

CHRI 2010

# FAIR TRIAL MANUAL

## A HANDBOOK FOR JUDGES AND MAGISTRATES



**Commonwealth Human Rights Initiative**

working for the **practical realisation** of *human rights* in the countries of the Commonwealth

# Commonwealth Human Rights Initiative

The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international non-governmental organisation, mandated to ensure the practical realisation of human rights in the countries of the Commonwealth. In 1987, several Commonwealth professional associations founded CHRI. They believed that while the Commonwealth provided member countries a shared set of values and legal principles from which to work and provided a forum within which to promote human rights, there was little focus on the issues of human rights within the Commonwealth.

The objectives of CHRI are to promote awareness of and adherence to the Commonwealth Harare Principles, the Universal Declaration of Human Rights and other internationally recognised human rights instruments, as well as domestic instruments supporting human rights in Commonwealth member states.

Through its reports and periodic investigations, CHRI continually draws attention to progress and setbacks to human rights in Commonwealth countries. In advocating for approaches and measures to prevent human rights abuses, CHRI addresses the Commonwealth Secretariat, member governments and civil society associations. Through its public education programmes, policy dialogues, comparative research, advocacy and networking, CHRI's approach throughout is to act as a catalyst around its priority issues.

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# **FAIR TRIAL MANUAL**

## A HANDBOOK FOR JUDGES AND MAGISTRATES

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# Acknowledgements

CHRI started its judicial reform programme in collaboration with INTERIGHTS, London in 2001. From holding judicial colloquia with judges across the Commonwealth, we 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 we began a concentrated training and sensitisation programme for district court judges and magistrates on human rights in the administration of justice. A series of workshops were held in Andhra Pradesh particularly between 2006 and 2009.

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

This Fair Trial Manual has been an outcome of several such exchanges which discussed at length the elements of a fair trial, the obstacles to justice and judge's role in addressing inadequate remedies and poor court craft.

The Manual was developed along with International Human Rights Clinic, Cornell Law School. We would particularly like to thank Sital Kalantary, Associate Clinical Professor of Law and Director of the Cornell International Human Rights Clinic who along with CHRI, helped develop the concept and framework for the Manual. Our gratitude also goes to Sheila Chitran and Richard Jamgochian both at the Human Rights Clinic of Cornell who conducted the research and structured the chapters.

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## Foreword

It is an established normative principle, albeit inadequately recognised, that a judge presiding over a trial in a criminal case is not a sovereign functionary condemned to be a mute spectator to the macabre morbidity of the contemporary reality of our criminal justice administration, but must be an active arbiter.

In a useful ready reference, the *Fair Trial Manual: A Handbook for Judges and Magistrates* shows how human rights jurisprudence informs the administration of criminal justice. Building from a raft of policies, practices, procedures and precedents pertaining to fair trial, Navaz Kotwal and Maja Daruwala for CHRI present a balanced, coherent and well synthesised account of the several and continually evolving international human rights standards and guarantees included in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). It points out how these, along with our constitutional values and norms shape our municipal, substantive and adjectival laws including the Indian Penal and Criminal Procedure Codes and the Indian Evidence Act. The Handbook emphasises the critical role and obligation of a judicial officer to ensure a trial is completely fair at all its stages. It draws attention to the constant need for judges to reflect on endemic and occasional prejudices, whether conscious or subliminal, that can or may impact judicial decisions. It assists judicial officers to recognise the existence of such prejudices and deal with them, lest inattention or inadvertence lead to unfair results. The Handbook reiterates the obligation to provide and enable a level playing field to all participants in a trial, such as the disabled and inadequately empowered or represented, not only by treating them on par with the enabled but by addressing the equities that their particularities require. It reaffirms the importance of the proactive role mandated on a judge to ensure adequate and competent representation, to moderate irrelevant, irreverent or excessively vigorous cross-examination, particularly of women, children, witnesses and other vulnerable classes of persons; the essential and deep content of the constitutional guarantee against self-incrimination; and the content and reach of our organic prohibition against *ex-post facto* laws, have all been succinctly dealt with, cross-referenced by binding precedents and overarching norms.

The Chapter on Arrest and Pre-Trial Detention is particularly appropriate in the context of a generally perceived absence of professionalism, neutrality and sensitivity to human rights, in a disturbing percentage of our police force.

Chapter 3 provides a useful ready reckoner, particularly for police officers and the judicial magistracy on the procedural and substantive safeguards that must inform fair trial norms. The oversight function of a Magistrate at all stages of the investigatorial and trial process; the prohibition against torture and cruel, inhuman or degrading treatment or punishment; and the role of the judge to ensure the effectuation of these compelling norms of a civilised community have been ably brought out in Chapter 3.

Chapter 4 coherently outlines the critical role of the judge in the administration of criminal justice and the need to balance the several apparently conflicting yet ultimately harmonious aspects of the judicial function. Delineated in the chapter is: the need for

objectivity and neutrality against the proactive role the judge must play to ensure a just conclusion; the prime importance of transparency of process against the importance of privacy and protection of victims of child abuse or rape, including by rationally exercising the discretion to hold in-camera trials in appropriate cases; the need to maintain the equilibrium of society by being an effective instrument in the dispensation of criminal justice, while not regressing from the non-derogable attribute of being a neutral arbiter in a adversarial process.

Parts 7 and 8 of this chapter provide adequate and ready guidance on the good practices that enable a fair trial in the area of production of witnesses and their examination and on the judicial role to ensure the production of prisoners to the court on the date of trial. The quality and essential content of the judgement and other cognate principles with regard to furnishing a copy of the judgement; the provisions of the Code of Criminal Procedure with regard to available appellate remedies against conviction; and the role of the Appellate Court in the exercise of appellate jurisdiction have been set out in Part 11 of the chapter.

While this is not and does not profess to be a comprehensive or complete treatment of all aspects – substantive, procedural and attitudinal – that should inform a fair trial, the work is nevertheless an essential reference material for judges and also police officers, which provides a daily checklist on rational and civilised practices that should form the basis of the essential sovereign function of criminal justice administration.

While the many pathologies that beset the contemporaneous criminal justice administration in India are outside the scope of this work, the principles and procedures brought out in this publication will assist substantially in elevating the fairness standards of the judicial role in this area.

I commend Navaz Kotwal and Maja Daruwala for bringing out this timely, well researched, documented and edited publication.

8 October 2010



**Justice Goda Raghuram**  
High Court of Andhra Pradesh





# 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 judges to run their courts to the highest standards of probity. They are an aid to objectivity through strict adherence to processual safeguards and are recognised as vital to justice not only *being* done but 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; or their religious or political beliefs; 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 procedural rights regardless of his 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 training 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 practice in the courts they command.



# **Fair Trial Manual**

A Handbook for Judges and Magistrates

## CHAPTER 1

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### General Principles of a Fair Trial Applicable in all Stages



# CHAPTER 1

## General Principles of a Fair Trial Applicable in all Stages

### Introduction

All principles discussed in this chapter are relevant to ensure a fair trial and are required to be upheld by all parties at every stage of the judicial proceedings – the pre-trial, trial and post-trial stages. Illustratively, fair trial norms include the right to be presumed innocent, the right to be defended by a lawyer, the right to be informed of charges. The rules that ensure protection of all parties – defence, prosecution, accused, victim and witnesses – are laid down in the Code of Criminal Procedure and the Evidence Act. The system is not perfect but is designed with the specific idea of creating a level playing field, arriving at the truth and delivering justice, as nearly as it is humanly possible to do.

As the judge has complete control of a case as soon as it comes to court, it is his paramount duty to ensure that fair trial norms that have been assured by the Indian Constitution as well as internationally agreed to 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 all parties before the court.

A trial primarily aimed at ascertaining truth has to be fair to all concerned which includes the accused, the 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 Right to Be Presumed Innocent

*“It is better that ten guilty escape than one innocent suffers.”<sup>1</sup> 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.<sup>2</sup> For example, the sentence served by an innocent person cannot be erased by any subsequent act of annulment.<sup>3</sup> 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.*

<sup>1</sup> Letter from Benjamin Franklin to Benjamin Vaughan, 14 March 1785.

<sup>2</sup> *Kali Ram v State of Himachal Pradesh* 1973 AIR SC 2773.

<sup>3</sup> *Ibid.*, para. 28.

## 1.1.1 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 right of the accused person. The presumption must stand and be the guiding principle right from the moment of suspicion, through investigation, throughout the trial process and till the delivery of the verdict.

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 proving his guilt lies on the prosecution.”<sup>4</sup> 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 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 Evidence Act and the codes of procedure are designed not to favour one party over the other, but to create a balance between all parties, that will eventually help lead as closely as possible to discovering the truth and delivering justice.

Arguments that there is nothing wrong per se in shifting the burden of proof on to the accused, especially where grave offences are involved, have not found favour in our legal system, where the notion of being innocent until proven guilty is considered as important as the liberty of the individual. Shifting the burden would create a presumption of guilt which the individual accused would have to displace. If not the judge would be bound to convict, creating a greater risk of innocent persons being convicted simply because they are without resources to fight their cases well. This is particularly necessary to factor in, in countries such as India, where most of the population is not in a position to mount a serious challenge to the state’s accusations. In addition, the state sets the rules by which the game is to be played, and is better equipped to play the game. Finally, the state has at its disposal various resources for evidence collection and gathering which the individual cannot possibly have.

The state, in the form of its law enforcement agencies and prosecution machinery wields the sword of justice when it acts on behalf 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 assessment of what is brought before him, and active interventions when he suspects or knows of danger to any of these rights by the flouting of these rules.

Over time, the pronouncements of the Supreme Court have consistently reaffirmed that the presumption of innocence is a human right.<sup>5</sup> 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.



<sup>4</sup> William Glanville, *The Proof of Guilt*; edn. 3, Stevens, 1963, pp. 184 -85.

<sup>5</sup> *Narendra Singh and Anr. v State of Madhya Pradesh*, (2004) CrLJ (2842), para. 31.

This presumption of innocence must condition his/her treatment and the procedure of the trial throughout.

The Apex Court in *P.N. Krishna Lal v Government of Kerala*<sup>6</sup> clarified that the principle of presumption of innocence is entrenched in the Indian Constitution, the Universal Declaration of Human Rights and the Civil and Political Rights Convention, to which India is a member, guarantee fundamental freedom and liberty to an accused person. The *procedure prescribed for trial must also stand the test of the rights guaranteed by those fundamental human rights.*<sup>7</sup> 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 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.”

Section 101 of the Indian Evidence Act further reinforces this right, by providing that whoever desires a court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts.<sup>8</sup> Thus, if the state wishes to convict an individual of an alleged crime, the state carries the burden of firmly establishing and proving the defendant’s guilt.

To protect this right to be presumed innocent, Section 161(2) of the Code of Criminal Procedure permits persons questioned by the police to refrain from answering questions which might expose them to criminal penalty.<sup>9</sup> Imprisonment without regard to procedures intended to protect the right to remain silent is unconstitutional under Article 21.

It is often wrongly believed that the burden of proof has been implacably reversed in those cases where state policy has required in introduction of stringent legislation to deal with well-recognised evils, illustratively, dowry killings. Here the statute 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.” Even here, the Law Commission and several Supreme Court cases have 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”, but even this is just a rebuttable presumption and the accused has every right to show that there were other circumstances that displace the prosecution’s case. In the words of the Law Commission: “Under the Section, it is first necessary to prove that such woman has

<sup>6</sup> 1995 Supp(2) SCC 187, para. 23.

<sup>7</sup> Author’s emphasis.

<sup>8</sup> The Indian Evidence Act, 1872, Section 101.

<sup>9</sup> Regarding police questioning: “Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.” Code of Criminal Procedure, 1973, Section 161(2).



been subjected by such person to cruelty or harassment and secondly, such cruelty should have been or in connection with any demand for dowry and thirdly that this must have been soon before her death. If these are proved, the court 'shall presume' the person caused the dowry death. Of course, the words 'shall presume' mean that the court is, in such circumstances, bound to presume that such person had caused the dowry death but still the presumption is rebuttable."

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

**Facts:** 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 some insecticide in kerosene oil either with tea or in water and it was a result of the poisonous insecticide that Sita Ram died. The post-mortem report suspected death 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. However Ram Gopal had not paid him anything but had promised to pay the 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. **Case History:** The prosecution's case relied on the post-mortem chemical analysis of the viscera which showed the presence of an organo-chloro compound. It argued that the deceased had sickened 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. There was no evidence to show that the accused was ever in possession of any organo-chloro compound. 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 other possibilities like 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 in 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 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, as the police had hired this witness to testify. Having found all the prosecution's primary evidence questionable, the Court reversed the conviction, explaining that the prosecution did not rebut the accused's presumption of innocence.

### 1.1.2 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.

In the last five decades, a considerable amount of international law has developed, 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. The rights and dignities contained in the UDHR should be a standard for every nation to follow and achieve.

Although the UDHR is not a legally binding document, it represents the will of the international community that human rights and dignity must be protected. Many of its principles have been turned into binding norms, reflected in specific multilateral covenants and treaties that obligate states to bring their own policy, practice and legal standards into conformity with them.

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 18 experts who meet thrice a year to consider periodic reports submitted by member states on their compliance with the treaty.<sup>10</sup>

<sup>10</sup> 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 states 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 it guarantees. Many of the rights contained in the ICCPR relate to the criminal justice system – whether in relation to the pre-trial, trial or post-trial stage. Many of the safeguards provided in Indian law are also mandated by international law.

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 our legislatures. Nevertheless, judges have often discussed the effect of the international covenants or agreements signed and ratified by India and whether these are enforceable in Indian courts. In relation to human rights norms, our courts have adopted a progressive line and have declared that insofar as the rights declared in such international instruments are consistent with the fundamental rights guaranteed by Part Three of the Constitution, they can be read as facets of, and to elucidate, the content of the fundamental rights guaranteed by our Constitution.<sup>11</sup> 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 Universal Declaration of Human Rights (UDHR) lays down the common standard to be met by all nations. Article 11(1) states: “*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.<sup>12</sup> 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.

### 1.1.3 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.***

Judgements require that in coming to a verdict the Court evidences in its rationale that it: has recognised that the burden of proof lies with the prosecution; has satisfied itself of the degree to which the burden of proof has been shown to be beyond reasonable



<sup>11</sup> *People’s Union for Civil Liberties v. Union of India* (1997) SC 1203 and *Vishakha v State of Rajasthan* (1997) 6 SCC 241.

<sup>12</sup> General Comment No. 13 (Article 14), in *UN Compilation of General Comments*, p. 124.

doubt or been left wanting; indicates the point in the trial when the onus of proof shifted, if at all it did, 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 rests on the prosecution.
- The prosecution must establish guilt beyond reasonable doubt.
- The benefit of 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* stressed the following “five golden principles”<sup>13</sup> 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.” The Court stressed that the circumstances concerned “must or should” and not “may be” 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 this right of the accused person. Their own predilections, the force of prosecutions 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. The objective evidence that is put forward, 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, the judge’s own biases or popular opinion cannot influence the judicial verdict.<sup>14</sup> 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.<sup>15</sup> The decision of the court can only be based on the facts and evidence proved before it.



<sup>13</sup> (1984) 4 SCC 116, para. 153.

<sup>14</sup> *Kali Ram v State of Himachal Pradesh* AIR 1973 SC 2773, para. 27.

<sup>15</sup> *Ibid.*



## Trial by Media

“Trial by media” refers to 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. The media have a right to report topical events, but in recent times the sensational nature and intensity pose a danger of creating exceptional pressures on judges, which they must resist.

A week after the 20 December 2001 attack on Parliament the police went so far as to call a press conference in the course of which the prime accused “incriminated himself” in front of the national media even before the matter went to trial.

Similarly, a co-defendant was initially sentenced to death for his alleged involvement, despite an overwhelming lack of evidence. Large sections of the Indian media portrayed him as a dangerous and trained terrorist. On appeal, the Delhi High Court overturned the conviction and described the prosecution’s case as “at best, absurd and tragic”.

Jayendra Saraswati, head of Kanchi Kamakoti, was accused of killing two mill workers as sacrifice, based solely on newspaper reports. The Andhra Pradesh High Court in *Labour Liberation Front v State of Andhra Pradesh* held that the writ petition filed to force the authorities to investigate relied on incorrect facts that should have been verified. The Court observed that “once an incident involving a prominent person or institution takes place, the media is swinging into action and virtually leaving very little for the prosecution or the Courts...”

## 1.2 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 laws and they must ensure that the rights of all are equally protected.*



## 1.2.1 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.”<sup>16</sup> Article 15 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.”<sup>17</sup>

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.

Equality however, does not always mean the same treatment to everyone, but recognises that there are pertinent differences which require that persons 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. “Sometimes the greatest discrimination can lie in treating things that are different as though they were exactly alike.”<sup>18</sup>

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:<sup>19</sup>

Direct discrimination thus 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



<sup>16</sup> Constitution of India, Article 14.

<sup>17</sup> Constitution of India, Article 15(1).

<sup>18</sup> *Jenness Fortsom* 403 (1971) US 431.

<sup>19</sup> *C-279/93 Finanzamt Köln-Altstadt v Schumacker* (1995) ECR I-225.

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 *Mrs Maneka Gandhi v. Union of India (UOI) and Anr.* that the right to equality articulated in Article 14 not only prohibits the state from discriminatorily applying the law, but also mandates that the law is not applied unreasonably, arbitrarily, fancifully or oppressively.<sup>20</sup> The Court explained that Article 14 interacts with Article 21, thereby making any unreasonable or arbitrary proceeding a violation of Article 21.<sup>21</sup> The Court also characterised the right to equality before the law as a fundamental right, thus attaching to every human being, everywhere, at all times.<sup>22</sup>

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

Mrs. Gandhi had her passport impounded by the Indian Passport Authority pursuant to the Passports Act, 1967. However, in contravention of the Act, the Authority did not provide Mrs. Gandhi with any reason why her passport was impounded, nor did the state permit her a hearing to challenge the decision.

Although the Court disposed the matter without passing any formal judgement due to the Attorney General's subsequent independent efforts to remedy the matter, the Court's opinion noted that the Passport Authority's conduct violated Articles 14 and 21 of the Constitution.

## 1.2.2 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 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."<sup>23</sup>

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

<sup>20</sup> *Mrs. Maneka Gandhi v. Union of India (UOI) and Anr. (1978) 1 SCC 248*, para. 56.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, para. 20.

<sup>23</sup> ICCPR, *supra* note 47, Article 26.



### 1.2.3 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 study all aspects of equality; just a few which district judges and magistrates 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 or in his 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 prejudice often goes unnoticed by the ones holding them and remains unchallenged because it reflects commonly held stereotypes, or is assertive of one’s own group identity, social orientation or personal proclivity. If allowed – however unwittingly – to come into play or go unchecked, it can taint the proceedings and skew outcomes to the disadvantage of one or the 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 that 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 secured.

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

Women, minority communities, Dalits, Scheduled Castes and Scheduled Tribes, and the poor in general, as well as those such 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 witness, victim or accused. 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 these things and remedy them, so that traditional disadvantage does not turn into serious obstacles to achieve fair outcomes. 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, coupled with the low rate of conviction in crimes against women, 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 has absolute control of his 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 captivity 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 rights. Witnesses too, may be looking for assurances of safety from the court. But ultimately, they all rely on the judge on his bench 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 lawyer owes him, or that the prosecution must aid the court in arriving at the truth, or that the judge is not a punishing authority, but an active umpire bound to make sure 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 hauled up before the courts. Initially, even knowing why he 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 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 when breached at the correct stages and when they are expected to be taken account of, they work to ensure fairness. Sloppy procedures lower general standards and create bad practice. Allowing habitual slippage and breaches of safeguards written into law incentivises illegality in policing and poor standards in prosecution and defence. It wastes court time, ensures that the victim is kept away from remedies or the accused is severely prejudiced by overlong 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, wasting taxpayers' money in trials that are bound to fail in the end owing to early infirmities.

This is why the court is expected to inquire and challenge the police in relation to the necessity of an arrest, the fullness of investigations, the rationale for remand and the custodial treatment of the accused. Given the well-known poverty of lawfulness in policing, the judge is required to go beyond merely noting the presence of the accused, to carefully inquire about the presence of ill-treatment, making sure his 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. Nor



are routine questions asked in the presence of the police by a busy judge sufficient fulfilment of his duty to inquire into the custodial situation of the accused.

Similarly, explaining carefully to the accused that he has the right to a competent lawyer of his choice and assisting him in getting one through legal aid if necessary is a vital early part of fulfilling the fairness doctrine. Absence of this knowledge and right in the accused immediately deprives him 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 and 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 pass over dates 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. The judge is the king of his court. 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.

### 1.3 Right to Remain Silent

*It is a generally accepted principle that the suspect/accused cannot be forced to incriminate him/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 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.<sup>24</sup> "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."<sup>25</sup> Second, the right to remain silent safeguards the accused by deterring police coercion and forced statements.<sup>26</sup> Third, by deterring coerced statements, the right to remain silent helps ensure that the statements made by the accused are reliable.<sup>27</sup>*

<sup>24</sup> *Miranda v Arizona*, 384 US 436 (1966).

<sup>25</sup> *Ibid.* See also 8 Wigmore, *Evidence* (1961).

<sup>26</sup> *Miranda*, 384 US 436.

<sup>27</sup> *Ibid.*



## 1.3.1 Domestic Law

### 1.3.1.1 Protection in Respect of 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.”

### 1.3.1.2 Examination of Witnesses by Police

Section 161(2) of the Code of Criminal Procedure 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 to a criminal charge or to a penalty or forfeiture”.

### 1.3.1.3 Further Statements of the Accused to the Court

The Code of Criminal Procedure, Section 313 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.”

### 1.3.1.4 The Accused is a Competent Witness for the Defence

During a trial, the accused can be arraigned as a witness for the defence but cannot be called on to give evidence except at their own request.<sup>28</sup> If the accused chooses not to give evidence, the court cannot draw any adverse presumption against him.<sup>29</sup> Additionally, the accused can choose not to answer questions put to them by the court.<sup>30</sup> 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 them to disclose or withhold any matter within their knowledge.<sup>31</sup>

Thus Sections 161, 313, 315 and 316 of the Code 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”<sup>32</sup> 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 will “prevent police interrogations

<sup>28</sup> Code of Criminal Procedure, 1973, Section 315.

<sup>29</sup> Ibid.

<sup>30</sup> Code of Criminal Procedure, 1973, Section 313.

<sup>31</sup> Code of Criminal Procedure, 1973, Section 316.

<sup>32</sup> *Nandini Satpathy v P.L. Dani* AIR 1978 SC 1025, para. 46.





from devolving into an antagonistic inquisition”.<sup>33</sup> The Court has also said that no adverse inference against the accused can be drawn because he refuses to answer.

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

Ms 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, 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 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. It is this wide armour that must be kept in mind.

### 1.3.2 International Law

Similar to domestic law, ICCPR Article 14(3)(g) guarantees the right of the accused “not to be compelled to testify against himself or to confess guilt”.<sup>34</sup> This protection is also to be found in the UN Body of Principles for the Protection of All Persons and under the Rome Statute of the International Criminal Court.

### 1.3.3 Guide for Judicial Enforcement

The right to silence has various facets. One is that the burden is on the state, or rather the prosecution, to prove that the accused is guilty. Another is that an accused



<sup>33</sup> Ibid., para. 45.

<sup>34</sup> ICCPR, *supra* note 47, Article 14 (3)(g).

is presumed to be innocent till he is proved guilty. The third is the right of the accused against self-incrimination, namely, the right to be silent and that he cannot be compelled to incriminate himself. There are also exceptions to the rule. An accused can be compelled to submit to investigation by allowing his photographs to be taken, voice recorded, blood sample tested, hair or other bodily material used for DNA testing, etc.

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?<sup>35</sup>**

- Individuals formally charged of an offence.
- Suspects who have been accused of an offence.
  - The scope and nature of the inspector’s inquiry must indicate that an accusation has been made.
  - The right thus does not apply merely during the beginning of the general investigatory stage.
- The person must have been accused before he is asked to make a statement. It is not sufficient that he became an 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). 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 in respect of an offence before an officer competent to investigate it, or when a complaint is made relating to the commission of an offence



<sup>35</sup> Satpathy, para. 50.

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 Apply?<sup>36</sup>

- An accused has the right of silence only for confessions or statements, the answer to which would incriminate the accused. Remanding the accused to custody for securing recovery under Section 27 of the Evidence Act is violative of the right to silence.
- The right would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against the accused.
- 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 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 imminently threatens 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 which 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) At What Stage Does the Right to Silence Apply?<sup>37</sup>

- 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 pre-court, police and custodial interrogations and other elements of the investigation process that might compel incriminating information.



<sup>36</sup> Ibid., paras. 57-61.

<sup>37</sup> Ibid., para. 55.

**(4) What is Compulsion?<sup>38</sup>**

- Duress:
  - Statements obtained through physical threats or violence. It also includes threatening, beating or imprisonment of any family member of the accused.
  - Statements obtained through psychological torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidating methods.
- 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 was in police custody he 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.<sup>39</sup> However, 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.

Courts must be especially aware that many accused, including indigents and illiterates, can often be confused or tense by the police process, and thus unable to protect themselves against overbearing questioning.<sup>40</sup> 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.<sup>41</sup>

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.<sup>42</sup>

<sup>38</sup> Ibid., paras. 68-69.

<sup>39</sup> Ibid., para. 74.

<sup>40</sup> *Satpathy*, para. 5.

<sup>41</sup> Ibid., para. 69.

<sup>42</sup> Ibid., para. 62.



## Narco Analysis

Narco Analysis, polygraph and brain mapping tests have been hotly contested legal issues in India. Various High Courts have given conflicting rulings on these issues. It is no longer so. The Supreme Court has now held that these tests cannot be administered on any accused without their 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 in this regard but has held them as binding.

The Supreme Court in *Selvi and others v State of Karnataka*<sup>43</sup> 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* judgement. 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.



<sup>43</sup> AIR 2010 SC 1974.

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 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.

## 1.4 *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.*

### 1.4.1 Domestic Law

#### 1.4.1.1 Protection Against *Ex-Post Facto* Law

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.”<sup>44</sup> 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.<sup>45</sup> So for example, when a newly enacted sentencing guideline calls



<sup>44</sup> Constitution of India, Article 21.

<sup>45</sup> *Rao Shiv Bahadur Singh v State of Vindhya Pradesh* AIR 1953 SC 394, para. 11.

for harsher penalties for the same crime, the court cannot apply these newer penalties to crimes committed before they entered into force.<sup>46</sup> However, courts can still apply repealed criminal statutes if the accused committed the crimes prior to such statute's repeal.<sup>47</sup> Illustratively, persons charged under the Terrorism and Disruptive Activities Act (TADA) and Prevention of Terrorism Act (POTA) continue to languish in jail even though the laws have been repealed, and they will be tried and sentenced under those laws. Courts can as well, apply a repealed statute to crimes committed after to the repeal if by trial time a new statute is in force that revives the earlier statute's rule.<sup>48</sup>

***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**

Defendant Chatterjee 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.

Chatterjee was fined Rs. 50,000, for accepting Rs. 47,550 from the government as compensation for damages that he falsely claimed the government inflicted on his property. He claimed 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 Chatterjee'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).



<sup>46</sup> *Kedar Nath Bajoria v West Bengal* AIR 1953 SC 404.

<sup>47</sup> *G.P. Nayyar v State (Delhi Administration)* AIR 1979 SC 602.

<sup>48</sup> *Ibid.*, para. 13.

## 1.4.2 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 espousing this principle, several international criminal statutes have adopted non-retroactivity, including the Rome Statute of the International Criminal Court.<sup>49</sup>

## 1.4.3 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*.<sup>50</sup>



<sup>49</sup> Rome Statute of the International Criminal Court, Art. 22, UN Doc. A/CONF. 183/9 (17 July 1998).

<sup>50</sup> *Bahatur*, para. 13.



CHAPTER 2

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Arrest and Pre-trial Detention



# CHAPTER 2

## Arrest and Pre-trial Detention

### Introduction

This chapter reviews the basic legal rules governing the practice of arrest and pre-trial 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 pre-trial procedures or fair trial should be compromised at any stage of operations in dealing with detainees even under special laws. The Supreme Court has only recently reiterated: "...courts which are empowered to issue prerogative writs have therefore, to be extremely cautious in examining the manner in which a detention order is passed in respect of an individual so that his right to personal liberty and individual freedom is not arbitrarily taken away from him even temporarily without following the procedure prescribed by law".<sup>1</sup> In the particular matter under scrutiny, the Supreme Court refused to overturn the High Court's decision to quash the detention on the discovery 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 Code of Criminal Procedure, the Indian Penal Code and the Indian Evidence Act cannot operate *de hors* or outside the fundamental rights given in 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 the court 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 will be evaluated. The quality of a trial will be 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 without fear or favour. From this comes the old saying that justice must not only be done but be seen to be done.

Everywhere, the treatment of suspects, accused and detainees is governed by the need for fairness. Just as the notion prevails that the punishment must fit the crime the laws governing the administration of justice are designed both substantively and procedurally to balance the interests of all: the state and the individual, the accused and the victim, the prosecution and 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, obligation and responsibilities on the other;

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<sup>1</sup> *The Hindu*, Friday, 19 September 2008, quoting Kabir J.

of weighing and balancing the rights, liberties and privileges of the single and those of individuals collectively.<sup>2</sup> The judge is the custodian of all this.

The Third Report of the National Police Commission (NPC) refers to the quality of arrests by the police and complains that the power of arrest is one of the chief sources of corruption within the police force. The report suggested 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. 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.”<sup>3</sup> In saying this, the Court was filling the word “lawful” with meaning. Put another way, the Court was saying 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 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 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 their 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 powers under the criminal code.

## 2.1 Right to Freedom from Arbitrary Arrest and Detention

*Freedom from arbitrary arrest and detention means that no one may be deprived of his or 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.*



<sup>2</sup> *Joginder Kumar v State of UP* AIR 1994 SC 1349, para. 9.

<sup>3</sup> *Ibid.*, para. 25.

## 2.1.1 Domestic Law

Police and Magistrates' powers of arrest are clearly laid out in the Code of Criminal Procedure. This creates two types of offences – cognisable and non-cognisable. Cognisable offences are of a more serious nature.<sup>4</sup> Non-cognisable offences are of a somewhat less serious nature, where the apprehension that the accused may commit more offences and pose an instantaneous danger to society is not so high.<sup>5</sup> Where the person is suspected of committing a cognisable offence, and in certain specified circumstances, the police are empowered to carry out an arrest without a warrant from a Judicial Magistrate.<sup>6</sup> In other instances (non-cognisable offences), arrests can only be carried out after obtaining a warrant from a Magistrate. The implication of this distinction is that in some matters, a judicial mind must be applied before an arrest can be justified, while in others, the police have the discretion to arrest. However, it is equally necessary for the arresting authority to apply its mind.

There is a common misconception – both within the public and the police – that the latter have unlimited powers to arrest. But the power to arrest is conditioned by the limitations mentioned above and those placed on it by the procedures for arrest. Repeated disregard of these procedures has led to concern about the numbers and reasonableness of arrests and to repeated Supreme Court pronouncements and statutory amendments giving content to the freedom from arbitrary arrest, by carefully detailing every step of the procedure.

Despite these extensive safeguards, the practice of arrest and detention without reasonable cause is widespread and remains more the rule rather than the exception. The 177th Report of the Law Commission laments the fact that there are no easily available remedies to the victims of abuse of power or procedure and therefore it is doubly essential for judges to ensure that existing legal rules are strictly adhered to.

### 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”.<sup>7</sup>

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;<sup>8</sup> the right to consult and be represented by a legal practitioner of choice;<sup>9</sup> and the right to be produced before a Magistrate within twenty-

<sup>4</sup> For instance, the First Schedule of the Code of Criminal Procedure, 1973 lists murder, rape, robbery, voluntarily causing grievous hurt, waging or attempting to wage war or abetting the waging of war against the Government of India as cognisable offences.

<sup>5</sup> For instance, the First Schedule of the Code of Criminal Procedure, 1973 lists defamation, committing forgery, criminal intimidation, bigamy as non-cognisable offences.

<sup>6</sup> Code of Criminal Procedure, 1973, Sections 41, 42, 151.

<sup>7</sup> Constitution of India, Article 21.

<sup>8</sup> Constitution of India, Article 22(1).

<sup>9</sup> Ibid.



four hours of arrest and not to be detained beyond twenty-four hours without the approval of a Magistrate.<sup>10</sup> 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.

### 2.1.1.2 Magistrate's Powers of Arrest

A Magistrate can arrest or order another to arrest:

- A person within the Magistrate's own jurisdiction who commits a crime in his presence;<sup>11</sup> or
- Through the issue of a warrant of arrest.

### 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 in *only* the following circumstances:<sup>12</sup>

- The person has been "concerned in a cognisable offence, or against whom a reasonable complaint has been made,...credible information has been received, or a reasonable suspicion exists".<sup>13</sup>
- The person has "any implement of house-breaking" in his/her possession without a lawful excuse.<sup>14</sup>
- A person is declared a proclaimed offender under the Code of Criminal Procedure or by State Order.<sup>15</sup>
- Anything that an officer reasonably suspects is stolen property in the possession of an individual whom the officer reasonably suspects to have committed an offence related to that property.<sup>16</sup>
- A person attempts to escape from legal custody or obstructs a police officer in the execution of his/her duty.<sup>17</sup>
- A person is reasonably suspected of deserting the armed forces.<sup>18</sup>
- Any situation involving a released convict breaching specific rules laid out in the Code of Criminal Procedure.<sup>19</sup>
- An 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.<sup>20</sup>
- Finally, any officer in charge of a police station may arrest, or have arrested, any person whom the officer in charge reasonably believes is concealing himself/herself with the purpose of committing an offence, or if that person is a habitual offender.<sup>21</sup>

<sup>10</sup> 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.

<sup>11</sup> Code of Criminal Procedure, 1973, Section 44.

<sup>12</sup> Code of Criminal Procedure, 1973, Section 41.

<sup>13</sup> Ibid., Section 41(1)(a).

<sup>14</sup> Ibid., Section 41(1)(b). The burden of proving the existence of an excuse rests with the accused.

<sup>15</sup> Ibid., Section 41(1)(c).

<sup>16</sup> Ibid., Section 41(1)(d).

<sup>17</sup> Ibid., Section 41(1)(e).

<sup>18</sup> Ibid., Section 41(1)(f).

<sup>19</sup> Ibid., Section 41(1)(g). See Section 365(5) for the specific rules.

<sup>20</sup> Ibid., Section 41(1)(h).

<sup>21</sup> Ibid., Sections 41(2); 109; 110.



A police officer may also arrest a person who has committed or is accused of committing a non-cognisable 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.<sup>22</sup> When the officer obtains the necessary information, the person must be released with a bond.<sup>23</sup>

A subordinate without the power of arrest may also make an arrest provided he/she has written authorisation from a superior, naming the accused and conveys the authorisation and grounds to the person being arrested.<sup>24</sup>

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.<sup>25</sup> Police officers have the power to pursue a person to any place in India in order to affect an arrest,<sup>26</sup> but must not use more restraints than are necessary to make the arrest or prevent escape.<sup>27</sup>

#### 2.1.1.4 Procedure for Arrest

The Code of Criminal Procedure sets out specific statutory requisites that police officers<sup>28</sup> must follow when making an arrest.

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.<sup>29</sup> The arresting officer may use all means necessary to effect the arrest of a person who forcibly resists or attempts to evade arrest.<sup>30</sup> In the course of making an arrest, the police have no power to cause the death of a person who is not accused of an offence punishable by death or life imprisonment.<sup>31</sup>

Every officer or other person arresting any person without a warrant shall immediately inform the arrested person of the full particulars of the offence for which he/she is arrested or other grounds for such arrest.<sup>32</sup>

Where a police officer arrests any person without warrant, other than a person accused of a non-bailable offence, he shall inform the person that he is entitled to be released on bail and that he may arrange for sureties.<sup>33</sup>

<sup>22</sup> Code of Criminal Procedure, 1973, Section 42(1).

<sup>23</sup> Ibid., Section 42(2).

<sup>24</sup> Ibid., Section 55(1).

<sup>25</sup> Ibid.

<sup>26</sup> Ibid., Section 48.

<sup>27</sup> Ibid., Section 49.

<sup>28</sup> Ibid., Section 43. A private person may arrest or cause a police officer to arrest any person who commits a non-bailable, cognisable offence in the private person’s presence. The suspect must be turned over to the police as quickly as possible. If the police officer finds grounds to arrest the suspect without a warrant, then the officer should re-arrest the suspect. If there is not sufficient reason to believe that the suspect committed an offence, then the police must immediately release the suspect from custody.

<sup>29</sup> Ibid., Section 46(1).

<sup>30</sup> Ibid., Section 46(2).

<sup>31</sup> Ibid., Section 46(3).

<sup>32</sup> Ibid., Section 50 cl. (1).

<sup>33</sup> Ibid., Section 50(2).



Every police officer making an arrest is obliged to give information regarding the arrest and place where the arrested person is held to any of his friends, relatives or any other person nominated by him.<sup>34</sup> 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.<sup>35</sup>

The officer shall also inform the arrested person of these rights as soon as he is brought to the police station.<sup>36</sup> An entry mentioning who has been informed must be recorded in a book maintained at the police station.<sup>37</sup>

The arresting officer may search the arrested person and seize any articles, except for the clothes he is wearing<sup>38</sup> and provide the arrested person with a receipt for any seized possessions.<sup>39</sup> All offensive weapons seized must be delivered to the court.<sup>40</sup>

If the person arrested is a female, the searching police officer must also be a female and perform the search “with strict regard to decency”.<sup>41</sup>

Women are specially protected from being arrested between sunset and sunrise, except in exceptional circumstances when prior permission must be obtained from a Judicial Magistrate.<sup>42</sup>

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 “as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose”.<sup>43</sup>

Reaffirming that the individual’s rights at the time of arrest are inherent in the Constitution and require to be scrupulously protected, the Supreme Court has further elaborated a very detailed protocol which guards against arbitrary detention.<sup>44</sup> The police are legally bound to observe this protocol and any deviation makes the officer liable for contempt of court proceedings. It is the Magistrate who is the key gateway protector of these rights.

Police personnel making an arrest must wear accurate and visible identification tags showing their name and designation.

<sup>34</sup> Ibid., Section 50(A)(1).

<sup>35</sup> *D.K. Basu v State of West Bengal* AIR 1997 SC 610.

<sup>36</sup> Code of Criminal Procedure, 1973, Section 50(A)(2).

<sup>37</sup> Code of Criminal Procedure, 1973, Section 50(A)(3).

<sup>38</sup> Ibid., Section 51(1).

<sup>39</sup> Ibid.

<sup>40</sup> Ibid., Section 52.

<sup>41</sup> Ibid., Section 51(2).

<sup>42</sup> Code of Criminal Procedure, 1973, Section 46(4).

<sup>43</sup> Ibid., Section 53(1).

<sup>44</sup> *D.K. Basu v State of West Bengal* AIR 1997 SC 610.



They must prepare a memo of arrest stating the time and place of arrest, to be countersigned by either a family member of the arrested person or a respectable resident of the locality where the arrest is made.

Within twelve hours of the arrest, the police officer making the arrest should intimate the police control room at the district headquarters about the arrest and the place of detention of the arrestee. This information should be displayed on a conspicuous notice board at the control room.

Taking account of the frequency of ill-treatment and custodial violence, the Supreme Court has also laid down that:

The arrested person should, where he so requests, be examined at the time of his arrest and major and minor injuries, if any, present on the body, must be recorded at that time. The “Inspection Memo” must be signed by the arrestee as well as the police officer making the arrest and a copy provided to the arrestee.

The arrested person should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by the Director, Health Services of the concerned state or union territory. The Director, Health Services should prepare such a panel for all *tehsils* and districts.

#### *Joginder Kumar v State of UP AIR 1994 SC 1349*

Joginder Kumar, a young lawyer was detained for five days without due process of law in an undisclosed location. He was called to the office of the Senior Superintendent of Police (SSP) for “some questioning”. He was assured that he would be released the next day. The next day he was held back for “further inquiries”. When his family went to the police station on the third day, they found that he had been taken to an undisclosed location.

His family had to file a habeas corpus petition in the Supreme Court to discover his whereabouts. The Court issued notices to the state and to the SSP to immediately produce Joginder Kumar and give reasons why he was detained for five days without following the due process.

Rejecting the police version that Joginder Kumar was cooperating with them out of his own free will, the Court said: “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; on weighing and balancing the rights of the single individual and those of individuals collectively....”

Stressing the importance of balancing the interests of society with the liberties of the individual, the Supreme Court of India held that a police officer “must be able to justify the arrest apart from his power to do so”. It went on to declare that “a person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting





the arrest that such arrest is necessary and justified.” The Supreme Court then went on to specify three requirements to ensure the protection of every individual’s constitutional rights:

1. If an arrested person so wishes, he/she may inform a person of his/her choosing of the fact of her arrest and her location;
2. A police officer must inform an arrested person of his/her right to inform a person of her choosing of her arrest; and
3. Officials must keep a record of the arrested person’s request and to whom it was made.

### *Madhu Limaye and Ors. v Respondent* AIR 1969 SC 1014

The petitioner, a member of the Lok Sabha, and several others were arrested at the Lakhisarai railway station in Bihar for allegedly defying an order under Section 144 of the Code.<sup>45</sup> The arrest took place on 6 November 1968 but the FIR was lodged only on 19 November. The petitioner sent a habeas corpus petition in the form of a letter to the Supreme Court on the date of his arrest. He stated that he and his companions had not been informed about the reasons or grounds for arrest. It appeared that the petitioner and his companions were produced before a Sub-Divisional Magistrate (SDM) on 6 November itself. Since they refused to pay bail bonds the SDM remanded them to judicial custody till 20 November.

The Supreme Court directed the production of the petitioner who appeared and argued the case in person. Apart from submitting that the arrests were illegal in as much as they had been effected by police officers for offences which were non-cognisable, Limaye contended that there was a violation of Article 22(1) of the Constitution. Both these contentions were accepted by the Court and the petitioner and his companions were ordered to be released. In examining the scope of Article 22(1) the Court held that it “embodies a rule which has always been regarded as vital and fundamental for safeguarding personal liberty in all legal systems where the rule of law prevails”.

## 2.1.2 International Law

Indian law is precisely in line with the international legal standards on pre-trial arrest and detention. The Universal Declaration of Human Rights (UDHR) asserts that “no one shall be subjected to arbitrary arrest, detention, or exile”.<sup>46</sup>



<sup>45</sup> This was under the old Code of Criminal Procedure. 1898.

<sup>46</sup> The Universal Declaration of Human Rights, Articles 3, 9; 10 December 1948, G.A. Res.217 (A)(III).

Article 9(1) of the ICCPR sets forth several provisions that essentially mirror the principles in Indian domestic law.<sup>47</sup> Article 9(1) of the ICCPR reads as follows: “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.”<sup>48</sup> This asserts more or less the same basic principle stated under Indian law.

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 the earliest opportunity to challenge his arrest and detention, prepare his defence, and apply for habeas corpus, or for release on bail as the case may be.

### 2.1.3 Guide for Judicial Enforcement

Any forcible detention of any person by the police, even very temporarily while questioning, amounts to a loss of liberty. Under the Constitution, according to the design of the Code of Criminal Procedure and myriad pronouncements of the superior courts, citizens can be deprived of liberty only in very specific circumstances and after the compulsions of due process have been satisfied. Nevertheless, serious breaches of procedure often stand 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

<sup>47</sup> International Covenant on Civil and Political Rights, Article 9; 16 December 1966, G.A. Res. 2200A (XXI) [hereinafter ICCPR].

1. 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.
2. 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.
3. 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 judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

<sup>48</sup> ICCPR, *supra* note 47, Article 9(2).



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 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 Code of Criminal Procedure and the interpretive judgements 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 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 policeman 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.

## 2.2 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.*

### 2.2.1 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”.<sup>49</sup>

#### 2.2.1.1 Arrested Person to be taken Before a Magistrate or Officer in Charge of a Police Station

The Criminal Procedure Code 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 to a Magistrate or an officer in charge of a police station without undue delay,<sup>50</sup> but no later than 24 hours unless there is a special order by a Magistrate.<sup>51</sup>



<sup>49</sup> Constitution of India, Article 22(2).

<sup>50</sup> Code of Criminal Procedure, 1973, Section 56.

<sup>51</sup> Ibid., Sections 57, 76.

### 2.2.1.2 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 24 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 police officer, if not below the rank of sub-inspector, must transmit a copy of the required diary entries along with the accused to the nearest Magistrate.<sup>52</sup> The Magistrate to whom the accused and the information are forwarded *may* authorise the detention of the accused in the custody he/she deems appropriate for not more than 15 days, whether or not the Magistrate has jurisdiction to try the case.<sup>53</sup>

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.<sup>54</sup> As a safeguard against prolonged detention and violence in custody, no magistrate can authorise detention in any custody unless the accused is produced before him.<sup>55</sup> Where the Magistrate authorises police remand beyond the statutory 24 hours he/she must record the reasons in writing.<sup>56</sup> The copy of this reasoned order must be sent to the Chief Magistrate.<sup>57</sup>

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.<sup>58</sup> 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.<sup>59</sup>

***Chiguluri Krishna Rao, President, the Bezawada Bar Association v Station House Officer, II Town Police Station and Ors. 2006(1) ALT 259***

An advocate was arrested for voluntarily causing hurt to a public servant to deter him from his public duty. It was a bailable offence. However, despite the President of the Bar Association and members offering to stand surety, he was denied bail by the police and then by the Magistrate. In the advocate's application to the High Court the Magistrate, explaining his refusal to grant bail, stated that the arrested person was brought before him at 4 a.m. in the morning. He ordered him to be produced on the next working day as was the practice across the whole state. Owing to intervening holidays, the next working day was at least 48 hours later. In appeal proceedings, the Magistrate also explained, that in any case, even had he granted bail there were no facilities or people at his residence to prepare bail bonds after verification of sureties.

The High Court of Andhra Pradesh held that, *in case of arrest by police, there is no choice for anyone, neither the courts nor the police, but to apply Article 22(1) and (2) in*



*letter and spirit*, which would mean that an arrested person must:

1. Be informed of the reasons for his arrest as soon as possible;
2. Shall not be denied his right to consult a lawyer of his choice;
3. Be brought before a Magistrate within 24 hours, excluding travelling time.

No difficulties that the police or magistracy may face, even the absence of infrastructure, “can be reason for violating the mandate of Article 22 of the Constitution. Absence of requisite infrastructure cannot be a reason for defeating the fundamental rights of the detainees”.

## 2.2.2 International Law

Indian law, 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.<sup>60</sup>

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.”

## 2.2.3 Guide for Judicial Enforcement

### 2.2.3.1 Magistracy to Guard Against Illegal Detentions

Personal liberty is paramount. Any deprivation of this, however short or temporary, has to be justified. 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 Criminal Procedure Code regarding bringing an accused before a Magistrate within 24 hours. The police officer, who fails to comply with this rule, is guilty of the offence of illegal detention/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 before him, the Magistrate must assure himself/herself that all the documents which must accompany the accused are presented to him. These include the first information report, the arrest memo, the inspection memo, the medical examination certificate, and the case diary along with the general diary entry number. Later, there are also documents, specifically the case diary, that indicates the pace and

<sup>52</sup> Ibid., Section 167(1).

<sup>53</sup> Ibid., Section 167(2).

<sup>54</sup> Ibid.

<sup>55</sup> Ibid., Section 167(2)(b).

<sup>56</sup> Ibid., Section 167(3).

<sup>57</sup> Ibid., Section 167(4).

<sup>58</sup> Ibid., Section 167(5).

<sup>59</sup> Ibid., Section 167(6).

<sup>60</sup> See for example, *Assanidze v Georgia*, App. No. 71503/01, Eur. Ct. H.R. (2004).



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 brought in because of the large numbers of unjustified arrests that the police make and the rough treatment meted out to suspects. Without all the papers before him 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 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. Such remands are likely to be challenged and set aside.

The law indicates that mere production of documents is not sufficient. 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 when the accused is first produced, 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 can refuse to proceed and remand the accused to judicial custody. 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.

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. He can censure the defence counsel for not protecting his client's interests and admonish all concerned for wasting the court's time. Even a 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 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. And it would increase the pressure to file charge sheets before the 60 or 90-day judicial remand is over.

### 2.2.3.2 The First Remand

Recognising that Magistrates too often mechanically allow remand of the accused under Sections 167 or 309 of the Code, without satisfying themselves that there are



reasonable grounds for such remand, the Bombay High Court, in a circular to all Magistrates, laid down the following guidelines:

1. A remand to police custody of an accused person should not ordinarily be granted unless there is reason to believe that material and valuable information would thereby be obtained, which cannot be obtained except by his remand to police custody.
2. Where a remand is required merely for the purpose of verifying a statement made by the accused, the Magistrate should ordinarily remand the accused person to magisterial custody.
3. If the Magistrate believes that it is not necessary for the purposes of the investigation to remand the accused in police custody, he should place the accused person in magisterial custody. In case he has no jurisdiction to try the offence charged, he should issue orders to forward the accused person to a Magistrate having the jurisdiction.
4. If the Magistrate is of the view that the police not only require more time for their investigation, but that for some good reason, they require the accused person to be present with them during that investigation, the Magistrate may remand him to police custody, but while doing so, he must record the reasons for his order.<sup>61</sup>

The High Court of Andhra Pradesh specifically criticised the common police practice of bringing arrested persons before Magistrates at odd hours at the very end of the mandatory 24-hour period and stressed the importance of following the law both “in letter and spirit”.<sup>62</sup>

The provision inhibiting detention without remand is a healthy one that checks commonly known police abuse of power. It is necessary that Magistrates should always enforce this requirement and where it is found to be disobeyed come down heavily on the police.

### 2.2.3.3 Granting Further Remands

Extra caution should be taken by Magistrates when investigations cannot be completed within the first remand period and further remand is sought by the police. Whenever extension of remand is sought, the Magistrate must note the exact steps in the investigation for which it is so sought. He should also check whether the request was justified by follow up.

Further, the statutory law on granting judicial remand beyond the 15-day period is crystal clear and has no room for exceptions. Proviso (b) of Section 167(2) of the Criminal Procedure Code enjoins a Magistrate as follows: “No Magistrate shall authorise detention in any custody under this Section unless *the accused is produced before him*.”<sup>63</sup> Nothing could be clearer. However, the practice of routinely sending the court information that the accused cannot be brought before it for various reasons, the commonest being non-availability of police escort from jail to court, has become



<sup>61</sup> Bombay High Court Circular Criminal.

<sup>62</sup> *Ibid.*, para. 8.

<sup>63</sup> Author’s emphasis.

widespread across the country. 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 15 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 the 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 judgements of several High Courts. Several judgements decry the fact that the police and prosecution routinely delay adjudication for their own reasons,<sup>64</sup> 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.<sup>65</sup> The circumstances within which it becomes allowable are nowhere satisfactorily explained. Some judgements speak of requiring reasons beyond the control of the police or jail authorities while requiring merely adequate grounds for extending remands in the absence of the accused. The issue of denial of opportunity to the accused to put forward his case and the extension of his custody on the word of executive excuses has not been fully discussed or taken into consideration. Several judgements also indicate that remand extended in the absence of the accused makes the confinement illegal and bail must be granted, while others appear to indicate that the custody is not rendered illegal and that bail need not be granted for that reason alone. This uncertainty has allowed Magistrates to continue with routine mechanical 15-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. 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 15 days are an unacceptable subversion of legislative intent.

## 2.3 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 suborn the process of law or flee from justice.*



<sup>64</sup> *Elumalai v State of Tamil Nadu* (1983) LW (CrI) 121.

<sup>65</sup> *Kurra Dasaratha Ramaiah and Ors. v State of Andhra Pradesh* (1992) CrLJ 3485 (AP-FB).



## 2.3.1 Domestic Law

### 2.3.1.1 Cases Where Bail Can be Taken

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 of the proceedings. Bail will be granted with or without conditions, and on an assurance 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, 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.<sup>66</sup> 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.

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.<sup>67</sup> This refusal will not prejudice the court in calling for the individual to pay the penalty on the bond.<sup>68</sup>

### 2.3.1.2 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 would have served for the offence he has been accused of, if he were found guilty.<sup>69</sup> Here he must be released on bail under a personal bond with or without sureties.<sup>70</sup> 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 charge-sheet has been filed within 90 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 90 days.<sup>71</sup> Similarly, in every other case if ongoing investigations stretch beyond 60 days and no charge sheet has been filed, the accused must be released on bail and cannot be detained beyond 60 days.<sup>72</sup> However, in the latter two circumstances where charge sheets have not been filed within the statutory limits of 90 and 60 days the person has a right to be released on bail but may continue to be detained if he does not furnish bail.<sup>73</sup> Once a bond has been executed, release must be immediate.<sup>74</sup>

<sup>66</sup> Code of Criminal Procedure, 1973, Section 436(1).

<sup>67</sup> *Ibid.*, Section 436(2).

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*, Section 436(A).

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*, Section 167(2)(a)(i).

<sup>72</sup> *Ibid.*, Section 167(2)(a)(ii).

<sup>73</sup> *Ibid.*, explanation to Section 167(1)(a)(i) and (ii).

<sup>74</sup> Code of Criminal Procedure, 1973, Section 442(1).



The law bars the Magistrate from authorising further detention. Such detention would be illegal even if the accused has not moved an application for release under these circumstances, as the provision does not rest on any plea of the accused.<sup>75</sup>

### 2.3.1.3 When Bail May be Taken for Non-Bailable Offences

While bail is the rule, in very serious offences bail should not be granted to the accused where there appear “reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life”,<sup>76</sup> or if the accused has been previously convicted of an offence punishable with death, life imprisonment, or imprisonment for seven years or more; or has been previously convicted on at least two occasions of a cognisable offence punishable with imprisonment for three years or more but not less than seven years.<sup>77</sup> However, in these circumstances, persons below 16 years, women and infirm people may be released on bail. Equally, the court may also release on bail a person accused of a cognisable offence and previously convicted of an offence punishable with death or life imprisonment, if it is satisfied that it is just and proper to do so.<sup>78</sup> However, the court is bound to hear the Public Prosecutor before releasing such a person on bail.<sup>79</sup>

### 2.3.1.4 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 shall not be excessive.<sup>80</sup> Whether a surety is sufficient and appropriate must be arrived at after an inquiry into the circumstances of the arrested person.<sup>81</sup> The Magistrate can ask for affidavits of proofs from the accused person, which will determine his paying capacity and monetary condition.<sup>82</sup> 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.<sup>83</sup> The prosecution’s objections must also be taken into account in arriving at a determination. Superior courts can vary bail amounts or conditions.<sup>84</sup>

### 2.3.1.5 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.<sup>85</sup>

<sup>75</sup> *Natabar Parida v State of Orissa*, 2 (1975) SCC 220.

<sup>76</sup> Code of Criminal Procedure, 1973, Section 437(1)(i).

<sup>77</sup> Code of Criminal Procedure, 1973, Section 437(1)(ii).

<sup>78</sup> *Ibid.*, Provisos to Section 437.

<sup>79</sup> *Ibid.*

<sup>80</sup> Code of Criminal Procedure, 1973, Section 440(1).

<sup>81</sup> *Ibid.*, Section 441(4).

<sup>82</sup> *Motiram v State of Madhya Pradesh* (1978) SC 1594.

<sup>83</sup> *Hussainara Khaton v Home Secretary, Bihar* (1979) SC 1360.

<sup>84</sup> Code of Criminal Procedure, 1973, Section 440(2).

<sup>85</sup> *Ibid.*, Section 443.



### 2.3.1.6 Bond Required from Minor

Minors cannot post bail on their own assurances; bail bonds must be executed by adult sureties.<sup>86</sup>

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 pre-trial detention. This is the larger principle behind bail.

#### *Hussainara Khatoon v State of Bihar (1980) 1 SCC 84*

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 spend 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 pre-trial 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 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 absconding.

#### *Motiram v State of Madhya Pradesh 4 (1978) 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 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.

### 2.3.2 International Law

Article 9(3) of the ICCPR provides that release from detention may be conditioned by guarantees to appear for trial. The Article 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 judgement."<sup>87</sup>

### 2.3.3 Guide for Judicial Enforcement

Indian jurisprudence as stated on 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 to be unaware of their rights or 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 has a right to bail, or that the right is indefeasible in the circumstances mentioned above. Further, the police have a statutory duty at the time of arrest to inform a suspect that he has a right to bail.<sup>88</sup> But this duty is observed mostly in its breach.

The Magistrate too has a duty to inform the arrested person of his right to bail at the very outset, when he 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 charge sheet has been filed within 60 or 90 days, as the case may be. Equally, the court can assure that the counsel is aware of his 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 to by the prosecution, or the police plead lack of



<sup>86</sup> Ibid., Section 448.

<sup>87</sup> ICCPR, *supra* note 47, Article 9 (3).

<sup>88</sup> Code of Criminal Procedure 1973, Section 50(2).

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, and 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 it is to be striven for 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 granting and refusing bail, 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 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, intimidating witnesses and so on.

While a detailed examination of evidence and elaborate documentation of the merits of a case are 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; and
- Whether the sureties are independent, or indemnified by the accused person.<sup>89</sup>

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 his roots in the community and is not likely to abscond, he can safely release the accused on order to appear or on his own recognisance.<sup>90</sup>
- When the accused is too poor to find sureties, there is no point in insisting on his furnishing bail with sureties, as it will only compel him to be in custody with the consequent handicaps in making his defence.<sup>91</sup>
- 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.<sup>92</sup>

<sup>89</sup> *Gudikanti Narasimhalu v Public Prosecutor* (1978) 1 SCC 240.

<sup>90</sup> Report of the Legal Aid Committee appointed by the Government of Gujarat, 1971, p. 185.

<sup>91</sup> Report of the Expert Committee on Legal Aid-Processual Justice to the People, May 1973.

<sup>92</sup> *Natia Jiria v State of Gujarat* 1984 CrLJ 936 (Guj) (FB) - a Full Bench of the Gujarat High Court affirmed the practice of release on personal bonds.



When an accused cannot afford to post bail the following should be considered while releasing him on personal bond:

- Length of residence in the community;
- Employment status, history and financial condition;
- Family ties;
- Reputation and character ;
- Prior criminal record including prior releases on bail;
- Identity of responsible members of the community that would vouch for him;
- Nature of the offence, probability of conviction and risk of non-appearance.

The order that grants – and most particularly when it refuses – bail must indicate that each of these factors has 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.<sup>93</sup>

## 2.4 Right to Legal Counsel

*The right to legal counsel which necessarily includes the right to communicate with counsel is one of the most essential elements of a fair trial. A suspect/accused without counsel is often unaware of all his 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 such information as to how long he may be detained, what are the allegations against him, 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.*

### 2.4.1 Domestic Law

The Constitution provides every arrested person with the right to consult and be defended by a legal practitioner of his choice.<sup>94</sup>

#### 2.4.1.1 Right of Person Against Whom Proceedings Are Instituted to be Defended

The Code of Criminal Procedure provides that any person accused of an offence may of right be defended by a lawyer of his choice.<sup>95</sup>

#### 2.4.1.2 Legal Aid to the Accused at State Expense in Certain Cases

Every court should appoint an attorney to the accused at the expense of the state when he “is not represented by a pleader, and where it appears to the court that the



<sup>93</sup> *Kalyan Chandra Sarkar v Rajesh Ranjan @Pappu Yadav and Anr.* (2005) 2 SCC 42.

<sup>94</sup> Constitution of India, Article 22(1).

<sup>95</sup> Code of Criminal Procedure, 1973, Section 303.

accused has not sufficient means to engage a pleader”.<sup>96</sup> With the approval of the state government, the High Court may fashion the rules that will provide for the mode of selecting lawyers, the “facilities” allowed to the lawyers, and the fee the appointed lawyers are to receive.<sup>97</sup>

The Legal Services Authorities Act, 1987 mandates the setting up of legal aid authorities and committees at the state, district and block (*taluk/tehsil*) levels which are expected 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 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.

The Chief Justice of the state High Court is the patron-in-chief of the State Legal Services Authority, which is chaired by a serving or retired Judge of the High Court. The District and Sessions Judge is the Chair of the District Legal Services Authority while the senior-most judge at the taluk/tehsil level is the Chair of the Taluk/Tehsil Legal Services Committee.

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. It is to safeguard the rights guaranteed to the accused under the Constitution that there is the urgency to provide a legal counsel at state expense to an indigent accused, at the point of arrest.

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.<sup>98</sup> 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.



<sup>96</sup> Ibid., Section 304(1).

<sup>97</sup> Ibid., Section 304(2).

<sup>98</sup> *Sheela Barse v State of Maharashtra* 1983 SCC 96.

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

Several blind prisoners were not provided with legal representation from the time of their initial appearance in front of 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 not merely at the trial stage. It is at this stage that the accused is at highest risk, and thus he is entitled to legal representation.

The Court remarked that it would be unfair to expect an illiterate person to ask for representation because he 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 is entitled to free legal services at the state's expense.

The Court went on to criticise several states for not implementing this rule and disregarding their obligation to provide counsel for indigent defendants despite earlier declarations asking for the same. The Court required every state to make provisions for the grant of free legal services to an accused who is unable to hire a counsel, owing to poverty or indigence.

***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 makes 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".

**2.4.2 International Law**

Indian law is again in line with international standards. 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”.<sup>99</sup>

### 2.4.3 Guide for 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 which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21.<sup>100</sup> The guiding principle is that no accused must go unrepresented and he must be allowed access to a lawyer or provided with a lawyer from the time he comes into contact with the criminal justice system.

In keeping with the rationale in the *Nandini Satpathy* case the Expert Committee on Legal Aid, had in its report to the central government in 1973 recommended the introduction of lawyers at the interrogation stage. This would not only help the poor in securing equal justice under the law but also have a redeeming influence in investigation procedures, which in turn might improve the quality and standards of criminal justice.<sup>101</sup>

During custodial interrogation the Court conditioned the lawyer’s role by clarifying that “he cannot supply answers or whisper hints or otherwise interfere with the course of questioning except to intercept where intimidatory tactics are tried, caution his client where incrimination is attempted, and insist on questions and answers being noted, where objections are not otherwise fully appreciated. He cannot harangue the police but may help his client and complain on his behalf, although his very presence will ordinarily remove the implicit menace of a police station.”<sup>102</sup>

The Court 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.<sup>103</sup> The police must nonetheless warn the suspect about his right to silence against incrimination, record the fact that the suspect was so warned, and if the suspect is literate, obtain a written acknowledgment of the warning.<sup>104</sup>

In the landmark *D.K. Basu* case, amongst the 11 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;

<sup>99</sup> ICCPR, *supra* note 47, Article 14 (3)(d).

<sup>100</sup> *Suk Das v Union Territory of Arunachal Pradesh* (1986) 2 SCC 401.

<sup>101</sup> Report of the Expert Committee on Legal Aid: Processual Justice to the People, p. 76: The report qualified this by saying, “a lawyer may not legally instruct his client to remain totally silent but he may certainly advise him on which questions he may refuse to answer and which aspects of police investigation he need not submit to.”

<sup>102</sup> *Nandini Satpathy*, para. 75.

<sup>103</sup> *Ibid.*, para. 76.

<sup>104</sup> *Ibid.*



- 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 right to free legal services at the state's expense.<sup>105</sup>

In Sheela Barse's case 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 15 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 their desire to have 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 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 interview and meet such lawyers regarding any matter for which he requires legal assistance and such interview should be 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 must also ensure that the lawyer representing the accused has prepared his case and is present to defend his client.



<sup>105</sup> *Khatri (II)*.

**Fair Trial Manual**  
A Handbook for Judges and Magistrates

CHAPTER 3

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From the Investigation to the  
Trial Stage



## CHAPTER 3

# From the Investigation to the Trial Stage

### Introduction

The previous section dealt with 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; and
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 section outlines the basic legal rules governing the investigation of an offence. It specifically examines some of the rights that belong to the accused from 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 pre-trial detention.

In order to assure a fair trial, it is imperative to follow strict procedural safeguards embedded in the Constitution and the Criminal Procedure Code from the moment the police receive information about an offence and initiate criminal investigation to the first production of the accused 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 does jeopardise the possibility of just outcomes. The 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 which is the essence of maintaining the balance between individual liberties and state power, to bring justice to people. It is for this reason that the independence of the judiciary is held 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 deprecations 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 fair trial.

It should be stressed that it is important for a fair trial that judges and magistrates personally examine the evidence brought forth by the prosecution. This does not follow from distrust vis-à-vis the police but it is essential 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 everyday occurrences. This has been repeatedly noted by Law Commission Reports, a slew of Supreme Court decisions and 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, led to increased convictions at court, nor contributed to the public’s perceptions of safety and security. The court turning a blind eye on 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 what has now become famously known as the *D.K. Basu*<sup>1</sup> 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”.



<sup>1</sup> AIR 1997 SC 610, para. 18.

Addressing the competing interests of individual liberty and society's need to police criminals, 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."<sup>2</sup>

A slew of judicial decisions have made it abundantly clear the Article 21 articulates a strict prohibition of torture. Illustratively, in *Francis Coralie Mullin v Administrator, Union Territory of Delhi*,<sup>3</sup> 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."<sup>4</sup> 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."<sup>5</sup>

### 3.1.1.1 Procedural Safeguards Against torture

Section 163 of the Criminal Procedure Code 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,<sup>6</sup> and make an entry of the same in the general diary maintained in every police station,<sup>7</sup> providing the details of the person who is informed.
- Draw up an "Arrest Memo" indicating the date, place and time of arrest; signed by two independent witnesses and countersigned by the arresting officer.<sup>8</sup>
- Draw up an "Inspection Memo" of all major and minor injuries on the body of the arrested person.<sup>9</sup>
- Conduct a medical examination of the arrested person at the time of arrest. This is to be repeated every 48 hours if the arrestee is in police custody.<sup>10</sup>
- It will also be 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.<sup>11</sup>

<sup>2</sup> Ibid., para. 34.

<sup>3</sup> 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.

<sup>4</sup> Ibid., para. 8.

<sup>5</sup> Ibid.

<sup>6</sup> Code of Criminal Procedure, 1973, Section 50(A)(1).

<sup>7</sup> Ibid., Section 50(A)(2).

<sup>8</sup> *D.K. Basu v State of West Bengal*.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Code of Criminal Procedure, 1973, Section 50(A)(4).



- The Magistrate must inform the arrested person, when first produced, about the right to a medical examination and also inquire whether they have any complaints of torture or maltreatment in custody.<sup>12</sup>

These provisions along with the 24-hour production rule and the provisions that say 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.

### 3.1.1.2 Penalty for Torture

The Indian Penal Code makes clear that physical and psychological ill-treatment of the accused by law enforcement officials is impermissible and punishable. Causing of “hurt”<sup>13</sup> or “grievous hurt”<sup>14</sup> by public servants to obtain confessions or to compel restoration of property, carry sentences up to seven and ten years of imprisonment respectively.<sup>15</sup>

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)<sup>16</sup> is punishable by imprisonment for up to one year for the disobedience<sup>17</sup> 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.<sup>18</sup> Moreover, Section 330 of the Indian Penal Code 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 Indian Penal Code,<sup>19</sup> 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.<sup>20</sup> Further, any police officer engaging in torture is liable for civil damages by the victim or victim’s family.<sup>21</sup>

<sup>12</sup> *Sheela Barse v State of Maharashtra* 1983 SCC 96.

<sup>13</sup> Under Section 319 of the Indian Penal Code, 1860, the scope of “hurt” includes causing bodily pain, disease or infirmity to any person.

<sup>14</sup> 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 disfiguration 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.

<sup>15</sup> Indian Penal Code, 1860, Sections 330, 331.

<sup>16</sup> *Ibid.*, Section 44.

<sup>17</sup> *Ibid.*, Section 166.

<sup>18</sup> *Ibid.*, Section 348.

<sup>19</sup> 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”.

<sup>20</sup> *Basu* para. 37.

<sup>21</sup> *Ibid.*, para. 45.



The recognition that there is violence and coercion in custody led to Section 176 of the Code of Criminal Procedure 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.<sup>22</sup> An inquiry under this Section is to be conducted independently by the Magistrate and not jointly with the police (*Nilabati Behara*, para. 9). This inquiry confers the Magistrate with all powers he 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 enquiry.<sup>23</sup>

### 3.1.1.3 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*,<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> 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 SCC 746

Nilabati Behera's 22-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 the constitutional 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 with a theft. The police defence 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

<sup>22</sup> Code of Criminal Procedure, 1973, Section 176.

<sup>23</sup> Code of Criminal Procedure, 1973, Section 176(4).

<sup>24</sup> 1993 SCC, para. 13.

<sup>25</sup> *Ibid.*, para. 22.

<sup>26</sup> *Ibid.*, para. 16.

<sup>27</sup> *Ibid.*, paras. 43-45





in locating the supposed escaped detainee, and the fact that Suman Behera's was still partially bound by rope, the Court ultimately held that his death was not a result of a train accident. On the contrary, Suma Behara had succumbed to injuries most likely inflicted by police-administered lathi blows. The Court then explained that the state was liable for compensation in these cases where police conduct during custodial detention results in the deprivation of a fundamental right, in this case, right to life in Article 21. Ms Behera was awarded Rs 150,000 from the State of Orissa and the state was also ordered to pay the Supreme Court Legal Services Committee Rs. 10,000.

### Defining Torture

The UN Convention Against Torture, 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."

### 3.1.2 International Law

No single human rights violation has been subject to more Conventions and Declarations than torture.<sup>28</sup> **The prohibition against torture is treated by all countries as being *jus cogens*.** In Latin the meaning of *jus cogens* is 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: "Each State Party shall



<sup>28</sup> D.K. Basu v State of West Bengal, AIR 1997 SC 610.

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.”

### 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. The Supreme Court urges both transparency of action and accountability for police officers. This is not the task of Parliament.”* In saying this, the Supreme Court cast a dual responsibility 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 turn a blind eye to police practices which they know to be common and also 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 Code of Criminal Procedure and Supreme Court guidelines require the courts to be proactive in ensuring that no torture takes place and no reliance is placed on torture to arrive at just outcomes. 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 it 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 Code of Criminal Procedure codifies the duties of the magistrate where it requires that at the time of production of an accused, the Magistrate:

- Asks the accused if he has been threatened, tortured or abused in custody;
- Checks 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 suspects that the accused is intimidated by police presence he can question and record the statement of the accused in the absence of the police;*
- Checks to ensure that the medical examination was conducted and the medical certificate is attached with the case papers;
- Examines each of these documents to ensure that their contents include everything that needs to be included.



It is usual for magistrates to 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 his 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 concerns. He should be particularly attentive to the detainee’s condition. Where necessary, he 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 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 as a member of society.<sup>29</sup> 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.<sup>30</sup>*



<sup>29</sup> *Roberson v Rochester Folding-box Co.*, 171 N.Y. 538.

<sup>30</sup> *Kharak Singh v State of Uttar Pradesh and Others* 1 (1964) SCR 332.

### 3.2.1 Domestic Law

The right to privacy is now established in India, but as part of Article 21, and not as an independent right in itself. The Constitution does not grant in express terms any right to privacy. It is not enumerated as a Fundamental Right in the Indian Constitution. However, such a right has been culled from Article 21 by the Supreme Court.

Two cases decided by the Supreme Court of India laid the foundations for the right. These concerned the intrusion into a home by the police under state regulations, by way of “domiciliary visits”. Such visits could be conducted at any time of the night or day, to keep a tag on persons to unearth suspicious criminal activity, if any, on their part. The validity of these regulations came under challenge. In the first case, *Kharak Singh v State of Uttar Pradesh*,<sup>31</sup> the Uttar Pradesh (UP) Police Regulations regarding domiciliary visits were in question and the majority of the Judges held that though the Constitution did not refer to the right to privacy expressly, it could still be traced from the right to “life” in Article 21.

According to the majority, Clause 236 of the relevant regulations in UP, was bad in law; it offended Article 21 in that there was no law permitting interference by such visits. The majority did not question whether these visits violated the “right to privacy”. But, the minority view while concurring that the fundamental right to privacy was part of the right to liberty in Article 21, part of the right to freedom of speech and expression in Article 19(1)(a), and also of the right to movement in Article 19(1)(d), held that the Regulations permitting surveillance violated the fundamental right of privacy. In effect, all the seven learned Judges held that the “right to privacy” was part of the right to “life” in Article 21.

The second case which laid the foundation of this right was that of *Govind v State of Madhya Pradesh*,<sup>32</sup> in which the Court developed the privacy law from the point it was left in *Kharak Singh*. The Court stated that, though, the “right to privacy was not absolute” and as the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness, the privacy right can be denied only when an “important countervailing interest is shown to be superior”, or “where a compelling state interest is shown.” Any right to privacy “must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child bearing”. The Court explained that, if there was state intrusion, there must be “a reasonable basis for intrusion”. The right to privacy, in any event, would necessarily have to undergo a process of case-by-case development.

The Court examined the validity of the particular Regulations 855 and 856. These, according to the Court, gave immense powers to the police and, thus needed to be read down so as to be in tune with the Constitution. “Our founding fathers were thoroughly opposed to a Police Raj! Therefore, the Court must draw boundaries upon these police powers so as to avoid breach of constitutional freedoms. While it could not be said that all domiciliary visits were unreasonable, still while interpreting them, one had to keep the character and antecedents of the person who was under watch as



<sup>31</sup> Ibid.

<sup>32</sup> AIR 1975 SC 1378.

also the objects and limitations under which the surveillance could be made. The right to privacy could be restricted on the basis of compelling public interest.”<sup>33</sup>

The Court observed that unlike the non-statutory regulations in *Kharak Singh*, in this case, Regulation 856 was “law” (being a piece of subordinate legislation) and hence it could not be said in this case that Article 21 was violated for lack of legislative sanction. The law was present in the form of these regulations. Regulations 853(1) and 857 prescribed a procedure that was “reasonable”. Regulation 856 only imposed reasonable restrictions within Article 19(5) and there was, even otherwise, a compelling state interest. Regulations 853(1) and 857 referred to a class of persons who were suspected as being habitual criminals, while Regulation 857 classified persons who could reasonably be held to have criminal tendencies. Further, Regulation 855, empowered surveillance only of those persons against whom reasonable material existed for the purpose of inducing an opinion that they show a determination to lead a life of crime. The Court thus read down the regulations and upheld them for these reasons. In other words, the regulations were upheld because they were bound by reasonable restrictions which could be examined against objective criteria.

Thereafter, in *Malak Singh*<sup>34</sup> the Supreme Court added another dimension to protections against invasion of privacy. *Malak Singh* reiterated that serious encroachments into privacy can infringe on an individual’s right to personal liberty guaranteed by Article 21. Not only is police surveillance of particular individuals permitted under the limited circumstances articulated in Chapter 23.4 of the Punjab Police Act, 1861,<sup>35</sup> but such surveillance must be unobtrusive and within bounds.<sup>36</sup>

Several years later in 1991, the Supreme Court observed in *People’s Union for Civil Liberties*<sup>37</sup> that the right to privacy is part of the right to life and personal liberty under

<sup>33</sup> *Ibid.*, para. 31.

<sup>34</sup> *Malak Singh and Ors. v State of Punjab & Haryana and Ors.* AIR 1981 SC 760, para. 6.

<sup>35</sup> The Police Act permits police to enter the following types of individuals into the Surveillance Register:  
(a) All persons who have been proclaimed under Section 87 and Section 82 of the Criminal Procedure Code of 1973;

(b) All released convicts in regard to whom an order under Section 565 of the Criminal Procedure Code, (old Code) has been made (Section 356 of the Criminal Procedure Code, 1973);

(c) All convicts the execution of whose sentence is suspended in the whole, or any part of whose punishment has been remitted conditionally under Section 401 of the old Criminal Procedure Code (Section 432 of the Criminal Procedure Code, 1973);

(d) All persons restricted under Rules of Government made under Section 16 of the Restriction of Habitual Offenders (Punjab) Act, 1918;

(e) Persons who have been convicted twice, or (more than twice), of offences mentioned in Rule 27.29;

(f) Persons who are reasonably believed to be habitual offenders or receivers of stolen property, whether they have been convicted or not;

(g) Persons under security under Sections 109 or 110, Code of Criminal Procedure;

(h) Convicts released before the expiration of their sentences under the Prisons Act and Remission Rules without the imposition of any conditions.

<sup>36</sup> *Malak Singh*, para. 9



Article 21 of the Constitution and once the facts in any given case constitute the right to privacy, Article 21 is attracted.

***Malak Singh and Ors. v State of Punjab & Haryana AIR 1981 SC 760***

A Punjab police station entered two brothers into the Surveillance Register pursuant to Chapter 23.4(3)(b) of the Police Act, alleging that the brothers were habitual opium smugglers. The brothers were given no justification for this action, nor the opportunity to challenge the decision. They then filed a writ petition requesting the removal of their names from the Surveillance Register.

The Supreme Court first explained that the surveillance of habitual and potential criminals may be necessary to prevent crime, and given the necessary confidential nature of such surveillance, it is contrary to public interest to require the police to publicly reveal their reasoning for the surveillance of a particular individual. The court then privately reviewed the police's reasoning concerning the surveillance of the two brothers and was satisfied that there existed reasonable grounds for the police to believe that surveillance was necessary. However, the Court also stated that surveillance can never be conducted in a manner that inhibits the fundamental freedoms guaranteed to all citizens, nor offend the dignity of the individual. Thus, courts must eagerly protect citizens from excessive surveillance not in compliance with Chapter 23.4 of the Police Act, which casts a duty on the police to confine entries in the register strictly to the class of persons enumerated therein.

***People's Union for Civil Liberties (PUCL) v Union of India & Anr. AIR 1997 SC 568***

PUCL filed a writ petition in the Supreme Court challenging the constitutional validity of Section 5(2) of the Indian Telegraph Act, 1882, which authorises the government to intercept messages "on the occurrence of any public emergency or in the interest of public safety" if it is satisfied that it is "necessary or expedient to do so" in five given situations.<sup>38</sup> PUCL approached the Court on the basis of a report on tapping of politicians' telephones by the Central Bureau of Investigation (CBI). It asked for the provision of Section 5(2) to be interpreted in the light of fundamental rights and read down to include procedural safeguards that would discount arbitrariness and prevent indiscriminate phone tapping by the law enforcement or investigating agencies.

The Court's Observations:

The right to have a telephone conversation in the privacy of one's home or office is part of the Right to Life and Personal Liberty enshrined in Article 21 of the Constitution, which cannot be curtailed except according to procedure established by law. The Court asserted that telephone tapping amounts to an invasion of privacy in violation of this core right.

<sup>37</sup> *People's Union for Civil Liberties v Union of India* AIR 1991 SC 207.

<sup>38</sup> In the interests of: (i) the sovereignty and integrity of India; (ii) the security of the state; (iii) friendly relations with foreign states; (iv) public order; and (v) preventing incitement to the commission of an offence.



Elaborating on the scope of Section 5(2) of the Telegraph Act, the Court clarified that this Section “does not confer unguided and unbridled power” on the investigating agencies to invade a person’s privacy. Telephone tapping is only permitted in the following two circumstances:

1. “On the occurrence of a Public Emergency”: This means the prevalence of a sudden condition or state of affairs affecting the people; and
2. “In the interest of Public Safety”: This means “the state or condition of freedom from danger for the people at large”.

The test of whether these circumstances exist would be “apparent to a reasonable person”. The Court strongly asserted that if the two circumstances are not in existence the central or state governments or their duly authorised officers cannot resort to phone tapping.<sup>39</sup>

### 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]<sup>40</sup> 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* said 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.<sup>41</sup> *People’s Union for Civil Liberties (PUCL) v Union of India*<sup>42</sup> 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.

<sup>39</sup> In the five given situations allowed by Section 5(2) of the Indian Telegraph Act, 1882.

<sup>40</sup> Author’s parenthesis.

<sup>41</sup> *Kharak Singh v State of Uttar Pradesh and others* 1 (1964) SCR 332.

<sup>42</sup> AIR 1997 SC 568.



Telephone tapping or interception of communications must be limited to the addresses specified in the order or to those 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 Telegraph Act.

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.

### 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.*<sup>43</sup>

#### 3.3.1 Domestic Law

##### 3.3.1.1 Diary of Proceedings in an Investigation

The Code of Criminal Procedure, Section 172 requires the police to conduct investigations expeditiously, while keeping thorough records of their methods and findings. Section 172(1) requires a police officer to keep a day-to-day case diary of his investigation “setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.”<sup>44</sup> 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.**<sup>45</sup>

##### 3.3.1.2 The Police Officer’s Report on the Completion of Investigation

Section 173 of the Code of Criminal Procedure imposes further record-keeping duties on the police. The police must present a police report to the magistrate containing the



<sup>43</sup> *Bhagwant Singh v Commissioner of Police, Delhi*, (1983) CriLJ 1081.

<sup>44</sup> Code of Criminal Procedure, 1973, Section 172(1).

<sup>45</sup> *Bhagwant Singh v Commissioner of Police, Delhi*, (1983) CriLJ 1081, para. 16.



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, with or without sureties; and
7. Whether he has been forwarded in custody under Section 170.

In cases tried before a Magistrate, the police must give the Magistrate all relevant supporting documents as well as the statements of all witness 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.<sup>46</sup>

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.<sup>47</sup> Police failure to swiftly 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.<sup>48</sup>

#### *Bhagwant Singh v Commissioner of Police, Delhi (1985) SC 1285*

Bhagwant Singh brought claim against his local police department, alleging that they did not adequately investigate the death of his daughter by burning. 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; and 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-emphasised. Complete, detailed and consistent police records indicate the sequence of police actions in investigations that



<sup>46</sup> Code of Criminal Procedure, 1973, Section 173.

<sup>47</sup> *Bhagwant*, paras. 10 and 14.

<sup>48</sup> *Mihir Kumar Ghosh v State of West Bengal and Ors*, (1990) CriLJ 26.

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 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 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.

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, which will ground the charge, increases pendency 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 decision to proceed with or discharge the case, the judge must ensure that all the required papers accompany the charge sheet. He must subsequently examine each paper carefully for chronological and factual consistency and detail. This must be done with absolute objectivity<sup>49</sup> with the sole purpose of assessing that the alleged actions do ground the charges made against the accused.



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<sup>49</sup> *Bhagwant* para. 16.

**Fair Trial Manual**  
A Handbook for Judges and Magistrates

CHAPTER 4

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From Trial to Final Judgement



# CHAPTER 4

## From Trial to Final Judgement

### Introduction

This chapter examines the basic legal rules governing the trial proceedings and the relevant case law. The analysis focuses on domestic law, and 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 Code of Criminal Procedure, the Indian Penal Code and the Indian Evidence Act. But the entire trial process is governed and underpinned by the principles laid down in the Constitution of India.<sup>1</sup>

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. 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 adversary 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 must ensure 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 and he has the duty to referee motions, weigh the facts and the circumstances, draw logical conclusions and arrive at a reasoned decision about guilt or innocence by weighing the facts, the evidence presented and the relevant law.

### 4.1 Right to be Tried by a Competent, Independent & 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,*

<sup>1</sup> Article 20(1), (2) and (3), Article 21 and Article 22.

*parliament or administration. Court decisions can be only 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.*

## 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 concepts 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, to set 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 election and 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 the 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*<sup>2</sup> 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



<sup>2</sup> 1981 (Supp.) SCC 87, pp. 221-222.

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.<sup>3</sup>

One of the oldest rules of justice and of common sense is that no man shall act as a judge in a case in which he has a substantial interest. The principle of individual impartiality or the rule that no man can be his own judge or give judgement concerning his 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 Code of Criminal Procedure, 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.<sup>4</sup>

The basic rule is that a judge cannot sit in a case in which he or 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 is not.

Having any personal interest even if you don't 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*. The transfer of the case was sought on the grounds that the Sessions Judge, an elder brother of a sitting MLA, 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 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

<sup>3</sup> *S.P. Gupta v Union of India* 1981 (Supp.) SCC 87, pp. 221-222.

<sup>4</sup> 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.



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 judgement 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.<sup>5</sup>

### 4.1.3 Guide for Judicial Enforcement

A judicial officer, no matter in what capacity he may function, has to act with the belief that he is not to be guided by any factor other than to ensure that he shall render a free and fair decision, which according to his conscience, is the right one on the basis of the material placed before him.<sup>6</sup>

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.”<sup>7</sup> *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.*<sup>8</sup> This requires the judge to be aware and active, and move towards a just conclusion by testing, probing and challenging all contentions in his 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 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

<sup>5</sup> International Covenant on Civil and Political Rights, Article 14, 16 December 1966, G.A. Res. 2200A (XXI).

<sup>6</sup> *Satish Jaggi v State of Chhattisgarh & Ors.* 3 (2007) SCC 62.

<sup>7</sup> *Ram Chander v State of Haryana* AIR 1981 SC 1036.

<sup>8</sup> *Ibid.*



independence from influence or authority applies to all levels of the judiciary including the magistracy. One strong signal of impartiality is being punctilious in following procedure and arriving at a reasoned conclusion. Procedural fidelity provides proof of impartiality. The necessity of following procedure and delivering a reasoned judgement supported by rational objective that can relate back to facts and arguments can never be over-emphasised. The Supreme Court in *Zahira Habibulla Sheikh*<sup>9</sup> strongly criticised the practice adopted by courts of pronouncing the final order without a reasoned judgement. The same Court in *State of Punjab and Ors. v Jagdev Singh Talwandi* 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 judgement 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.”<sup>10</sup>

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 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 decisions. The litigants would then lose their ability to appeal the decision on the grounds of personal interest or bias.

## 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.<sup>11</sup> 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.*

### 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 is repeatedly reaffirmed 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

<sup>9</sup> *Zahira Habibulla Sheikh and Anr. v State of Gujarat and Ors.* (2004) 4 SCC 158.

<sup>10</sup> (1984) 1 SCC 596.

<sup>11</sup> United Nations Compilation of General Comments, *Comment No. 13 on Article 14 of the ICCPR*, pp. 123-124, para. 6.





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. 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.<sup>12</sup>

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 under trial (in the sense that) the security of securities is publicity” (*Scott v Scott* (1911) All. E.R. 1, 30).

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. “We feel no hesitation in holding 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. It is hardly necessary to emphasise that this inherent power must be exercised 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. 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. In this connection it is essential to remember that public trial of cases is a means, though important and valuable, to ensure fair administration of justice; it is a means, not an end. 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. That, in our opinion, is the rational basis on which the conflict of this kind must be harmoniously resolved.”<sup>13</sup>

#### 4.2.1.1 Court to be Open

The position at statute holds closely to the articulation by the Apex Court. 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.<sup>14</sup> 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.<sup>15</sup> The

<sup>12</sup> *Naresh Shridhar Mirajkar and Ors. v State of Maharashtra and Anr.* AIR 1967 SC 1, para. 20.

<sup>13</sup> *Ibid.*, para. 21.

<sup>14</sup> Code of Criminal Procedure, 1973, Section 327(1).

<sup>15</sup> *Ibid.*



power of the court to hold certain trials in camera is inevitably associated with the administration of justice itself. The inquiry into, and trials of, rape or crimes under Sections 376, 376A, 376B, 376C, or 376 D of the Indian Penal Code must be conducted in camera.<sup>16</sup> Similar provisions are also found in Section 53 of the Indian Divorce Act which provides that the whole or any part of any proceeding under this Act may be heard within closed doors if the court thinks fit. Section 14 of the Official Secrets Act provides that in addition and without prejudice to any powers which a court may possess to order the exclusion of the public from any proceedings if, in the course of such proceedings before a court against any person for an offence under this Act or the proceedings on appeal, or in the course of the trial of a person under this Act, application is made by the prosecution, on the ground that the publication of any evidence to be given or of any statement to be made in the course of the proceedings would be prejudicial to the safety of the state, that all or any portion of the public shall be excluded during any part of the hearing, the Court may make an order to that effect. But the passing of sentence shall in any case take place in public. Section 22(1) of the Hindu Marriage Act, likewise, lays down that a proceeding under this Act shall be conducted in camera if either party so desires, or if the court thinks fit to do so, and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except with the previous permission of the court. Lastly, Section 151 of the Code of Civil Procedure provides that nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. In those cases, a judge may use his/her discretion to allow any individual to have access to, or remain in the room or building being used by the court.<sup>17</sup> Without the previous permission of the court, a person may not print or publish a story about such cases.<sup>18</sup>

***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 appealed to 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



<sup>16</sup> Ibid., (2).

<sup>17</sup> Ibid.

<sup>18</sup> Ibid., (3).

must generally hear causes in open and must permit the public admission to the court room.”<sup>19</sup>

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.”<sup>20</sup>

## 4.2.2 International Law

Just as Indian domestic statutes and judicial decisions place great emphasis on the value of the individual’s right to a public hearing, 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”.<sup>21</sup> Similar to Indian domestic law, the ICCPR carves out an exception to the right to a public hearing, stating: “The press and the public may be excluded from all or part of a trial for reasons of morals, public order, 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 judgement 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.”<sup>22</sup>

## 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.”<sup>23</sup> It stresses that the purpose of having an open public hearing is to enable the fair administration of justice, and therefore, if a real conflict between the fair administration of justice and a public trial should arise, concerns for the fair administration of justice must control the situation.<sup>24</sup>

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

- The provisions of sub-section (2) of Section 327 of the Code 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 sex abuse or rape:
  - (i) 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;
  - (ii) 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

<sup>19</sup> *Naresh Shridhar Mirajkar* AIR 1967 SC 1 at para. 20.

<sup>20</sup> *Ibid.*, para. 21.

<sup>21</sup> ICCPR, Article 14(1), 16 December 1966, G.A. Res. 2200A (XXI).

<sup>22</sup> *Ibid.*

<sup>23</sup> *Naresh Shridhar Mirajkar* AIR 1967 SC 1 at para. 21.

<sup>24</sup> *Ibid.*



- the Presiding Officer of the court who may put them to the victim or witnesses in a language which is clear and not embarrassing; and
- (iii) The victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

The Apex Court in *State of Punjab v Gurmeet Singh and Ors.*<sup>25</sup> 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.”<sup>26</sup>

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

### Good Practice

Pursuant to a judgement of the Delhi High Court,<sup>27</sup> a trial court in Delhi examined a minor male child victim of sexual abuse through the use of a closed-circuit television. The examination of the child was fixed for a day when it was a court holiday so that the young child was not traumatised by the harsh atmosphere of the court premises. Due care was taken to ensure that there was no physical confrontation between the child and the accused. The Judge examined the child victim as a prosecution witness in his Chamber. Here only the child along with his maternal grandmother (who was allowed to be present as a support person), the Judge and his typist were present. A video camera was fixed in the Judge’s Chamber and this relayed to the monitor located in the courtroom. The Public Prosecutor, the complainant counsel, the defence counsel, the accused and the relatives of the child sat in the courtroom and watched the proceedings conducted in the Judge’s Chamber. The defence counsel also presented his list of questions for cross-examination of the child to the Judge. All questions were put to the child only by the Judge in a friendly and cordial manner. The child was given appropriate breaks so as to ensure that he was not over-stressed by the examination. No cross-examination of the child by the accused or the defence counsel was permitted.

The rule that all trials must be conducted in the open, nevertheless allows the judge in his discretion to make exceptions. These exceptions require the judge to apply his 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, to decide on 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.



<sup>25</sup> 2 (1996) SCC 384.

<sup>26</sup> Ibid., para. 18.

<sup>27</sup> *Sheba Abidi v State of Delhi and Anr.* 113 (2004) DLT 125.

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 Shidhar Mirajkar*<sup>28</sup> relying on Haldane, said: “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 are 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 exception, 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 one without undue delay. A fair trial implies a speedy trial and no procedure can be reasonable, fair or just, if it 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 pre-trial stage to the final appeal, are completed, and judgements are issued within a reasonable time.*

#### 4.3.1 Domestic Law

A speedy trial, as such, is not mentioned as a specific fundamental right in the Constitution. Nevertheless, quick 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.<sup>29</sup> The Supreme Court in *Kartar Singh v State of Punjab*<sup>30</sup> 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 Criminal Procedure Code also reaffirms that the requirement of swiftness and promptitude applies to all stages of the criminal process – investigation, inquiry, trial, appeal, revision and retrial.<sup>31</sup>

<sup>28</sup> AIR 1967 SC 1, para. 23.

<sup>29</sup> *Abdul Rehman Antulay and Ors. v R.S. Nayak and Anr.* (1992) 1 SCC 225.

<sup>30</sup> (1994) 3 SCC 569.

<sup>31</sup> *Ibid.*



In every inquiry or trial, the proceedings should be held “**as expeditiously as possible.**”<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> A magistrate cannot remand an accused person to custody for more than 15 days at a time.<sup>35</sup> 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.<sup>36</sup> The court may not adjourn a proceeding for the sole purpose of allowing the accused person to show cause against his potential sentence.<sup>37</sup> Costs can be imposed on either party by the court if witnesses are present but are not examined at the request of either the defence or the prosecution.<sup>38</sup>

Post-independence, the Supreme Court has strongly disapproved of judicial delays. In *Machander v State of Hyderabad*,<sup>39</sup> 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 judgement 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.*”

In *Veerabadrhan Chettiar v E.V. Ramaswami Naicker*<sup>40</sup> 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”.<sup>41</sup> In *Chajoo Ram v Radhey Shyam*,<sup>42</sup> 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*,<sup>43</sup> though the Court found the acquittal of the accused unsustainable, it refused to order a remand or direct a trial after a lapse of 20 years.

The 1978 Supreme Court decision in *Hussainara Khatoon (1) v Home Secretary, State of Bihar*<sup>44</sup> 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

<sup>32</sup> Code of Criminal Procedure, 1973, Section 309(1).

<sup>33</sup> Ibid.

<sup>34</sup> Ibid., (2).

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Code of Criminal Procedure, 1973, Section 309(2).

<sup>38</sup> Ibid., Explanation 2.

<sup>39</sup> AIR 1955 SC 792.

<sup>40</sup> AIR 1958 SC 1032.

<sup>41</sup> AIR 1958 SC 1032 (1035).

<sup>42</sup> AIR 1971 SC 1367.

<sup>43</sup> (1972) 3 SCC 504.

<sup>44</sup> (1980) 1 SCC 81.



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 which says no one shall be deprived of his [her] life or personal liberty except according to procedure established by law. The Supreme Court relied on its earlier decision in the *Maneka Gandhi v Union of India*<sup>45</sup> case which lays down 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 expenditure needed to improve the administrative and judicial apparatus with a view to ensuring speedy trial.<sup>46</sup>

The law laid down in *Hussainara Khatoon’s* case<sup>47</sup> was further developed in subsequent decisions. In *State of Bihar v Uma Shankar Katriwal*<sup>48</sup> 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 16 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 meant 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.<sup>49</sup> In *Kadra Pahadiya v State of Bihar*<sup>50</sup> too, the Court reaffirmed the principle of the *Hussainara Khatoon* case<sup>51</sup> and held that “...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.”<sup>52</sup>

In *Sheela Barse v Union of India*,<sup>53</sup> the Supreme Court addressed the question left unanswered in the *Hussainara* case<sup>54</sup> 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.”

<sup>45</sup> (1978) 1 SCC 248.

<sup>46</sup> *Hussainara Khatoon (IV) v Home Secretary, State of Bihar*, (1980) 1 SCC 107.

<sup>47</sup> *Supra* n. 48.

<sup>48</sup> (1981) 1 SCC 85.

<sup>49</sup> (1981) 1 SCC 75 (77).

<sup>50</sup> (1983) 2 SCC 104.

<sup>51</sup> *Supra* n. 48.

<sup>52</sup> *Ibid.*, 107.

<sup>53</sup> (1986) 3 SCC 632.

<sup>54</sup> *Supra* n. 48.



This case specifically dealt with the procedure to be followed in matters where the accused was less than 16 years. The Court held that where a juvenile is accused of an offence punishable with imprisonment of seven years or less, investigation was to be completed within three months of the filing of the FIR or else the case was to be closed. Also, all proceedings in respect of the matter had to be completed within a further six months after filing the charge sheet.<sup>55</sup>

In *Rakesh Saxena v State through CBI*,<sup>56</sup> the Court quashed the proceedings on the ground that any further continuance of the prosecution after a lapse of over six years was uncalled for. In *Srinivas Gopal v Union Territory of Arunachal Pradesh*,<sup>57</sup> 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.

Not every type of delay amounts to injustice. In *State of Maharashtra v Champalal Punjaji Shah*<sup>58</sup> 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 was responsible for some of the delays and whether he was prejudiced in the preparation of his 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.<sup>59</sup> On the basis of the test laid down in *Champalal Punjaji Shah*,<sup>60</sup> the Court, in *Diwan Naubat Rai v State through Delhi Administration*,<sup>61</sup> 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*<sup>62</sup> finally adjudicated on questions left open in the *Hussainara* case,<sup>63</sup> 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 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'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. Not fixing any such outer limit ineffectuates the guarantee of the right to a speedy trial.
- 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*<sup>64</sup> the Supreme Court directed the release of the undertrials on bail if the trial continued for a certain period and the accused were in prison for a certain period of time. It also directed acquittal or discharge of an accused, where for an offence punishable with imprisonment for a certain period, the trial had not begun even after a lapse of the whole or two-thirds of that period. But the Court excluded certain economic and other offences from the application of these guidelines. In a subsequent case<sup>65</sup> the Supreme Court clarified its order in *Common Cause*,<sup>66</sup> 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.

<sup>55</sup> Cases involving children below 18 years will be dealt with in line with the practice laid down in the Juvenile Justice Act.

<sup>56</sup> 1986 Supp SCC 505.

<sup>57</sup> (1988) 4 SCC 36.

<sup>58</sup> (1981) 3 SCC 610.

<sup>59</sup> This decision has been severely criticised by Prof. Upendra Baxi, in his book, *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.

<sup>60</sup> Supra n. 59.

<sup>61</sup> (1989) 1 SCC 297.

<sup>62</sup> (1992) 1 SCC 225.

<sup>63</sup> Supra n. 48.

<sup>64</sup> (1996) 4 SCC 33; followed in

*Rajiv Gupta v. State of Himachal Pradesh* (2000) 10 SCC 68.

<sup>65</sup> *Common Cause. a registered society. through its director v. Union of India*, (1996) 6 SCC 775.

<sup>66</sup> Supra note 76.



The initiative taken by the Court in the *Common Cause* case<sup>67</sup> was taken ahead in *R.D. Upadhyay v State of Andhra Pradesh*.<sup>68</sup> 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.

Another attempt was made to concretise the right to a speedy trial in *Raj Deo Sharma v State of Bihar*.<sup>69</sup> 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 judgement was whittled down in the subsequent clarification order,<sup>70</sup> 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)*:<sup>71</sup>

- 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*,<sup>72</sup> 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.

However, the right to a speedy trial received a setback from the Apex Court's decision in *P. Ramachandra Rao v State of Karnataka*.<sup>73</sup> In this case, the Court reversed the trend initiated in *Common Cause a registered society v Union of India*,<sup>74</sup> and thereafter, in *Raj Deo Sharma v State of Bihar*.<sup>75</sup> 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, unexpectedly, in *P. Ramachandra Rao*,<sup>76</sup> 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* case<sup>77</sup> was correct and still held the field, while the time limits or bars of limitation prescribed in several directions made in *Common Cause (I)*<sup>78</sup> and *Raj Deo Sharma (I)*<sup>79</sup>

<sup>67</sup> Ibid.

<sup>68</sup> (1996) 3 SCC 422.

<sup>69</sup> AIR 1998 SC 3281.

<sup>70</sup> *Raj Deo Sharma v State of Bihar* (1999) 7 SCC 604.

<sup>71</sup> Supra, note 82.

<sup>72</sup> (2001) 4 SCC 355.

<sup>73</sup> AIR 2002 SC 1856.

<sup>74</sup> Supra note 76.

<sup>75</sup> Supra note 82.

<sup>76</sup> Supra note 87.

<sup>77</sup> Supra note 72.

<sup>78</sup> Supra note 76.

<sup>79</sup> Supra note 82.



and (II)<sup>80</sup> 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 Code of Criminal Procedure to effectuate the right to a speedy trial.

***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.<sup>81</sup> 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.*** 10 (2006) 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*



<sup>80</sup> (1999) 7 SCC 604.

<sup>81</sup> *Hussainara Khatoon and Ors. v Home Secretary, State of Bihar* AIR 1979 SC 1377.

*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: “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 judgement.”<sup>82</sup> 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.”<sup>83</sup>

### 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 Criminal Procedure Code, 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 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 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



<sup>82</sup> ICCPR, Article 9(3), 16 December 1966, G.A. Res. 2200A (XXI).

<sup>83</sup> *Ibid.*, Article 14(3).

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.

The magistrate has no power to quash a case. His concern is to ensure that cases do not drag on and to justify each adjournment as reasonable and not contributory to unjustified delay.

Given that speedy trial is a fundamental right, the latitudes provided by the Code 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.

In our opinion, any latitude to adjourn proceedings should be narrowed further if the accused is in custody. Anything that extends a period of incarceration of a person presumed innocent, unless entirely attributable to his own actions, must be considered as being prima facie unjust, prejudicial to the accused, and damaging of the fullest realisation of the accused person's right to a speedy trial.

The Code of Criminal Procedure safeguards the right to a speedy trial. Illustratively, in Section 309 it requires that the magistrate demonstrates that his discretionary powers to adjourn have been wisely used when it says that where witnesses are present for examination, 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 magistrate's discretion in granting adjournments, as for any other discretionary power, requires that it be based on 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 of the system.

These two principles – that speedy trial is the norm and adjournments are granted after carefully calibrated consideration – also informs the statutory provisions that put limitations on the maximum number of days the magistrate can remand a person to custody. The maximum of 15 days remand has become another routinely adopted device of court management without regard to the right to a speedy trial. If for example, the state pleads the absence of the accused for want of a police escort, there is no justification for a further 15-day remand. The prisoner could be brought before the court, as is his right, within the next day, or even in the next few hours if the court guarded the fundamental right zealously.

In our view, the principles laid down in *Antulay* suggesting that the operational realities of the court can be a factor in delays are unduly broad and allow considerations which are outside the permissible criteria envisaged for the use of judicial discretion.



The guidelines take account of causes of delay that are attributable to the system. In our view, the infirmities of the system cannot be a reason to deny an accused a fundamental right. Similarly, several judgements in High Courts and the Supreme Court appear to indicate that a permissible delay can be dependent on the nature of the offence and the type of defendant. So for instance, where there is a complicated case of tax fraud, embezzlement of public money, etc., even a long delay of four years has not been considered unreasonable enough to quash the proceedings. On the other hand, where petty offences or juveniles are concerned, courts have been more readily amenable to safeguarding the accused's right to a speedy trial.

In our view, this brings in a degree of differentiation between various types of accused persons and makes the realisation of a fundamental right dependent on the kind of people and gravity of the offence involved. This logic appears to rest on a concession to the inability of the system to mount a proper prosecution case. In our view, the realisation of this fundamental right must work equally for all accused persons. If a case is a complex and convoluted one it is nevertheless incumbent on the court to ensure that the prosecution has built its case well enough for the court to entertain it at the very outset. The fundamental right cannot be hostage to the excuse that the matter is complex or that the alleged crime is heinous and therefore delays in building the case are excusable. Equally, a delay to the right to a speedy trial cannot be reasonable if it is caused by a lack of security or vehicles to bring an accused to court, and certainly not because of the absence of counsel.

When the Supreme Court in *P. Ramachandra Rao*<sup>84</sup> 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 judicial discretion "to expeditiously..." would be informed by the constitutional imperative that the right to a speedy trial is a fundamental right, belonging to the accused. This restricts the weight that can reasonably be given to factoring the operational dysfunction of the court as an excuse for delay.

In addition, where the accused is in custody, a premier consideration for the judge must be as per the Supreme Court's diktat 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 unduly long incarceration before his conviction. In this view of the issue, no incarceration can be justified on grounds of shortfalls within the system itself.

## 4.4 Right to a Lawyer of Choice

*Every accused should be provided the opportunity to be defended by a pleader at the time of the proceedings and should have sufficient opportunity of communication with his legal adviser for the purpose of his defence. No advocate or counsel can be forced on to an accused and he should be permitted to be defended by a counsel in whom he has full confidence. This right also extends to having all necessary means for the defence which is a well-established principle under law. This means that the accused must have all the elements of evidence at his disposal. This right is derived from the principle of the equality*



<sup>84</sup> AIR 2002 SC 1856.

*of arms. It means that in relation to the prosecution, the defence must have an equal opportunity to prepare and present a case, and that the prosecution and defence must have an equal position throughout the proceedings.*

#### 4.4.1 Domestic Law

Article 22 of the Constitution guarantees that every arrested person has the right to “consult and to be defended by a legal practitioner of his choice”.<sup>85</sup>

##### 4.4.1.1 Right of an Accused Person to be Defended

The Code of Criminal Procedure reinforces this idea, stating that: “any person accused of an offence before a criminal court, or against whom proceedings are initiated under this Code, may of right be defended by a pleader of his choice.”<sup>86</sup>

#### *Ranjan Dwivedi v Union of India* AIR 1983 SC 624

The petitioner – Ranjan Dwivedi, a lawyer, was arraigned as an accused in a case involving the assassination of a political leader in a bomb blast in Bihar. Initially, the senior lawyer representing the principal accused also appeared for Ranjan, but later withdrew. Dwivedi approached the Supreme Court in a writ petition under Article 32 stating that although he was not an indigent person, as a struggling lawyer he had neither the capacity nor the means to engage a competent lawyer for his defence. He pointed out that under the rules framed by the Delhi High Court, a sum of Rs. 24 per day was payable to a lawyer appearing as *amicus curiae* in a Sessions Court. Ranjan argued that for such a paltry sum no lawyer of standing would find it possible to appear for him. The prosecution was conducted by senior lawyers. Ranjan contended that as a matter of processual fair play, the state should provide him with a lawyer for his defence on the basis of equal opportunity. He sought a writ to the Union of India to give him financial assistance to engage a counsel of his choice on a scale equivalent to, or commensurate with, the fees that were paid to the counsel appearing for the state.

The Court rejected the contention that the counsel assigned to the petitioner would be paid fees on par with lawyers appointed for the state, but at the same time enhanced the fee payable to Rs. 500 per day for the senior counsel and Rs. 250 per day for a junior counsel to represent Dwivedi.

The Court however did go on to say that the existing rules of fixing counsel’s fees are totally antiquated and does not take into account the realities of the situation. In such a scenario, High Courts have ample power to fix a reasonable amount for fees payable to counsel appearing for a petitioner, based on the facts and circumstances of the case. The Court directed that in case the amount fixed is lower than the scales of fees fixed by the High Court in question, by its interim orders, the excess amount paid to the petitioner in terms thereof shall not be recoverable.



<sup>85</sup> Constitution of India, Article 22.

<sup>86</sup> Section 303.

## 4.4.2 International Law

Resembling Indian domestic law, the ICCPR states in Article 14(3)(d): “In the determination of any criminal charge against him, everyone shall be entitled to...be tried in his presence, and to defend himself in person or through legal assistance of his own choosing [and] to be informed, if he does not have legal assistance, of this right.”<sup>87</sup> Article 14(3)(b) of the ICCPR requires that all criminal defendants receive equally applied, adequate time and facilities to prepare their defence and communicate with a counsel of their own choosing.<sup>88</sup>

## 4.4.3 Guide for Judicial Enforcement

There is no elaborate guidance on this aspect of a fair trial but it is for the judge to ensure that both parties have equal representation and that neither the accused or the victim goes without proper and skilled representation.

## 4.5 Right to Free Legal Aid

*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 has access to free legal counsel if he cannot afford it.<sup>89</sup>

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

The Code of Criminal Procedure makes this right explicit and outlines its implementation.<sup>90</sup> 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 shall assign a pleader to defend the accused at the state’s expense.<sup>91</sup> With the previous approval of the 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 fees payable to the pleaders by the government.<sup>92</sup> The state government may order that these provisions be made applicable

<sup>87</sup> ICCPR, Article 14(3)(d), 16 December 1966, G.A. Res. 2200A (XXI).

<sup>88</sup> ICCPR, Article 14 (3).

<sup>89</sup> Constitution of India, Article 21.

<sup>90</sup> Code of Criminal Procedure, 1973, Section 304.

<sup>91</sup> Ibid., (1).

<sup>92</sup> Ibid., (2).





to any class of trials before other courts in the state, as they apply in relation to trials before the Courts of Session.<sup>93</sup>

Repeatedly, courts have stated that legal aid is vital for India's legal system. The Supreme Court in several decisions has referred to both Articles 21 and 39A to underline the importance of providing legal aid to undertrials. In the *Hussainara*<sup>94</sup> 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."

In *Hussainar Khatoon and Ors. v Home Secretary, State of Bihar, Bihar Patna*, 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.<sup>95</sup>

In the *Suk Das*<sup>96</sup> case, the Supreme Court, reversing the decision of the High 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.

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

In this case, the appellant, along with four others, were charged with an offence under Section 506 of the Indian Penal Code. 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. 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.

<sup>93</sup> *Ibid.*, (3).

<sup>94</sup> *Hussainara Khatoon (V) v State of Bihar* (1980) 1 SCC 108.

<sup>95</sup> *Khatri (II) v State of Bihar* (1981) 1 SCC 627.

<sup>96</sup> *Suk Das v Union Territory of Arunachal Pradesh* (1986) 2 SCC 401.



The Court reiterated that in a case where on a conviction a sentence of imprisonment would be imposed and social justice requires that the accused be given legal aid, 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 cannot afford them.<sup>97</sup> Indeed, in its *Hoskot* decision, the Indian Supreme Court referenced the ICCPR when addressing the importance of providing free assistance of counsel to indigent defendants.<sup>98</sup>

## 4.5.3 Guide for Judicial Enforcement

Although the Supreme Court makes clear that providing a defendant with free legal aid on his appeal is a state duty rather than an act of charity, it also recognises that the state must pay a “reasonable sum that the court may fix when assigning counsel to the prisoner”.<sup>99</sup> The court retains the discretion to determine “whether it is necessary for the ends of justice to make available legal aid in the particular case” after examining the totality of the situation.<sup>100</sup>

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 on;<sup>101</sup>
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;<sup>102</sup> and
4. Legal aid lawyers' fees must be paid at least on par with public prosecutors.<sup>103</sup>

<sup>97</sup> ICCPR, Article 14(3)(d), 16 December 1966, G.A. Res. 2200A (XXI).

<sup>98</sup> *M.H. Hoskot*, para. 20.

<sup>99</sup> *Ibid.*, para. 26.

<sup>100</sup> *Ibid.*

<sup>101</sup> The basis for such a demand can be found in judgements 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 CriLJ 1125; *Ram Awadh v State of Uttar Pradesh* 1999 CrLJ 4083; *Kunnumal Mohammad v State of Kerala* AIR 1963 Ker 54; *Ranchod Mathur Wasawa v State of Gujarat* 1974 CrLJ 779 SC; *Hussain v State of Kerala* (2000) 8 SCC 129.

<sup>102</sup> The decision of the Madras High Court in *Re Mohan* dated 27 May 1997.

<sup>103</sup> The decisions in *T. Suthendra Raja v State of Tamil Nadu* 1995 CrLJ 1496 and *Rataniya Bhima Bhil v State of Gujarat* 1997 CrLJ 891 sought to comment on this disparity but were unable to persuade the state to rectify it, as yet.



## 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 so that he 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 Code of Criminal Procedure work in concert to ensure that an accused person is notified of the charges against him.

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

Section 207 of the Code of Criminal Procedure dictates that in any criminal proceedings instituted on the basis of a police report, the Magistrate must freely furnish to the accused:

1. A copy of the police report;
2. A copy of the first information report;
3. The statements of any prosecution witnesses;
4. Any recorded confessions or statements; and
5. Any other documents forwarded to the magistrate by the police.

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

If a matter is triable exclusively by the Court of Sessions, Section 208 of the Code requires that the Magistrate freely furnish to the accused the statements of persons examined by the Magistrate, any statements and confessions, 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 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. There is personal anxiety and jeopardy involved, in addition to financial loss, damage to reputation and the social consequences of being under suspicion. Most importantly, the liberty of the



individual is at stake. Therefore, the law requires that accusations cannot be lightly or frivolously based and must not be furthered on flimsy grounds. The requirement that the papers indicating substantial evidence be provided early to 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 Contents of Charges

The accused must be given full notice of the offences he is charged with.<sup>104</sup> Each offence must be described and have the specific name of the offence as stated in the law.<sup>105</sup>

#### 4.6.1.4 Particulars as to Time, Place and Person

The framed charge must state the exact time and place of the alleged offence and the person against whom, or the thing in respect of which, it was committed.<sup>106</sup>

#### 4.6.1.5 Framing the Charges

The trial court judge in the magistrate's court or the Sessions Court 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.

#### 4.6.1.6 Court May Alter Charges

The court has sufficient powers to alter or add to any charges that have been included by the prosecution agency.<sup>107</sup> Every alteration or addition shall be read and communicated to the accused.<sup>108</sup>

#### 4.6.1.7 Recall of Witnesses When Charges are Altered

When a charge is altered or added by the court, the prosecutor and the accused will be 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.

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

<sup>104</sup> Code of Criminal Procedure, 1973, Section 211(1).

<sup>105</sup> Code of Criminal Procedure, 1973, Section 211(2).

<sup>106</sup> Code of Criminal Procedure, 1973, Section 212.

<sup>107</sup> Code of Criminal Procedure, 1973, Section 216(1).

<sup>108</sup> *Ibid.*, Section 216(2).



A division bench of the Orissa High Court<sup>109</sup> observed that the manner in which the trial court had conducted the proceedings in the *Maheswar Gouda* case left much to be desired. The charges framed against the accused were defective. This indicated that the judges considered this stage to be a mere mechanical formality they have to fulfil. The court held that: “The Presiding Officer of a court of session must take an intelligent part in the proceedings and exercise due care while framing the charges as these are not matters of empty formality. He should not merely be a disinterested auditor of the contest between the prosecution and the defence and should come to a clear understanding of the actual events that occurred and ensure that proper and necessary steps have been taken to arrive at the truth.”

***Gangula Suryanarayana Reddy v State of Andhra Pradesh* (2002) CrLJ 2472 (AP)**

The accused were in judicial custody for five years. They were charged with offences under Sections 120-B, 148, 324, 326, 307, 302 read with Sections 149 and 112 of the IPC. The petitioners said that they were not in a position to meet the full expenses incurred by them while defending themselves. The offences with which they were charged were serious and were likely to result even with the punishment of death or life imprisonment. There were 430 witnesses and the cost of securing copies of the statements of the prosecution witnesses was far beyond their reach. They made an application to the High Court to secure copies of the prosecution witnesses’ statements free of cost stating that there was no provision in the Code, the criminal rules of practice, or circulars prescribing the supply of depositions free of cost.

The Court was of the opinion that if a person is unable to obtain the copies because he is not in a position to pay for them, it would lead to adjournment after adjournment because the advocate appearing for him, even if provided by the state, would not be in a position to defend the case.

Deciding that the accused must be provided with all papers free of cost, the Court observed that in the absence of the papers the accused would not be in a position to defend themselves, their representative would be unable to argue properly in their favour, and that the absence of papers and adjournments as a result of this would delay the trial inordinately. The Court stated: “The spirit of the scheme of the Code of Criminal Procedure is that the copies of the depositions of the prosecution witnesses should be made available to the accused persons so that they can make the defence effectively.”

It also urged the state government to frame rules in this context. In the absence of rules, the Court directed all magistrates and judges that on filing of an application for copies, supported by an affidavit, a copy of the evidence should be furnished to an indigent accused.



<sup>109</sup> *Maheswar Gouda and Ors. v State* 1983 CriLJ 1029.

***State of Orissa v Debendra Nath Padhi (2005) 1 SCC 56***

The issue before the Apex Court was: Can the trial court while framing the charges 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 cognisance 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 Code of Criminal Procedure 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 made the following observations: 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 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 Code; 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.

## 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 in a language that he understands.<sup>110</sup>

## 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. He 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 charge sheet is filed by the prosecution, copies must be supplied to the accused.

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



<sup>110</sup> ICCPR, supra note 47, Article 14 (3)(d).

or without examining the basic infirmities of the charges by judges and magistrate at this particular stage, the charges that the accused has to answer remain vaguely defined. The overburdened 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 log jams at later stages. As the processual pile, ups mount, the accused, especially if he 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. Defective charges would probably lead to frequent acquittals which again are a waste of taxpayers' money and the energies and manpower of the already overstretched court.

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.

Assuming that the papers are complete where a matter is triable by the Sessions Court the Magistrate has merely to check that the papers are complete, are disclosed to the accused and commit the case to the Sessions Court. The committal however must happen in the presence of the accused.

There must be reasonable 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 duty and allows a usurpation of his 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.

Though a detailed consideration of the evidence is not called for at this stage, the court must also not blindly 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. However, before passing an order of discharge, the Magistrate has to consider the charge sheet. He should examine the accused if he feels it necessary, and finally, he must give the prosecution and the accused an opportunity to be heard. Once this is done, it is a mandatory provision for the Magistrate to record his reasons for discharging the accused.

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 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. This is why the law insists that the accused has the right to be personally present (or be represented by his lawyer) on all occasions so that he knows what is said against him and who says it, so that he can challenge it and mount the best possible defence that he 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 Code of Criminal Procedure 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 has 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.<sup>111</sup>

With the introduction of video linking 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.<sup>112</sup>



<sup>111</sup> *State of Madhya Pradesh v Budhram* 1996 CrLJ 46 (MP).

<sup>112</sup> *State of Maharashtra v Praful B Desai* AIR 2003 SC 2053.



### 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 personal appearance and allow the matter to go forward through his representative.<sup>113</sup> On the other hand, a judge is also responsible to keep the court in order and may on occasion, in the interest of justice, where it feels that in fact “the accused persistently disturbs the proceedings of the Court”, order him out of the court. Another instance when the court can proceed in the absence of the accused is when he is a declared an absconder.<sup>114</sup> This provision is in derogation of the normal procedure that evidence in a trial of an accused shall be recorded in his presence. But its justification lies in the accused’s default to take part in the trial.

#### *State of Madhya Pradesh v Budhram* 1996 CrLJ 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 Code. 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 Code.

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.”



<sup>113</sup> Code of Criminal Procedure, 1973, Section 317.

<sup>114</sup> Code of Criminal Procedure, 1973, Section 299.

## 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.<sup>115</sup>

## 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.

Where the matter is trivial, technical, or does not involve moral turpitude, and the accused are busy business people, or women, labourers, old persons, wage earners, and others who have to come from a long distance, the court may take a call about the necessity for these people to be present at every appearance, after taking into account the nature of the case and the persons involved.<sup>116</sup>

Only in very rare instances can a judge or magistrate 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.<sup>117</sup> 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 absence merely because his lawyer is present or has agreed that the trial may continue without his 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 absence.

It is common for police and jail authorities to plead that there is no escort for a prisoner and not produce him at court on a trial date. This cannot be a reason to continue the trial in his absence. In fact, the Supreme Court has remarked that not bringing an accused to court persistently can amount to obstruction of justice; that it should be seen as such and proceeded against.

## 4.8 Right to Examine Witnesses

*Fair trial includes fair and proper opportunities allowed by the law to prove ones innocence. Denial of this right means a denial of fair trial. The right is critical to preserving fairness and ensuring accuracy at trial. The accused cannot adequately present his defence and challenge the prosecution's case against him unless he has the opportunity to call witnesses on his 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*



<sup>115</sup> ICCPR, Article 14(3)(d), 16 December 1966, G.A. Res. 2200A (XXI).

<sup>116</sup> *Mathew v State of Kerala* 1986 (2) Crimes 393 (Ker).

*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.*

## 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 behalf and challenge evidence put forward by the prosecution. If this is denied to the accused, there is no fair trial.

Fair trial 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 denial of 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 they are not breached.<sup>118</sup>

### 4.8.1.1 Evidence for the Prosecution

The charge sheet 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 is asked to plead his case, he 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. It is essential 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 and 242 of the Code afford the opportunity to the prosecution to examine its witnesses and put forth oral or documentary evidence. Every witness must be examined orally. It is not sufficient to put in depositions taken before the Magistrate and allow cross-examination on such depositions. The judge shall go on to 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. The judge's duty is to exclude inadmissible evidence whether it is or not objected to by both parties.

Sections 243 and 246 of the Code afford the accused the right to cross-examine the prosecution's witnesses. The judge, in the interests of justice, can defer this cross-



<sup>117</sup> Code of Criminal Procedure, 1973, Section 317.

<sup>118</sup> *Kalyani Bhaskar v M.S. Sampornam* (2007) 2 SCC 258.

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 but sub-section 2 of Section 231 vest the judge with the discretion to permit for sufficient reason, either (i) the cross-examination of any witness to be deferred till any other witness or witnesses have been examined, or (ii) recall any prosecution witness for further cross-examination.

#### 4.8.1.2 Entering the Defence

Sections 233 of the Code 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 shall call the accused to enter his 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 necessarily to be given for the purpose.

#### 4.8.1.3 Evidence for the Defence

The provision of Section 243 and 247 of the Code granting the right to the accused to produce witnesses in his defence, applies equally to cases instituted on a police report or private complaint. 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 defence.

The provision for the defence's evidence in warrant cases instituted other than on a police report is contained in Section 247 of the Code of Criminal Procedure which is *pari materia* with Section 243.

The provision as contained in Section 254 pertains to the trial of summons cases by a Magistrate. When there is no admission of guilt by the accused and a conviction thereon under Section 252, 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".<sup>119</sup> Denial of this right by interchanging transcripts of evidence was impermissible and such an error that it could not be cured even by obtaining the defendant's consent to waive his opportunity for cross-examination.<sup>120</sup> 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.<sup>121</sup>

## 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."<sup>122</sup> 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.<sup>123</sup> While anonymous witnesses are not *per se* forbidden, they are strongly discouraged under international law.<sup>124</sup>

## 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.

<sup>119</sup> 1967 CriLJ 1702, para. 5.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

<sup>122</sup> ICCPR, Article 14(3)(e), 16 December 1966, G.A. Res. 2200A (XXI).

<sup>123</sup> *Windisch Case* 186 Eur. Ct. H.R. (ser. A) at 11 (1990).

<sup>124</sup> *Doorson v The Netherlands* 2 Eur. Ct. H.R. (ser. A) at 470, para. 69 (1997).



A judge is not merely a passive observer but an alert adjudicator, who is not only umpiring contending parties. He is expected to be active in ensuring that justice is upheld. He is the jealous guardian of the credibility of his court as well as the procedural niceties that ensure that justice is done as far as it is humanly possible. The judge on his bench has complete control over the case and has the powers to intervene in the interests of fairness, as well as to punish, if he observes deliberate efforts 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. The demeanour of witnesses may be important for the judge to form an opinion regarding their veracity, and every judge must make a written note on this.

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 the questioning of witnesses. He 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 of the Code.

Exercise of the court's powers to examine witnesses under Section 311 of the Code would enable it to discover the truth and deliver a just decision. Section 311 of the Code of Criminal Procedure 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 and recall and re-examine any person already examined. It 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". The Supreme Court has even gone to the extent of saying that the requirement of "a just decision of the case" did not limit the Court's action to something in the interest of the accused only; "the action may equally benefit the prosecution".

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.



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 do 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. This action alone can restore the people's faith in the judiciary, and justice will be done.

The Supreme Court has, in several cases, emphasised on the need for witness protection and repeatedly called for such programmes and measures to be drawn up by the executive.<sup>125</sup> 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; and
- The cost of providing police protection to the witness."<sup>126</sup>

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



<sup>125</sup> *Zahira Sheikh v State of Gujarat* (2006) 3 SCC 374, *National Human Rights Commission v State of Gujarat*, (2003) 9 Scale 329.

<sup>126</sup> *Neelam Katara v Union of India* CrI. W. No. 247 of 2002 cited from SAHRDC, *Human Rights and Humanitarian Law: Developments in Indian and International Law* (Oxford University Press, Delhi, 2007).

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.<sup>127</sup>

## 4.9 Right to the Free Assistance of an Interpreter

*All rights to an adequate defence are useless even if the accused is present, if he lacks the ability to understand the charges brought against him, follow the proceedings or communicate his own defence and challenge properly because he 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 in a language he fully understands, failing which he will be unable to defend himself.*

### 4.9.1 Domestic Law

#### 4.9.1.1 Procedure Where the Accused Does Not Understand the Proceedings

Throughout the Criminal Procedure Code 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 Code requires that “whenever any evidence is given in a language not understood by the accused, and he is 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 Criminal Procedure Code 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.<sup>128</sup> Denial of the right to an interpreter violates Article 21 of the Constitution and requires a re-trial.



<sup>127</sup> *Punjab v Gurmit Singh* (1996) 2 SCC 384, para. 22.

<sup>128</sup> *K.M. Subramani v State of AP* 2003 CriLJ 3526, para. 8.



***K.M. Subramani v State of Andhra Pradesh 2003 CriLJ 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 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 a Rs. 5000 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 had 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 awarded Subramani a fresh trial.

### 4.9.2 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”.<sup>129</sup>

### 4.9.3 Guide for Judicial Enforcement

The words of Section 279 of the Code: “It shall be interpreted to him in open court” suggest that the judge has a duty to interpret himself for the person unable to understand the language of the court, or to ensure that his pleader explains each witness statement and evidentiary document, or to seek the services of an interpreter in order to fulfil the requirements of the Section.

It is true that 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.<sup>130</sup> However, it is the authors’ view that court proceedings are not meant to be understood by the officers of the court speaking in a language not understood by the accused. The accused is expected to understand the proceedings. If he cannot comprehend the submissions of his own counsel or rebuttals and evidence and is unable to make a judgement about

<sup>129</sup> “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.” ICCPR, Article 14(3)(f), 16 December 1966, G.A. Res. 2200A (XXI).

<sup>130</sup> *Shivnarayan*, AIR 1967 SC 986.



what course his lawyer should take, or to instruct him or make interventions as he may wish to, then, as an individual under trial he remains outside the proceedings as if in absentia and this must prejudice his defence.

Though the terminology Section 318 does not specifically demand that the judge assists the accused in understanding the proceedings, he has the power to use his 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”.

In our view, it is essential for a judge to indicate in the report of the trial to the higher court, his own endeavours to make the accused understand as well as all the circumstances that forced him 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 understand the gravity of his situation or a psychological evaluation to understand his ability to comprehend – but not less.

Lay persons coming to court as accused, victims or witnesses are frequently disadvantaged by virtue of being 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 as in most southern states. Judges, 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. And in the *Subramani* case quoted above the High Court, on studying how the case was handled, remarked that in several cases, the 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.



## 4.10 *Ne Bis In Idem*: Prohibition of Double Jeopardy

The principle of double jeopardy or *ne bis in idem*, whereby nobody can be tried 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.<sup>131</sup> First, double jeopardy protects individuals from state harassment, and second, it protects an innocent defendant from repeated trials for the same offence which increases the risk that the court may convict. Explaining both the underlying policies behind double jeopardy, US Supreme Court Justice Black 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.”<sup>132</sup>

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 earlier formal acquittal or conviction. Technically expressed, he can take the plea of *autrefois acquit* or *autrefois convict*.

### 4.10.1 Domestic Law

#### 4.10.1.1 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.<sup>133</sup> The Code of Criminal Procedure, General Clauses Act,<sup>134</sup> and the Indian Penal Code<sup>135</sup> support this prohibition on double jeopardy. The rule of *autrefois acquit* and *autrefois convict* is applicable to all criminal trials.

<sup>131</sup> George Cooner Thomas, *Double Jeopardy: The History, the Law*, 50 (1998).

<sup>132</sup> *Green v US*, 355 US 184, 187-88 (1957).

<sup>133</sup> “No person shall be prosecuted and punished for the same offence more than once.” Constitution of India, Article 20(2).

<sup>134</sup> “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.” GENERAL CLAUSES ACT, 1987, Section 26.

<sup>135</sup> “Where anything which is an offence is made-up of parts, any of which parts itself is an offence, the offender shall not be punished with the punishment of more than one of such offences, unless it be so expressly provided . . . .” Indian Penal Code, 1869, Section 71.



### 4.10.1.2 A Person Once Convicted or Acquitted Cannot Be Tried for the Same Offence

Section 300 of the Criminal Procedure Code states that a person acquitted or convicted by a competent court may not be tried again for the *same offence*.<sup>136</sup> 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.<sup>137</sup>

Section 300 also puts forward three exceptions to the double jeopardy prohibition and provides several illustrations:<sup>138</sup>

- A person convicted of an offence based on conduct that causes consequences which constitute a different offence from the offence which he 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 was convicted.<sup>139</sup> 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 can be tried for murder even though he 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 was not competent to try the offence with which he is subsequently charged.<sup>140</sup> 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 258<sup>141</sup> of the Code of Criminal Procedure cannot be tried again for the same offence unless the

<sup>136</sup> Code of Criminal Procedure, 1973, Section 300(1).

<sup>137</sup> Ibid., Explanation. Code of Criminal Procedure, 1973, Section 300.

<sup>138</sup> Illustrations:

1. A is tried on a charge of theft as a servant and acquitted. He cannot later, while the acquittal remains in force, be charged with theft as a servant, or on the same facts, with theft simply, or with criminal breach of trust.

2. A is tried for causing grievous hurt and convicted. The person injured later dies. A may be tried again for culpable homicide.

3. A is charged before the Court of Session and convicted of the culpable homicide of B. A may not later be tried on the same facts for B's murder.

4. A is charged by a Magistrate of the first class and convicted of voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts, unless the case comes within sub-section (3) of this Section.

5. A is charged by a Magistrate of the second class and convicted by him of theft of property from B's person. A may subsequently be charged with, and tried for, dacoity on the same facts.

6. A, B and C are charged by a Magistrate of the first class and convicted of robbing D. A, B and C may afterwards be charged with, and tried for, dacoity on the same facts.

<sup>139</sup> Ibid., Section 300(3).

<sup>140</sup> Ibid., Section 300(4).

<sup>141</sup> Section 258 grants the judge the power to stop criminal proceedings at any time and discharge the accused.



court that issued his discharge consents to the subsequent trial.<sup>142</sup> 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.

***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 *challaned* for the kidnapping offence. 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 a conviction 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.



<sup>142</sup> Ibid., Section 300(5).

## 4.10.2 International Law

As mentioned above, all legal systems designed to protect fundamental rights prohibit double jeopardy. International conventions also comply 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."<sup>143</sup>

## 4.10.3 Guide for Judicial Enforcement

The Supreme Court in *State of Andhra Pradesh v Kokkiliagada Meerayya and Anr.*<sup>144</sup> laid down the following important rules that emerge from Section 300 of the Code:

1. An order of conviction or acquittal in respect of 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 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 in respect of some of those charges, and not all, and is acquitted or convicted, he 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 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 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 might have been made or for which he might have been convicted under the Code of Criminal Procedure.<sup>145</sup>

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".<sup>146</sup> Offences comprising different ingredients remain distinct even if the factual allegations relating to each offence are substantially the same.<sup>147</sup> For example, in *State of Rajasthan v Hat Singh and Ors.*, 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

<sup>143</sup> ICCPR, Article 14(7), 16 December 1966, G.A. Res. 2200A (XXI).

<sup>144</sup> 1 (1969) SCC 161.

<sup>145</sup> *Ibid.*, para. 6.

<sup>146</sup> *State of Rajasthan v Hat Singh and Ors.*, AIR 2003 SC 791, para. 15.

<sup>147</sup> *Ibid.*



set of facts gave rise to both offences, the Court found the two offences distinct because the offences were comprised of different ingredients and were not identical in sense.<sup>148</sup>

## 4.11 Right to a Reasoned Judgement and Availability of Judgement

*A reasoned judgement given in public, increases confidence in the judiciary, 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 judgement 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 judgement must satisfy three elements: it must be public, it must be available to the accused and it must be reasoned. The judgement must be valid in terms of the Constitution and the statutes guiding it. The justification for the reasoning in the judgement must be based on the law and cannot appear to be attributed to personal opinions, prejudices or the socialisation of the judge.*

### 4.11.1 Domestic Law

Domestic law mirrors international norms and incorporates all three elements mentioned above as necessary before a judgement can pass the test of fairness.

Since the *Maneka Gandhi* case<sup>149</sup> made it explicit, it is well established that 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 judgements as much as to every other stage of trial or court proceedings.

In relation to judgements, 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 judgement naturally requires that the judgement be based on reason. A reasoned judgement that takes account of all the facts, evidence and arguments to arrive at logical surmises minimises perceptions of bias, arbitrariness or prejudice. Without a reasoned judgement, made available within a reasonable time, the right to appeal is compromised. The reasoning in a judgement 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 emphasised in the case where a person is to be deprived of his liberty or be subject to punishment.

#### 4.11.1.1 Judgement Must be Known

Sections 353 and 354 of the Code of Criminal Procedure together deal with the substantive and procedural requirements that a judge must ensure are followed. The



<sup>149</sup> *Mrs. Maneka Gandhi v Union of India (UOI) and Anr.* (1978) 1 SCC 248.

requirements in relation to how a judgement is delivered, its language and content are not matters of form but are elements of fairness and must be fully met. Section 353 mandates that the judgement must be delivered in an open court; be read out in court; or the operative part of the judgement read out and the substance of the judgement explained.

#### 4.11.1.2 Judgement to be Made Available

The accused cannot effectively exercise his right to appeal without a copy of his trial judgement in hand. Article 21 is violated if the court fails to provide the accused with a copy of the judgement in time to file an appeal.<sup>150</sup> Section 363 of the Code confirms the accused's right to a copy of his judgement. Where the accused is sentenced to imprisonment, the court must immediately furnish a copy of the judgement to him free of cost. On an application for a certified copy of the judgement and if necessary a translation, the court must furnish the same without delay to the accused. In judgements conferring the death sentence, the court must immediately furnish the accused with a certified copy of the judgement regardless of whether the accused has requested it or not.

#### 4.11.1.3 Reasoned Judgement

Section 354(1)(b) mandates that judgements must be reasoned. Every judgement must thus contain the points for determination, the decision and the reasons for such decision.

##### *M.H. Hoskot v State of Maharashtra* AIR 1978 SC 1548

Mr. Hoskot was convicted and sentenced to three years imprisonment in 1973 for scheming to counterfeit academic degrees. Mr. 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".<sup>151</sup> Evidence suggested that the court did not provide Mr. Hoskot with a copy of the judgement that was delivered in 1973 till 1978. When addressing this possible delay in receiving his judgement, the Supreme Court explained that Article 21 requires prompt delivery of a copy of the judgement to the accused. The Court remarked that a prisoner's right to appeal is in peril if district jail officials are allowed to claim they have delivered judgement copies 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 judgement, and expressed hope that Jail Manuals be updated to mandate punishment of jailors who fail to obtain proof of delivery.

#### 4.11.2 International Law

Although not expressly mentioned in the ICCPR, the right to a reasoned judgement, the right to a public judgement and the availability of that judgement is inherent in the provisions regarding a fair trial. The ICCPR's requirements provide that everyone



<sup>150</sup> *M.H. Hoskot v State of Maharashtra* AIR 1978 SC 1548, para. 14.

<sup>151</sup> *Ibid.*, para. 4.



convicted of a crime has the right to appeal his conviction and sentence.<sup>152</sup> The Human Rights Committee has examined numerous complaints concerning the failure of courts to issue a reasoned judgement. These complaints have been examined under Articles 14(3)(c) and (5) of the Covenant 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 judgements, duly reasoned for all instances of appeal* in order to enjoy the effective exercise of the right to have a conviction and sentence reviewed by a higher tribunal according to law."<sup>153</sup>

The reasons for the judgement 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 judgement is considered incomplete unless the reasons for accepting one view and rejecting the other are clearly mentioned in it.

### 4.11.3 Guide for Judicial Enforcement

A reasoned judgement diminishes the chances of appeal, reduces the courts overload and saves taxpayers' money. Most importantly, it provides all parties involved in the case with a sense of fairness and enhances the public's confidence in the judicial process. Reasoned judgements 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 judgements 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. It reduces opportunities to mount frivolous challenges. Reasoned judgements remove doubts and suspicions of bias and preconceived notions. This is particularly valuable in India, where societal biases, real or perceived, permeate social relations, owing to which these could be present in the minds of those before the court.

The intention of Sections 353 and 354 of the Code is that judges and magistrates direct their attention to every material question of fact or law arising in the case. A judgement 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.

1. Points for Determination:
  - (a) The points for determination should be formulated. The judge or magistrate must be able to show that the entire material which has a bearing on these points has been fully considered and *judicially* determined.



<sup>152</sup> ICCPR, Article 14(5), 16 December 1966, G.A. Res. 2200A (XXI).

<sup>153</sup> 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; emphasis added.

- (b) Evidence under each of the points has been analysed and discussed before taking a decision on that point. A judgement ought to set forth what the evidence is, and not merely the judge/magistrate's conclusion.
- (c) 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.
- (d) The judgement 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.

2. Appreciation of Evidence:

- (a) Every judgement 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/magistrate should analyse the evidence with care and thoroughness, discuss the evidence and give reasons as to why he believes or disbelieves a particular witness.
- (c) The judgement must contain an intelligent discussion on the pros and cons of 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 judgement is upheld in appeal.
- (e) In every criminal trial the degree of probability of guilt has to be much higher, almost amounting to certainty; and if there is the slightest reasonable or probable chance of innocence of an accused the benefit must be given to him.
- (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 demolished or why they must be upheld.
- (g) It is not sufficient for a judgement 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 judgement that is sought and moves its judgement out of the realm of opinion, bias or prejudice. *Clarity of thinking, being succinct and simplicity of language is 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 judgement with acute precision.
  - (b) A judge/magistrate 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 judgement must state in respect of 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 judgement ending in a conviction.
  - (b) In the operative part of the judgement, the court should state the conviction and the sentence in a specific and clear manner.

The court can also consider making a compensation order where the offence has resulted in personal, loss or damage.



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CONCLUSION

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# 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 or 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 or she has to become a guardian of the law; the guardian of people's rights; the guardian of justice; 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 hands, he has the task of upholding the Constitution and the law, safeguarding the justice system, guaranteeing a fair trial and 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 or she is the king and 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 pre-trial, 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 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 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 emphasised whenever relevant. The judge is not only responsible for his or her own actions, but to some extent he or 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.



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# CHRI Programmes

CHRI's work is based on the belief that for human rights, genuine democracy and development to become a reality in people's lives, there must be high standards and functional mechanisms for accountability and participation within the Commonwealth and its member countries. CHRI furthers this belief through strategic initiatives and advocacy on human rights, access to information and access to justice. It does this through research, publications, workshops, information dissemination and advocacy.

## **Strategic Initiatives:**

CHRI monitors member states' compliance 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 Ministerial Action Group, the UN, and the African Commission for Human and Peoples' Rights. Ongoing strategic initiatives include: Advocating for and monitoring the Commonwealth's reform; Reviewing Commonwealth countries' human rights promises at the UN Human Rights Council and engaging with its Universal Periodic Review; Advocating for the protection of human rights defenders and civil society space; and Monitoring the performance of National Human Rights Institutions in the Commonwealth while advocating for their strengthening.

## **Access to Information:**

CHRI catalyses civil society and governments to take action, acts as a hub of technical expertise in support of strong legislation, and assists partners with implementation of good practice. CHRI works collaboratively with local groups and officials, building government and civil society capacity as well as advocating with policy-makers. CHRI is active in South Asia, most recently supporting the successful campaign for a national law in India; provides legal drafting support and inputs in Africa; and in the Pacific, works with regional and national organisations to catalyse interest in access legislation.

## **Access to Justice:**

**Police Reforms:** In too many countries the police are seen as oppressive instruments of state rather than as protectors of citizens' rights, leading to widespread rights violations and denial of justice. CHRI promotes systemic reform so that police act as upholders of the rule of law rather than as instruments of the current regime. In India, CHRI's programme aims at mobilising public support for police reform. In East Africa and Ghana, CHRI is examining police accountability issues and political interference.

**Prison Reforms:** CHRI's work is focused on increasing transparency of a traditionally closed system and exposing malpractice. A major area is focused on highlighting failures of the legal system that result in terrible overcrowding and unconscionably long pre-trial detention and prison overstay, and engaging in interventions to ease this. Another area of concentration is aimed at reviving the prison oversight systems that have completely failed. We believe that attention to these areas will bring improvements to the administration of prisons as well as have a knock on effect on the administration of justice overall.

The Indian Constitution, statutes, and case law all set forth elaborate safeguards for the suspect and specific guidelines for fair trials. The law recognizes that power equations may be uneven and takes particular account of the need for judicial intervention giving trial judges strong powers to be more than passive spectators to the trial. Despite all this, trial judges all too often do not play their gatekeeper roles to ensure that suspects are afforded all due process and victims are not further victimised at the hands of the system.

The present permissiveness prevents systemic reform all across the criminal justice system and has allowed so common a culture of violation of due process norms that the actual safeguards are hardly invoked and have often been completely forgotten. While the reasons for not following statutory safeguards are many, the path of reform advocacy requires that, to begin with, there be renewed efforts to make them visible again, put them at the front and centre of judicial training and raise questions as to why they are not followed. This has been the endeavour of the Commonwealth Human Rights Initiative for the past several years since it embarked on judicial trainings.

Through the Fair Trial Manual it is our endeavour to create a greater appreciation amongst judges of the practical value of using human rights norms in delivering justice.

The Manual seeks 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 practice in the courts they command.



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