to the case. The judge must give the accused and his lawyer adequate time to prepare for the questioning of witnesses. He/she must be attentive to apparent deficiencies in the defence lawyer’s or prosecutor’s professional conduct, and where necessary, intervene to ensure the right to a fair trial.

It is the prosecution’s duty to examine witnesses who are essential to the unfolding of the case on which it relies. It is as much the prosecutor’s duty as of the court to ensure that full and material facts are brought on record so that there is no miscarriage of justice. The discharge of this duty should not be affected by the consideration that the material produced may go in favour of the accused. If the court is of the view that the prosecution has failed to examine material witnesses for vexatious purposes, it can draw an adverse inference on the prosecution’s case. In such instances, if the ends of justice require, the court may summon and examine such witnesses by exercising its powers under Section 311, Cr.P.C.

⁴⁶⁰ Windisch, 186 Eur. Ct. H.R. (ser. A) at 11 (1990).

⁴⁶¹ *Doorson v. The Netherlands*, 2 Eur. Ct. H.R. (ser. A) at 470, para 69 (1997).



Exercise of the court's powers to examine witnesses under Section 311, would enable it to deliver a just decision. Section 311 provides that any court may, at any stage of inquiry, trial or other proceedings, summon any person as a witness, examine any person present though not summoned as witness, recall and re-examine any person already examined, and goes on to provide that the court can summon and examine, or recall or re-examine any such person "if his evidence appears to be essential for a just decision of the case."

However, arbitrary use of this power may lead to adverse results for either party. Thus, the power this Section provides must be used judicially and definitely not to fill the lacuna by the prosecution or the defence or to the disadvantage of the accused. The court must ensure that it uses the powers under this Section not to favour the defence or the prosecution, but merely because the court believes that it is necessary under the facts and circumstances of the particular case.

Natasha Singh v. CBI, (2013) 5 SCC 741

In this case, the accused was charged under the Prevention of Corruption Act, 1988 and the IPC. After the examination of all witnesses, the trial court, fixed March 5, 2013 as the date for hearing final arguments. The appellant then filed an application under Section 311, on March 5, 2013 for permission to examine three witnesses. The said application was dismissed by the trial court. A petition filed by the appellant before the High Court challenging the order of the trial court was dismissed by the High Court. Against this an appeal was filed in the Supreme Court. The Court held that before deciding on the rejection of any application under Section 311, it is imperative to determine whether additional evidence is necessary to reach a fair and just decision. An application under Section 311 must not be allowed only for the purpose of filling up a lacuna in the case of the defence or of the prosecution, or if such an allowance works to the disadvantage of the accused or to give an unfair advantage to the opposite party. Further, such additional evidence should not be received if it is seen as a disguise for "retrial." Such a power must be exercised, only if it is likely that the evidence, is germane to the issue involved.

There are frequent occasions where witnesses turn hostile and resile from their earlier statements to the police. There may be several reasons for this. They may be under pressure, threat or inducement. Where eye-witnesses, material witnesses or the victim turns hostile, it is essential for the judge to determine if they have done so under pressure. If it is brought to the court's notice that the witness or victim is being coerced into resiling, it should immediately take note of the fact. It should reprimand the police for failing to protect the person. It can provide them protection while simultaneously proceeding against the persons threatening them.

4.9 Section 313: Opportunity to the Accused to Explain His/Her Case

4.9.1 Domestic Law

This provision is meant to benefit the accused. It provides the accused with the opportunity to personally explain any circumstances appearing in evidence against him/her. The court may put questions to the accused at any stage, without giving any prior warning. The court can also ask questions generally about the case, before the accused is called on for presenting his/her defence and after prosecution witnesses have been examined.⁴⁶²

⁴⁶² Section 313(b), Code of Criminal Procedure, 1973.



The examination under Section 313(1)(a) is discretionary, but that under Section 313(1)(b) is mandatory. The words “shall question him” in Section 313(1)(b) bring out the mandatory nature of this Section and it is the court’s duty to oblige with the same.⁴⁶³

In circumstances where there is great prejudice and disadvantage being caused to the accused, the accused may make an application to the court requesting that he/she may be allowed to answer the questions without physically appearing in court. Such application must be accompanied by an affidavit in which the accused swears to the facts making it difficult to appear in court; an assurance that no prejudice will be caused to him/her by dispensing of his/her physical presence and an undertaking that he/she will not raise a grievance on this issue later on in the trial.⁴⁶⁴

Manner of Questioning

The questions must be put to the accused in a language known to him/her. There must be separate questions for each part of incriminating evidence so the accused has the chance to defend himself/herself against each of them.⁴⁶⁵ The court must keep in mind the circumstances of the accused, and must be careful that the questions posed are capable of being understood. The questions must be such that an ignorant or illiterate person is capable of appreciating and responding to. The questions should not have the character of cross-examination.

Moreover, statements made under Section 313 do not constitute “evidence.” It is merely the accused’s version or explanation.⁴⁶⁶

4.9.2 Guide to Judicial Enforcement

The underlying object of the provision is to provide the accused with the platform to explain circumstances against him/her. This is in consonance with principles of fair trial. Examination under Section 313 is not an empty formality. It is a process which is meant to instil faith in the judiciary. Improper examination of the accused will lead to lapses throughout the trial. If any incriminating evidence is not brought to the notice of the accused, then such evidence cannot be used against him/her as he/she was not given an opportunity to rebut it.

Statements made by the accused or failure of the accused to answer particular questions cannot ease the burden of the prosecution. They cannot ask for a conviction on the basis of these statements and such cannot be a substitute for prosecution evidence.

Every error in complying with this section does not result in the trial being vitiated. It must be shown that an irregularity amounted to injustice.⁴⁶⁷

4.10 Section 319: Power to Proceed against other Persons Appearing to be Guilty of Offence

The purpose of Section 319 is that the case against all the known suspects should be proceeded with expeditiously. For the sake of convenience, it is also required that cognizance against the newly added accused should be taken in the same manner as against the other accused.

⁴⁶³ *Basavaraj R. Patil and Others v. State of Karnataka and Others*, (2000) 8 SCC 740.

⁴⁶⁴ *Keya Makherjee v. Magma Leasing Ltd.*, (2008) 3 SCC 81.

⁴⁶⁵ *Paramjeet Singh @ Pamma v. State of Uttarakhand*, (2010) 10 SCC 439.

⁴⁶⁶ *Devendra Kumar Singla v. Baldev*, 2004 Cri LJ 1774 (SC).

⁴⁶⁷ *Nar Singh v. State of Haryana*, (2015) 1 SCC 496.



4.10.1 Domestic Law

In the course of any inquiry into, or trial of, an offence, if it appears from the evidence that any person not being accused has committed any offence for which such person should be tried together with the accused, the court may proceed against such person for the offence, which he/she appears to have committed.⁴⁶⁸

By virtue of Section 319, Cr.P.C., a person can be summoned and proceeded against when it appears from the evidence that he/she has committed an offence for which a joint trial with other accused is permissible. However, it is the discretion of the court whether joint trial should take place, depending on the circumstances.

Bar of limitation will not apply to this section. A person who has not been charge-sheeted or against whom no complaint has been made can be summoned whether he/she is present in the court or not. However, Section 319 should be read with Section 398, Cr.P.C.. Thus, a person who is already discharged in that case should not be summoned again. However, the court cannot take cognizance of a fresh offence under this Section.⁴⁶⁹

The power of proceeding against an additional accused is only discretionary in nature. Where such person is not attending the court, he/she may be arrested or summoned, as the circumstances of the case may require and if the person is attending the court, although he/she is not under arrest or upon a summons, he/she may be detained by such court for the purpose of the inquiry into, or trial of, the offence which he/she appears to have committed.⁴⁷⁰

A person who is an accused under this Section ought not to be given an opportunity to avail of the remedy of discharge under Section 227 Cr.P.C.⁴⁷¹

4.10.2 Guide to Judicial Enforcement

1. The evidence that is used by the court for this provision, must be the evidence recorded during the trial, not under Sections 161, 164 or 202. The evidence should be complete. It is the judge's discretion to decide if the examination-in-chief is sufficient to establish a *prima facie* case or if cross-examination should also be completed.
2. The court should first issue summons simpliciter, i.e. a bailable warrant, failing which it should issue a non-bailable warrant. Discretionary power to issue a non-bailable warrant has to be exercised sparingly with circumspection and not in a routine manner. The standard of proof employed for summoning a person as an accused under Section 319 is higher than the standard of proof employed for framing a charge against an accused.⁴⁷²
3. Where the court proceeds against any such person, the proceedings with respect to such person shall be commenced afresh, and the witnesses re-heard. Starting a *de novo* trial is absolutely necessary since the rights of the arraigned person are affected. However, the case may proceed as if such person had been an accused person when the court took cognizance of the offence upon which the inquiry or trial was commenced.⁴⁷³ An accused joined under this Section has the right to cross-examination of the witness before framing of charge.

468 Section 319, Cr.P.C.

469 *Kumari Misra v. Chander Roshni Dubey*, 1994 Cri LJ 2157, 2158 (All).

470 Section 319, Cr.P.C.

471 *Jogendra Yadav & others v. State of Bihar*, (2015) 9 SCC 244.

472 *Id.*

473 Section 319, Cr.P.C.



4.11 WITNESS PROTECTION IN INDIA

The Supreme Court has, in several cases, emphasized the need for witness protection and repeatedly called for such programmes and measures to be drawn up by the executive.⁴⁷⁴ According to the guidelines laid down by the Delhi High Court in *Neelam Katara v. Union of India*:

- *In determining whether or not a witness should be provided police protection, the Competent Authority shall take into account the following factors:*
- *The nature of the risk to the security of the witness which may emanate from the accused or his associates;*
- *The nature of the investigation or the criminal case;*
- *The importance of the witness in the matter and the value of the information or evidence given or agreed to be given by the witness;*
- *The cost of providing police protection to the witness.*⁴⁷⁵

The witness protection programme in India is not a very robust one, despite its need being reiterated several times by various fora. Witness protection is traditionally understood very simplistically in the context of travelling allowance and daily expenditure being paid to witnesses for attending court.⁴⁷⁶ This concept has now evolved into the responsibility to create “necessary confidence” in the witnesses to be protected from the wrath of the accused.⁴⁷⁷ The latest development in the area of witness protection is the notification of a Witness Protection Scheme by the Government of Delhi, following the directives of the Delhi High Court.⁴⁷⁸ As per the new scheme, the witnesses have been divided into three categories on the basis of threat perception.⁴⁷⁹ So as to regularise the payment of compensation/ expenditure incurred by the witnesses, the scheme also establishes a “Witness Protection Fund” from which “expenses incurred during the implementation of Witness Protection Order passed by the Competent Authority, shall be met.”⁴⁸⁰ The scheme also affords protection of identity of the witness, if so desired, on the basis of a threat analysis report.⁴⁸¹ The scheme is nuanced in the type of protection that it permits. This includes:

- Ensuring that witness and accused do not come face to face during investigation or trial;
- Monitoring of mail and telephone calls;
- Arrangement with the telephone company to change the witness’s telephone number or assign him or her an unlisted telephone number;
- Installation of security devices in the witness’s home such as security doors, CCTV, alarms, fencing etc;
- Concealment of identity of the witness by referring to him/her with the changed name or alphabet;
- Emergency contact persons for the witness;
- Close protection, regular patrolling around the witness’s house;

474 *Zahira Sheikh v. State of Gujarat* (2006) 3 SCC 374, *National Human Rights Commission v. State of Gujarat*, W.P. (Crl.) 109/2003 decided on May 1, 2009.

475 *Neelam Katara v. Union of India*, ILR (2003) 2 Del 377.

476 14th Report of the Law Commission of India on “Reform of Judicial Administration” (1958).

477 154th Report of the Law Commission of India on “The Code of Criminal Procedure, 1973” (1996).

478 2009 SCC OnLine Del 2304.

479 Clause 3, Delhi Witness Protection Scheme, 2015.

480 Clause 4, Delhi Witness Protection Scheme, 2015.

481 Clause 9, Delhi Witness Protection Scheme, 2015.



- Temporary change of residence to a relative's house or a nearby town;
- Escort to and from the court and provision of government vehicle or a state funded conveyance for the date of hearing;
- Holding of in-camera trials;
- Allowing a support person to remain present during recording of statement and deposition;
- Usage of specially designed vulnerable witness court rooms which have special arrangements like live links, one-way mirrors and screens apart from separate passages for witnesses and accused, with option to modify the image of the face of the witness and to modify the audio feed of the witness' voice, so that he/she is not identifiable;
- Ensuring expeditious recording of deposition during trial on a day-to-day basis without adjournments;
- Awarding periodical financial aids/grants to the witness from the Witness Protection Fund for the purpose of re-location, sustenance or starting new vocation/profession, if desired;
- Any other form of protection measures considered necessary, and specifically, those requested by the witness.⁴⁸²

Cross-examination is one of the most important processes to reveal the facts of the case. However, a judge or magistrate always has the discretion to decide how far a cross-examination may go or for how long it may continue. A fair exercise of this discretion is generally not questioned by an appellate court. An irrelevant cross-examination not only adds to the cost of litigation but is also a waste of public and court time.

During the cross-examination of witnesses, it is the judge's duty to ensure that unnecessary, prolonged cross-examination, which may easily be indicative of harassment, is disallowed. The judge should bear in mind that the atmosphere in a court is intimidating for most people. In view of this, questions may need to be repeated or rephrased, as some people may take longer to absorb, comprehend and recall information. The judge should also stress the need to keep questions simple, as some people may find it difficult to understand and answer them. The judge or magistrate should ensure that questions posed by the prosecution or defence are non-threatening as some people may respond to rough questioning either by excessive aggression or by trying to placate the questioner.

With regard to sexual offences, the Supreme Court has stressed that trial courts should deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied on without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which could lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.⁴⁸³

⁴⁸² Clause 3, Delhi Witness Protection Scheme, 2015.

⁴⁸³ *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384, para 22.



4.12 Examination of Child Witnesses under Protection of Children from Sexual Offences Act, 2012 (POCSO)

Under POCSO, there are special provisions with regard to the examination of a child. The Act mandates that the counsel appearing for the accused shall communicate the questions to be put to the child to the judge who shall in turn put those questions to the child.⁴⁸⁴ Further, the judge has a duty to ensure that the child is not called repeatedly to testify in court.⁴⁸⁵ The judge is required to prohibit aggressive questioning or character assassination of the child and ensure that the dignity of the child is maintained at all times during the trial.⁴⁸⁶ Moreover, the judge is required to ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his/her advocate.⁴⁸⁷

The Delhi High Court in *Virender v. State of NCT of Delhi*,⁴⁸⁸ laid down various guidelines to be followed when the victim or witness is a child. These guidelines⁴⁸⁹ were laid down for compliance by the police, magistrates (while recording the statement of the child), doctors, and the court (while recording evidence). On the basis of these guidelines, the High Court of Delhi has established Vulnerable Witness Deposition Complexes for recording of evidence/statements of vulnerable witnesses, including children. The Supreme Court in *State of Maharashtra v. Bandu @ Daulat*,⁴⁹⁰ took note of, and approved these guidelines.

4.13 PLEA BARGAINING

Plea bargaining, in India, refers to the practice of reduction of sentence for an undertrial prisoner in exchange for admission of his guilt. It was added to the Cr.P.C by an amendment in the year 2005. An entire Chapter (XXI A) was inserted with the heading “Plea Bargaining” and the relevant provisions range from Sections 265 A to L.⁴⁹¹

4.13 1 Domestic Law

Plea bargaining is allowed for offences other than an offence for which the punishment is death or imprisonment for life or imprisonment for a term exceeding seven years. It does not apply where such offence affects the socio-economic condition of the country (offences determined to be so by the central government from time to time, by law) or has been committed against a woman, or a child below the age of fourteen years. As per Section 265-L, Cr.P.C., the provisions for plea bargaining also do not apply to children.

A person accused of an offence may file an application for plea bargaining in the court in which such offence is pending for trial. The application may be filed at any stage of the process. After accepting the application of the accused for plea bargaining, the accused is examined in camera, without the presence of the other party so as to make sure that the decision of making a guilty plea is being taken by the accused voluntarily. Thereafter, time is provided to both parties to

484 Section 33(2), POCSO Act.

485 Section 33 (5), POCSO Act.

486 Section 33 (6), POCSO Act.

487 Section 36, POCSO Act.

488 CrI.A. No. 121/08, Judgment Dated 29.09.2009

489 Available at: http://delhihighcourt.nic.in/writereaddata/upload/Notification/NotificationFile_LCWCD2X4.PDF

490 (2018) 11 SCC 163.

491 Chapter XXI, Code of Criminal Procedure, 1973.



“work out a mutually satisfactory disposition of the case.” The Cr.P.C. also grants immunity to the accused that the statements or facts stated in an application for plea bargaining, is not to be used for any other purpose.⁴⁹² Section 265-I allows for the period of detention undergone by the accused to be set off against the sentence of imprisonment.

Interestingly, time and again in the chapter, the duty of ensuring that the process remains completely voluntary is cast upon the court, at all stages. A report of the mutual settlement is to be given to the court, which awards the compensation in accordance with it. The judgment is to be delivered in an open court. The judgment is final and no appeal is allowed from it except by way of filing a Special Leave Petition to the Supreme Court under Article 136 of the Constitution or by filing a writ petition under Articles 226 or 227 of the Constitution. Hence, it is especially important for the court to play an active role in ensuring that the process is completely voluntary. Involuntariness does not imply only coercion, threats, etc. A person agreeing to plead guilty only for the reason that he/she is unable to satisfy conditions of bail also signifies involuntariness. In this context, it is important for the judge to find out the actual reasons for the accused seeking to use plea bargaining. Suitable steps under the law may be then taken by the judge to ensure that the accused is not pleading guilty for extraneous reasons, and also to ensure that innocent persons are not pleading guilty just to ensure their release from jail.

4.13.2 Guide for Judicial Enforcement

One of the areas of concern for judges is to determine whether an accused person is pleading guilty voluntarily, despite the skewed proportion of bargaining powers of the parties. In doing so, the judge is required to have an understanding of the nature and background of the accused person, factors behind his/her motivations for pleading guilty and other circumstances of relevance. Even though the law does not envisage such a deep involvement of the court, nevertheless, the same is imperative for dispensation of justice.

4.14 Right to the Free Assistance of an Interpreter

All rights to an adequate defence are useless even if the accused is present, if he/she lacks the ability to understand the charges brought against him, follow the proceedings or communicate his/her own defence, because he/she does not understand the proceedings or cannot understand the language. In criminal trials where the consequences of a negative decision carry enormous weight on the future of the individual, it is imperative that the accused can follow the proceedings in detail and can express himself/herself in a language he/she fully understands, failing which he/she will be unable to defend himself.

4.14.1 Domestic Law

4.14.1.1 Procedure Where the Accused Does Not Understand the Proceedings

Throughout the Cr.P.C there are various sections designed with the aim of ensuring that the accused has every opportunity to mount an effective defence.

As far as language is concerned, Section 279 of the Cr.P.C. requires that “whenever any evidence is given in a language not understood by the accused, and he is

⁴⁹² Sulabh Rewari, Tanya Aggarwal, “Wanna make a deal? The introduction of plea bargaining in India”, (2006) 2 SCC (Cri) J-12.



present in court in person, it shall be interpreted to him in open court in a language understood by him.” In addition, Section 318 of the Cr.P.C recognises that there may be categories of persons who “cannot be made to understand the proceedings.” However, in such cases the Section allows the judge to proceed with the trial even if the accused cannot understand the proceedings, but, if such proceedings result in conviction, the judge must forward the proceedings to the High Court along with a report of the circumstances of the case, and the High Court will then pass such order as it thinks fit.

These provisions are of course intended to “safeguard” defendants’ interests.⁴⁹³ Denial of this right to an interpreter violates Article 21 of the Constitution and requires a re-trial.

K.M. Subramani v. State of Andhra Pradesh, 2003 Cri. LJ 3526

Subramani, a Tamilian, was charged with causing the death of two motor scooter riders when he allegedly drove his lorry negligently through a traffic intersection. The court conducted his entire trial in Telugu, which Subramani did not understand. The court did not provide Mr. Subramani with a Tamil interpretation so that he could comprehend the proceedings. The judge even read the charges against him and questioned Subramani in Telugu. Subramani was convicted and sentenced to one year of rigorous imprisonment and Rs. 5,000 fine. The trial judge did not obey the procedure laid down in Section 318 and failed to submit the matter to the High Court for review.

On appeal, the High Court found that the trial court indulged in a “short cut” by not providing the defendant with the procedural rights that Sections 318 and 279 afforded him.

Characterising the trial court’s decision to conduct the proceedings in a language not understood by the accused or provide a translation as a “miscarriage of justice,” the High Court ordered a fresh trial.

4.14.2 International Law

Similar to the domestic right, Article 14(3)(f) of the ICCPR mandates that a criminal defendant is entitled to “the free assistance of an interpreter if he cannot understand or speak the language used in court.”⁴⁹⁴

4.14.3 Guide for Judicial Enforcement

The Supreme Court has held that where the accused is well represented, but does not understand any of the languages being spoken in court, lack of interpretation is a mere irregularity which will not result in a re-trial.⁴⁹⁵ However, it should be kept in mind that court proceedings are not meant to be understood by the officers of the court speaking in a language not understood by the accused. He/she is expected to understand the proceedings. If he/she cannot comprehend the submissions of his/her own counsel or rebuttals and evidence and is unable to make a judgment about what course his/her lawyer should take, or to instruct

⁴⁹³ *K.M. Subramani v. State of AP*, 2003 Cri. LJ 3526, para 8.

⁴⁹⁴ “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby”: Article 14(3)(f), ICCPR.

⁴⁹⁵ *Shivanarayan Kabra v. State of Madras*, AIR 1967 SC 986.



him/her or make interventions as he/she may wish to, then, as an individual undertrial he/she remains outside the proceedings as if in absentia and this will prejudice his/her defence.

Although the language of Section 318 does not specifically demand that the judge assists the accused in understanding the proceedings, he/she has the power to use his/her discretion to do everything necessary to make the proceedings meaningful to the accused and exhaust all avenues of endeavour before proceeding with the trial *after* coming to a conclusion that the accused “cannot be made to understand the proceedings.” It is essential for a judge to indicate in the report of the trial to the higher court, his/her own endeavours to make the accused understand as well as all the circumstances that forced him/her to the conclusion that the accused “cannot be made to understand the proceedings.” The judge always has a discretion to do more than the words of the law provide – for example to ensure that the accused has a counsel who can assist him/her understand the gravity of his/her situation or a psychological evaluation to understand his/her ability to comprehend – but not less.

Lay persons coming to court as accused, victims or witnesses are frequently disadvantaged by virtue of being intimidated, afraid and unfamiliar with court technicalities and legal jargon. They are doubly disadvantaged if they do not understand the language of the place.

Inability to comprehend the language is a major hurdle to assuring a fair trial. In the lower courts, business can be conducted in the dominant language of the state, but the records may be kept in English. Prosecutors and defence lawyers may, during the course of the same case, have varying degrees of fluency in the language spoken at court. Frequently, the accused, victims and witnesses have absolutely no knowledge of English, in which the court records what is said during the trial. This means that these people are not in a position to challenge the record of the proceedings as written.

Proceedings that are not understood are no proceedings at all. Judges therefore have a heavy burden to discharge. They are duty bound to ensure that at every stage of the proceedings all persons involved understand both the oral, written and forensic evidence and arguments. Judges must do all things – such as asking questions and reading back statements – to ensure that trials run their course in accordance with the highest standards.

Busy judges may find this an onerous task. In the *Subramani* case quoted above, the High Court, on studying how the case was handled, remarked that in several cases, trial courts do not follow the procedure prescribed under the statute. When a person is being prosecuted and his individual liberty is at stake, it is the bounden duty of the magistrate to explain everything in the language understood by the accused, so that he can raise his pleas and provide proper assistance and guidance to his counsel. This exhortation can extend to explaining all relevant matters as will aid the accused in his understanding.

Provisions under the POCSO Act, 2012

Under the POCSO Act, there are provisions that allow for a translator or an interpreter at the time when statements are recorded. Section 26 (2) lays down that wherever necessary, the magistrate or the police officer, as the case may be, may take the assistance of a translator or an interpreter, having such qualifications,



experience and on payment of such fees as may be prescribed, while recording the statement of the child. Section 26(3) states that the magistrate or the police officer, may seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, in case of a child having a mental or physical disability, to record the statement of the child, on payment of such fees as may be prescribed.

4.15 *Ne Bis In Idem*: Prohibition of Double Jeopardy

The principle of double jeopardy or ne bis in idem, whereby nobody can be prosecuted or punished twice for the same offence protects against three distinct abuses:

- A second prosecution for the same offence after final acquittal;
- A second prosecution for the same offence after final conviction; and
- Multiple punishments for the same offence.

All developed legal systems designed to respect fundamental rights recognise the prohibition on double jeopardy. The prohibition on double jeopardy was designed to protect individuals from being subject to the hazards of trial and possible conviction more than once for an alleged offence.⁴⁹⁶ First, double jeopardy protects individuals from State harassment and second it protects an innocent defendant from repeated trials for the same offence that increases the risk that the court may convict. Explaining both the underlying policies behind double jeopardy, Justice Black of the US Supreme Court stated, “the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.”⁴⁹⁷

On the rationale that no one should be harassed or put at risk repeatedly or punished twice for the same offence a person brought to trial has a complete defence in his/her earlier formal acquittal or conviction. Technically expressed, he/she can take the plea of *autrefois acquit* or *autrefois convict*.

4.15.1 Domestic Law

4.15.1.1 Guarantee Against Double Jeopardy

The principle of double jeopardy is safeguarded under Article 20(2) of the Constitution which prohibits prosecuting or punishing a person for the *same offence* more than once. The Cr.P.C. and the General Clauses Act,⁴⁹⁸ support this prohibition on double jeopardy. The rule of *autrefois acquit* and *autrefois convict* is applicable to all criminal trials.

496 George Cooner Thomas, *Double Jeopardy: The History, the Law* 50 (1998).

497 *Green v. US*, 355 US 184, 187-88 (1957).

498 “Where an act or omission constitutes an offence under two or more enactments then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.” Section 26, General Clauses Act, 1987.



4.15.1.2 A Person Once Convicted or Acquitted Cannot Be Tried for the Same Offence

Section 300 of the Cr.P.C states that a person acquitted or convicted by a competent court may not be tried again for the same offence.⁴⁹⁹ However, the dismissal of a complaint or the discharge of the accused does not represent an acquittal for the purposes of Section 300, and a court can retry the accused when the previous proceeding resulted in either dismissal or discharge.⁵⁰⁰

Section 300 also provides three exceptions to the double jeopardy prohibition and provides several illustrations:

- A person convicted of an offence based on conduct that causes consequences which constitute a different offence from the offence which he/she was convicted, may later be tried for the different offence, if the consequences had not happened or were unknown to the court at the time when he/she was convicted.⁵⁰¹ For example, if a person is convicted of attempt to murder, but the victim dies at some later moment as a direct consequence of the acts of the perpetrator, he/she can be tried for murder even though he/she has been tried for attempted murder on the same set of facts.
- A person acquitted or convicted of any offence may be subsequently charged with, and tried for, any other offence arising out of the same set of facts, if the court that first tried him/her was not competent to try the offence with which he/she is subsequently charged.⁵⁰² For example, a person, after acquittal for theft in a magistrate's court, can be tried for attempted murder in the Court of Sessions, even though the alleged crime arose from the same set of facts.
- A person discharged by the court pursuant to Section 258⁵⁰³ of the Cr.P.C cannot be tried again for the same offence unless the court that issued his/her discharge consents to the subsequent trial.⁵⁰⁴ This exception is in line with the rationale that safeguards an individual from State harassment. The prosecution, having failed to get the case heard in one court, cannot begin the matter in another court or geographic jurisdiction without getting the consent of the original court.

499 Section 300(1), Cr.P.C.

500 Explanation to Section 300.

501 Section 300(3), Cr.P.C.

502 Section 300(4), Cr.P.C.

503 Section 258 grants the judge the power to stop criminal proceedings at any time and discharge the accused.

504 Section 300(5), Cr.P.C.



Mukhtiar Ahmed Ansari v. State (NCT of Delhi), (2005) 5 SCC 258

The appellant, Mukhtiar Ahmed Ansari, was convicted by the Sessions Court for offences under the Arms Act and TADA. The prosecution's case was that the appellant was found in possession of several firearms and ammunition. He was arrested and the weapons were seized. Since they were recovered in a notified area, the accused was booked under the Arms Act as well as under TADA. The investigation also revealed that the accused was the mastermind and gang leader in a kidnapping for ransom case. Ansari was also separately charge-sheeted for kidnapping.

The designated trial court held that the TADA provisions were not attracted. The case against Ansari remained only under Sections of the Arms Act and the case was transferred to a Metropolitan Magistrate for trial. The prosecution, however, appealed against the order of the designated court before the Supreme Court. The Supreme Court held that the TADA provisions were attracted and the designated court was not justified in observing that TADA was not applicable. The designated court was directed to decide the case on merits. The case thus returned to the designated court from the Court of the Metropolitan Magistrate. The charge was thereafter framed against the accused under the TADA sections, and the trial proceeded.

At this stage the appellant along with two others charged in the kidnapping case were acquitted by the trial court.

The designated court considered the evidence of prosecution and defence witnesses, and the documents produced by the parties, and held that the appellant-accused was guilty of possessing firearms and ammunitions without a licence, and he had thereby committed an offence punishable under the Arms Act. He was also held guilty of consciously possessing firearms and ammunitions without a licence in the "notified area" punishable under Section 5 of TADA, and was accordingly convicted. Despite an acquittal in the kidnapping case, the court took on record evidence from that case.

Ansari appealed against the conviction order and sentence passed by the designated court before the Supreme Court. The Supreme Court held that since the appellant-accused was acquitted by a competent court from the kidnapping charge, the designated court was unjustified in proceeding on allegations of that case. Once the appellant-accused was acquitted in the kidnapping case, the doctrine of *autrefois acquit* was attracted. The proceedings of the designated court were held as vitiated and the conviction was set aside.

4.15.2 International Law

As mentioned above, all legal systems designed to protect fundamental rights prohibit double jeopardy. International conventions are also in tune with India's prohibition on double jeopardy. The ICCPR states: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."⁵⁰⁵

505 Article 14(7), ICCPR.



4.15.3 Guide for Judicial Enforcement

The Supreme Court in *State of Andhra Pradesh v. Kokkiliagada Meerayya and Anr.*⁵⁰⁶ laid down the following important principles that emerge from Section 300 of the Cr.P.C:

1. *An order of conviction or acquittal with respect to any offence constituted by any act against or in favour of a person does not prohibit a trial for any other offence constituted by the same act which he/she may have committed, if the court trying the first offence was incompetent to try that other offence.*
2. *If in the course of a transaction, several offences are committed for which separate charges could have been made, but if a person is tried with respect to some of those charges, and not all, and is acquitted or convicted, he/she may be tried for any distinct offence for which at the former trial a separate charge may have been, but was not, made.*
3. *If a person is convicted of any offence constituted by any act, and that act together with the consequences which resulted, therefrom constituted a different offence, he/she may again be tried for that different offence arising out of the consequences, if the consequences had not happened or were not known to the court to have happened, at the time when he/she was convicted.*
4. *A person who has once been tried by a court of competent jurisdiction for an offence and has been either convicted or acquitted shall not be tried for the same offence or for any other offence arising out of the same facts, for which a different charge from the one made against him/her might have been made or for which he/she might have been convicted under the Cr.P.C.*⁵⁰⁷

As Article 20(2) only applies to second prosecutions and punishments for the *same offence*, it is imperative that judges distinguish between same offences and distinct ones. Offences are the same if they are “identical in sense, import, and content,” while offences are distinct if they are “made up of different ingredients.”⁵⁰⁸ Offences comprising different ingredients remain distinct even if the factual allegations relating to each offence are substantially the same.⁵⁰⁹ For example, in *State of Rajasthan v. Hat Singh and Ors.*,⁵¹⁰ the Supreme Court held that Section 5 and Section 6 of the Rajasthan Sati Ordinance, 1987, defined distinct offences. While Section 5 punished the criminal intention to glorify sati, Section 6 punished the criminal intention to violate or defy prohibitory orders against sati issued by the lawful authority. Thus, although the same set of facts gave rise to both offences, the court found the two offences distinct because the offences comprised of different ingredients and were not identical in sense.⁵¹¹

506 (1969) 1 SCC 161.

507 *Id.*, para 6.

508 *State of Rajasthan v. Hat Singh and Ors.*, AIR 2003 SC 791, para 15.

509 *Id.*

510 AIR 2003 SC 791

511 *Id.*, paras. 17-18.



4.16 Right to a Reasoned Judgment and Availability of Judgment

A reasoned judgment given in public, increases confidence in the judiciary, and is considered to be an essential part of the fair administration of justice and a vital parameter of democratic functioning. The right to a reasoned judgment is regarded as part of the elements of natural justice and as a crucial element that grounds an effective appeal.

Any decision of the court has to serve justice. For a trial to be considered fair, a judgment must satisfy three elements: it must be public, it must be available to the accused and it must be reasoned. The judgment must be valid in terms of the Constitution and the statutes guiding it. The justification for the reasoning in the judgment must be based on the law and cannot appear to be attributed to personal opinions, prejudices or the socialisation of the judge.

4.16.1 Domestic Law

Domestic law mirrors international norms and incorporates all the three elements mentioned above as necessary before a judgment can pass the test of fairness.

Since the *Maneka Gandhi* case⁵¹² made it explicit, it is well established that there is the constitutional guarantee that no person shall be deprived of life or personal liberty except according “to procedure established by law.” This implies that the procedure itself has to be fair and reasonable with all the attributes that these words carry as discussed above. This requirement of fairness applies to judgments as much as to every other stage of trial or court proceedings.

In relation to judgments, it is only reasonable that they must be widely known, made available to those affected by the consequences, and certainly to the accused. Fairness in a judgment naturally requires that the judgment be based on reason. A reasoned judgment is one that takes account of all the facts, evidence and arguments to arrive at logical surmises and minimises perceptions of bias, arbitrariness or prejudice. Without a reasoned judgment being made available within a reasonable time, the right to appeal is compromised. The reasoning in a judgment ensures that every argument available on which to base an appeal is available. This applies as much to the prosecution’s right to appeal, but is particularly emphasized in the case where a person is to be deprived of his/her liberty or be subject to punishment. The sentencing order of the court should also be reasoned, mentioning reasons behind the sentence imposed on the accused.

4.16.1.1 Judgment Must be Known

Sections 353 and 354 of the Cr.P.C together deal with the substantive and procedural requirements that a judge must follow. The requirements in relation to how a judgment is delivered, its language and content are not just matters of form, but are also elements of fairness and must be fully met. Section 353 mandates that the judgment must be delivered in an open court; be read out in court; or the operative part of the judgment read out and the substance of the judgment explained.

⁵¹² *Maneka Gandhi v. Union of India (UOI) and Anr.*, (1978) 1 SCC 248.



4.16.1.2 Judgment to be Made Available

The accused cannot effectively exercise his/her right to appeal without a copy of the judgment of the trial court being available to him/her. Article 21 is violated if the court fails to provide the accused with a copy of the judgment in time to file an appeal.⁵¹³ Section 363 of the Cr.P.C. confirms the accused's right to a copy of his/her judgment. Where the accused is sentenced to imprisonment, the court must immediately furnish a copy of the judgment to him/her free of cost. On an application for a certified copy of the judgment, and if necessary, a translation, the court must furnish the same without delay to the accused. In judgments imposing the death sentence, the court must immediately furnish the accused with a certified copy of the judgment regardless of whether the accused has requested it or not. Any person affected by the judgment or order passed by a criminal court can also make an application for a copy of the same.⁵¹⁴

M.H. Hoskot v. State of Maharashtra, AIR 1978 SC 1548

M.H. Hoskot was convicted and sentenced to three years imprisonment in 1973 for scheming to counterfeit academic degrees. Hoskot was not able to lodge an appeal till he had served his entire sentence due to, what the court termed, a possible "disturbing episode of prison injustice." Evidence suggested that the court did not provide Hoskot with a copy of the judgment that was delivered in 1973 till 1978. When addressing this possible delay in receiving his judgment, the Supreme Court held that Article 21 requires prompt delivery of a copy of the judgment to the convict. The Court remarked that a prisoner's right to appeal is in peril if jail officials are allowed to claim they have delivered copies of the judgment without obtaining the prisoner's signature confirming receipt of the copy. The Court also commented that it is dubious to allow jailors to deliver copies of the judgment, and expressed hope that Jail Manuals be updated to mandate punishment of jailors who fail to obtain proof of delivery.

4.16.1.3 Reasoned Judgment

Section 354(1)(b) mandates that judgments must be reasoned. Every judgment must thus contain the points for determination, the decision and the reasons for such decision.

4.16.2 International Law

Although not expressly mentioned in the ICCPR, the right to a reasoned judgment, the right to a public judgment and the availability of that judgment is inherent in the provisions regarding a fair trial. The ICCPR's requirements provide that everyone convicted of a crime has the right to appeal his/her conviction and sentence.⁵¹⁵ The Human Rights Committee has examined numerous complaints concerning the failure of courts to issue a reasoned judgment. These complaints have been examined under Articles 14(3)(c) and (5) of the ICCPR which are to be read together to show that the right to review a conviction and sentence must be made available without delay. According to the Committee's case law under Article 14(5): "A convicted person is entitled to have *within reasonable time, access to written judgments, duly reasoned for all instances of appeal* in order to enjoy the

513 *M.H. Hoskot v. State of Maharashtra*, AIR 1978 SC 1548, para 14

514 Section 363 (5), Cr.P.C.

515 Article 14(5), ICCPR.



effective exercise of the right to have a conviction and sentence reviewed by a higher tribunal according to law.”⁵¹⁶

The reasons for the judgment form the substratum of every decision and their factual accuracy is a guarantee that the court has applied its mind to the evidence in the case. Providing reasons for a decision is so important that it was suggested by a Committee on Ministers’ Powers (United Kingdom) that the communications by a court to the parties concerned, giving the reasons for its decisions should be considered as a principle of natural justice. A judgment is considered incomplete unless the reasons for accepting one view and rejecting the other are clearly mentioned in it.

4.16.3 Guide for Judicial Enforcement

A reasoned judgment is an essential element for maintenance of the rule of law. It provides all parties involved in the case with a sense of fairness and enhances the public’s confidence in the judicial process. Reasoned judgments create a consistency across the court system and an internal logic to the jurisprudence that is created. It reduces chance litigation, and therefore, the urge to come frequently to court on all points, declines. Consistently well-reasoned judgments also make it clear to the police and prosecution what standards of evidence and proof the court will entertain, and assists in more thorough case preparation, and marshalling of evidence before the matter comes to trial. Reasoned judgments remove doubts and suspicions of bias and preconceived notions.

The intention of Sections 353 and 354 of the Cr.P.C is that judges and magistrates direct their attention to every material question of fact or law arising in the case. A judgment must be able to indicate that the court has taken account of the witness testimony, expert opinion, forensic evidence, and assessed the weight of arguments on both sides.

In a judgment, the judge should deal with the following issues:

1. Points for Determination:

- a) The points for determination should be formulated: The judge must be able to show that the entire material which has a bearing on these points has been fully considered and *judicially* determined.
- b) Evidence under each of the points has been analysed and discussed.
- c) Before taking a decision on that point, a judgment ought to set forth what the evidence is, and not merely the conclusion.
- d) Where more than one accused is involved, the court has to deal with the case of *each* accused separately and has to ascertain and give a finding as regards the acts proved to have been committed by each of the accused.
- e) The judgment must be able to indicate the logic behind the decision as it applies to every individual defendant. The line of reasoning for each individual, even where there has been a common purpose in the offences, must relate to the actions and state of mind of only *that* individual and must be able to ground the determination of that sole individual’s innocence or guilt as an inevitable conclusion. There can be no assumption of guilt through mere association alone.

⁵¹⁶ Communication No. 320/1988 *V Francis v. Jamaica* (views adopted on 24 March 1993), in UN document, GAOR, A/48/40 (Volume II), p. 66, para 12.2.



2. Appreciation of Evidence:

- a) Every judgment of a court must be based on legal evidence, substantiated by law and logic without having to resort to speculations or inferences.
- b) Appreciation of evidence must be rational and dispassionate. The judge should analyse the evidence with care and thoroughness, discuss the evidence and give reasons as to why he/she believes or disbelieves a particular witness.
- c) The judgment must contain an intelligent discussion on the case with a summary of the evidence of material witnesses.
- d) It is the duty of the judge to state fairly the evidence both for and against each of the accused persons. A judge should never attempt to make the case against an accused stronger than the evidence justifies in order to ensure that his/her judgment is upheld in appeal.
- e) In every criminal trial, the degree of probability of guilt has to be much higher, and if there is the slightest reasonable or probable chance of innocence of an accused the benefit must be given to him/her.
- f) Since it is necessary for the prosecution to show that guilt has been established beyond reasonable doubt, the court must be careful that its reasoning examines alternative explanations and scenarios provided by the defence and indicate how they have been rejected or why they must be upheld.
- g) It is not sufficient for a judgment to merely say that the court did not believe a particular witness, or that in the opinion of the court a particular witness' demeanour did or did not create confidence. Those are just statements of conclusion. The court must give a reasonable explanation as to why it has so concluded. By indicating how it has in fact arrived at its belief or disbelief on every material piece of evidence, the court provides the reasoned judgment that is sought and moves its judgment out of the realm of opinion, bias or prejudice. Clarity of thinking, being succinct and simplicity of language are vital to this process.
- h) A conviction cannot be based on the testimony of witnesses whose examination in chief stands contradicted by their cross-examination.

3. Offences and Charges to be Clearly Specified:

- a) The offence for which the accused is convicted must be specified in the judgment with acute precision.
- b) A judge should record findings whether of conviction or acquittal of all the charges under which the prisoner is committed for trial and must indicate which ones stand proved and which cannot be sustained.
- c) When an offender is convicted for two or more offences and the court awards more than one sentence, the judgment must state with respect to which offence these sentences are imposed, i.e. a separate sentence must be passed for each offence proved.

4. Sentence:

- a) The sentence is the operative and integral part of a judgment ending in a conviction.



- b) In the operative part of the judgment, the court should state the conviction and the sentence in a specific and clear manner.
- c) Reasons should be provided justifying the quantum of sentence imposed.
- d) The court should also consider making a compensation order where the offence has resulted in personal loss or damage. Sections 357 and 357A of the Cr.P.C should be used for this purpose.

4.17 Rights of Victims

4.17.1 Access to Justice and Fairness

A basic right that is recognised in many jurisdictions is the right to participate in criminal proceedings which includes the right to be impleaded, right to know, right to be heard and so on. Thus, there must be justice and fairness during the trial while providing for the victim. The following rights are recognised by the Cr.P.C.:

- i. Right to a fair trial – one without intimidation: As discussed earlier, *in camera* trials may be ordered to safeguard the rights of the victim, to ensure protection and to prevent re-victimisation. Cases may be transferred to other states to ensure a fair trial.⁵¹⁷
- ii. Sec. 439(2), Cr.P.C. provides the victim with a say in bail proceedings in certain circumstances.⁵¹⁸ Courts have recognised the right of the complainant or any aggrieved party to move the High Court or Court of Sessions for cancellation of a bail grant to the accused.⁵¹⁹
- iii. Sec. 12(1) of the Legal Services Authorities Act, 1987 provides for legal aid to victims of crime.
- iv. A victim has post-trial rights as well, which allow for a right to appeal against an order of acquittal and this can be preferred by the complainant.⁵²⁰

4.17.2 Compensation for Victims of Crime

A major case that emphasized a paradigm shift in the approach towards victims of crimes who were held to be entitled to reparation, restitution or compensation for loss of injury suffered by them was that of *Ankush Shivaji Gaikwad*.⁵²¹ It was held that courts should consider the making of a compensation order in every case where death, injury, loss or damage occurs and, where the victim is not compensated, there existed a duty on the court to give reasons for not doing so.⁵²² Additionally, Section 357A has been added to the Cr.P.C. which provides for victim compensation schemes.

4.17.2.1 Section 357, Cr.P.C.

The importance of compensation to victim assistance has been recognised and stressed.⁵²³ Section 357 emphasises the importance of restorative justice. The section provides for the award of expenses or compensation to the victim.

517 *G. X. Francis v. Banke Bihari Singh* AIR 1958 SC 309, *Zahira Habibullah Sheikh v. State of Gujarat*, (2004) 4 SCC 158.

518 See also: Section 439(1A), requiring the presence of the accused/informant for certain offences of rape.

519 *Puran v. Rambilas*, (2001) 6 SCC 338; *R. Rathinam v. State*, (2000) 2 SCC 391; *UPSC v. S. Papaiah*, (1997) 7 SCC 614.

520 *Arunachalam v. P.S.R. Sadhanantham*, (1979) 2 SCC 297.

521 (2013) 6 SCC 770.

522 *Delhi Domestic Working Women's Forum v. Union of India and Ors.*, (1995) 1 SCC 14.

523 See: Law Commission of India, 156th Report (1997); *Ankush Shivaji Gaikwad v. State of Maharashtra*, (2013) 6 SCC 770.



Section 357(1)

Section 357(1), Cr.P.C empowers a court to order payment of compensation in situations where it imposes a sentence of fine or a sentence where fine forms a part. The court may order the whole or part of the fine to be applied in defraying the expenses incurred in prosecution and payment of compensation. However, Section 357(2) provides that the payment shall not be made before the appeal is decided, or the period for filing an appeal has elapsed.

Section 357(3)

Section 357(3) provides for payment of compensation in cases where the fine does not form a part of the sentence.⁵²⁴ It empowers the court to award compensation to victims while convicting the accused person/s.⁵²⁵ The power of the court to award compensation to victims under Section 357 is not ancillary to other sentences but is an addition thereto; thus compensation under Section 357(3) is an additional power.⁵²⁶ It is a measure of responding appropriately to crime as well as of reconciling the victim with the offender. Therefore, all courts are recommended to exercise this power liberally so as to meet the ends of justice in a better way.

Difference between Sections 357(1) and (3)

The primary difference between Sections 357(1) and (3) is that in Section 357(1), the imposition of fine is an essential requirement, while in Section 357(3), even in the absence thereof, the court can direct payment of compensation.⁵²⁷ Further, the amount of compensation that a judge may award under Section 357(1) is limited by the amount of fine he/she is authorised by law to pass, by virtue of Section 29, Cr.P.C. Since compensation awarded under Section 357(3) is not based on imposition of a fine, the court is not bound by Section 29 limitations when exercising its power under Section 357(3).

Capacity to Pay

In awarding compensation, the court has to decide whether the case is a fit one in which compensation has to be awarded. If it is found that compensation should be awarded then the capacity of the accused to pay compensation has to be determined. It is the duty of the court to take into account the nature of the crime, the injury suffered, the justness of the claim for compensation and other relevant circumstances in fixing an amount.⁵²⁸ Thus, the quantum of compensation will depend on the facts and circumstances of each case.

4.17.2.2 Section 357A:

Every state government, in co-ordination with the central government, is required to prepare a scheme for providing funds for the purpose of compensation to the victim or his/her dependents who have suffered loss or injury as a result of the crime and who require rehabilitation. Whenever a recommendation is made, the relevant Legal Services Authority is required to decide the quantum of compensation to be awarded under the scheme.⁵²⁹

524 *Sarwan Singh v. State*, AIR 1978 SC 1525.

525 *Hari Singh v. Sukhbir Singh*, (1988) 4 SCC 551.

526 *Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd.*, (2007) 6 SCC 528.

527 *Mangilal v. State*, (2004) 2 SCC 447.

528 *Sarwan Singh v. State*, AIR 1978 SC 1525.

529 Section 357A, Code of Criminal Procedure, 1973.



If at the conclusion of the trial, the trial court is satisfied, that the compensation awarded under Section 357 is not adequate for such rehabilitation, or where the case ends in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.⁵³⁰

Where the State fails to protect the Fundamental Right of the claimant, the victim is entitled to the benefits of the victim compensation scheme under Section 357A in addition to interim compensation.⁵³¹

In *Laxmi v. Union of India*,⁵³² the Supreme Court in the context of acid attacks has laid down that:

- The hospital where the victim of the acid attack is first treated should give a certificate that the individual is a victim of acid attack;
- A uniform compensation of Rs. 3 lakh should be paid by all states/ UTs to acid attack victims; and
- Rs. 1 lakh should be paid immediately within fifteen days and the remaining Rs. 2 lakh should be paid within two months as expeditiously as possible.

4.17. 3 Guide for Judicial Enforcement

The victim is constantly under scrutiny in a system which is not conducive to reward victims in reporting the crime or help improve their experience in fighting for justice. Thus, it is imperative that victims' rights are taken up carefully and followed as closely as possible. Doing this would ensure a fair administration of justice where all the parties are provided assistance.

Victims therefore are entitled to the following:

1. The right to be heard.
2. The right to attend criminal proceedings.
3. The right to a fair trial.
4. The right to a public trial – this adds to the fairness, unless the nature of a trial is such that it needs to be *in camera*, in which case they have the right to a closed trial.
5. The right to represented by a lawyer/advocate.
6. The right to legal aid.
7. The right to compensation (interim or otherwise).
8. The right to prefer an appeal.

530 Section 357A, Code of Criminal Procedure, 1973.

531 Gang-Rape Ordered by Village Kangaroo Court in W.B. In re, (2014) 4 SCC 786.

532 (2014) 4 SCC 427.





CONCLUSION

As private individuals living in a democracy, we are allowed to be what we are and act as we wish within the limits of the law. That is the beauty of a constitutional democracy.

But being a judge is a high and honourable calling. As an adjudicator of the law, a judge has to be something more than his/ her natural self. A judge has to leave behind the private person, with preferences and with prejudices, and become a fair and neutral umpire. He/she has to become a guardian of the law; the guardian of people's rights; the guardian of justice; and the guardian of fairness and equity. That is a heavy responsibility.

The judge has not only the fate of the individuals accused, witnesses, defendants and prosecution in his/her hands, he/she has the task of upholding the Constitution and the law, safeguarding the justice system, guaranteeing a fair trial, making real change in the lives of the country's citizens, and upholding the promise of the Constitution and the statutes that have been created.

The judge may not be able to control what the police, lawyers and forensic scientists do outside the court. But he/she is the custodian of the judicial process. Once the matter is in the court, the direction of the trial is only in the judge's hands.

This manual has tried to provide a full account of the basic legal rules that regulate a fair trial at the pretrial, investigative and trial stages. Adherence to these rules is a *sine qua non* in a democratic society governed by the rule of law, and, compliance is an indispensable condition for ensuring respect for the rights and freedoms of the individual human being.

For rights to be effectively realised, judges, prosecutors and lawyers have an essential role to play. The police and prosecutorial authorities have a duty under the law to protect these rights, as do the judges, who must at all times be alert to any sign that these have not been respected. It is only when these rights are strictly adhered to and any breaches are checked at the earliest stages, that a judicial system is created where it functions for the ultimate purpose of administering justice fairly and efficiently.

The manual has also shown the indispensable role played by judges and magistrates in the fair administration of justice. The role of both prosecutors and defence lawyers has also been emphasized whenever relevant. The judge is not only responsible for his/her own actions, but to some extent he/she is also responsible for those of prosecutors and defence lawyers. Where the judge has any indication that either the police or the prosecutor has erred in the course of the investigation or criminal inquiry by resorting to unlawful means, or that the defence lawyer has not duly consulted with his or her client, then that judge has a duty to intervene to correct those errors or insufficiencies, as such an action may be essential in order to guarantee a fair hearing.



The rights dealt with in this manual are manifold and it is difficult, or even impossible, to single out some as being more important than others. These rights indeed form a whole, and constitute the foundation on which a society respectful of human rights in general, including the rule of law, is built.

We hope that the manual assists every judge in carrying out his or her role of upholding the fair trial rights as guaranteed by the Constitution and our laws.





CHRI PROGRAMMES

CHRI believes that the Commonwealth and its member countries must be held to high standards and functional mechanisms for accountability and participation. This is essential for human rights, transparent democracies and Sustainable Development Goals (SDGs). CHRI specifically works on strategic initiatives and advocacy on human rights, Access to Justice and Access to Information. It focuses on research, publications, workshops, analysis, mobilisation, dissemination and advocacy and informs the following principal programmes:

1. Access to Justice (ATJ) *

- * **Police Reforms:** In too many countries the police are seen as an oppressive instrument of state rather than as protectors of citizens' rights, leading to widespread rights violations and denial of justice. CHRI promotes systemic reform so that the police act as upholders of the rule of law rather than as enforcers of a regime. CHRI's programme aims at mobilising public support for police reforms and works to strengthen civil society engagement on the issues. In East Africa and Ghana, CHRI examines police accountability and political interference.
- * **Prison Reforms:** CHRI's work in prisons looks at increasing transparency of a traditionally closed system and exposing malpractices. Apart from highlighting failures of the legal system that result in overcrowding and unacceptably long pre-trial detention and prison overstay, we engage in interventions and advocacy for legal aid and policy changes to revive prison oversight systems. Attention to these areas can bring improvements to the administration of prisons and conditions of justice.

2. Access to Information

CHRI is acknowledged as a key organisation working on the promotion of Access to Information. It encourages countries to pass and implement effective Right to Information laws. It routinely assists in the development of legislation and has been particularly successful in promoting Right to Information laws and practices in India, Sri Lanka, Afghanistan, Bangladesh, Ghana, and more recently, Kenya. In Ghana, CHRI is the Secretariat for the RTI civil society coalition. We regularly critique new legislation and intervene to bring best practices into governments and civil society knowledge both at a time when laws are being drafted and when they are first being implemented. We have experience of working in hostile environments as well as culturally varied jurisdictions; these enable us to bring valuable insights into countries seeking to evolve new laws on right to information. In Ghana, for instance, it has been promoting knowledge about the value of Access to Information and to campaign for the introduction of an effective law.

- * South Asia Media Defender's Network (SAMDEN)

CHRI has developed a regional network of media professionals to address the issue of increasing attacks on media workers and pressure on freedom of speech and expression in South Asia, especially in rural areas. This network, the South Asia Media Defenders Network (SAMDEN) recognises that such freedoms are indivisible and know no political boundaries. Anchored by a core group of media professionals who have experienced discrimination and intimidation, SAMDEN is developing an interactive website platform to highlight pressures on media, issues of shrinking media space and press freedom. It is also working to mobilise media so that strength grows through collaboration and numbers. A key area of synergy lies in linking SAMDEN with the Right to Information movements and activists.

3. International Advocacy and Programming

CHRI monitors the compliance of Commonwealth member states with human rights obligations and advocates around human rights exigencies where such obligations are breached. CHRI strategically engages with regional and international bodies including the Commonwealth Secretariat, Ministerial Action Group, the UN and the African Commission for Human and People's Rights. Ongoing strategic initiatives include advocating for and monitoring the Commonwealth reform, reviewing promised by Commonwealth members at the UN Human Rights Council, and the Universal Periodic Review. We advocate for the protection of human rights defenders and civil society spaces and monitor the performance of National Human Rights Institutions in the Commonwealth while pressing for their strengthening.

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(SECOND EDITION)

Maja Daruwala is currently a board member and Senior Advisor at CHRI, particularly focussing on the Access to Justice Programme. She was Director of CHRI for twenty years, until September 2016.

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Maja has lived and worked in India, England, Singapore and Sri Lanka. She has previously been Chair of the Minority Rights Group, UK and a board member of several charitable boards including the Open Society Foundation's Justice Initiative, the International Women's Health Coalition, New York, the International Record Management Trust, UK, Oxfam UK, and the Public Affairs Centre (PAC) Bangalore.

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Mrinal Satish's area of specialization is criminal law. He has been a faculty member at the National Judicial Academy, Bhopal, National Law School of India University, Bangalore and National Law University, Delhi. He has been actively involved in judicial education, and even prior to his appointment as Chairperson, Delhi Judicial Academy, he was often invited to speak on various topics at the National Judicial Academy and State Judicial Academies.

Mrinal Satish has also been involved in various law reform initiatives. He was a part of the research team that assisted the Justice Verma Committee (2013) on amendments to rape laws. He assisted the 20th and 21st Law Commissions on various reports involving issues of criminal law. He has been appointed as an amicus curiae by the Delhi High Court in a number of cases. In 2017, he was appointed as a member of a three-member fact-finding enquiry committee constituted by the Delhi High Court to enquire into an incident of custodial violence in Tihar Jail.



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